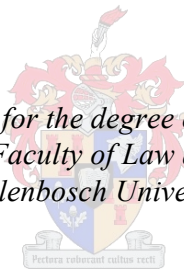


# **Investigating an Alternative Administrative-Law System in South Africa**

by  
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*Dissertation presented for the degree of Doctor of Laws in the  
Faculty of Law at  
Stellenbosch University*



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## ABSTRACT

This dissertation considers the question whether there are viable alternatives to the conceptual framework within which the South African administrative-law system operates, given that the administration now functions under new constitutional demands and new approaches to administrative engagement. The intention is not to proffer concrete recommendations for such a system, but only to propose an approach by means of which questions concerning the legal regulation of the administration and administrative function may be addressed.

The dissertation introduces the concept of the contextualised administrative-law system. This concept emphasises the legal relationship between the public administration and the judiciary, but is not limited to this relationship. The administrative-law system does not operate in a vacuum, though, and is informed by the conceptual framework within which the system operates. The system is also a function of its geo-political and socio-economic context.

The historical development of the doctrine of separation of powers, as one aspect of the conceptual framework, is traced. Thereby the normative, dynamic and flexible nature of the doctrine is established. On this basis, the potential and value of a fourth branch, the administration, within the separation-of-powers doctrine is assessed. By implication, the administrative function would constitute a fourth, distinct function in addition to the legislative, executive and judicial functions.

The concept of the administrative-law system is consequently applied to the South African context. Firstly, the development of the South African system is outlined and, secondly, the administrative-law relationship is analysed. This discussion establishes that the system is characterised by an embryonic administrative law, the equating of administrative law and judicial review, an emphasis on the rule-of-law or “red-light” approach to administrative regulation, a rhetoric of deference, and the supremacy of the Constitution of the Republic of South Africa, 1996. Therefore, the system must be informed by the Constitution and, arguably, by Karl Klare’s project of transformative constitutionalism and Etienne Mureinik’s “culture of justification”.

The content of the separation of powers is also investigated by means of an historical analysis of the considerations that rationalise the existence of an independent administrative jurisdiction in France. This entails an exposition of the *Conseil d’État*’s structure, organisation and dual function. Principles that describe the

French system, other than the pure separation of powers, are discussed, namely, the duality of jurisdiction, the separation of administrative and judicial authorities, the separation of the administrative jurisdiction and active administration, the maxim “to judge the administration is still administering”, and the hybrid nature of administrative litigation.

The legal regulation of public contracts can be regarded as a doctrinal perspective of the administrative-law system. The public contract is discussed as one form of administration, due to its conceptual ambiguity as a legal instrument on the boundary between public and private law and due to the administration’s increasing contractual activity. To an extent the *contrat administratif* of French law indicates that particular legal rules are an extension of the broader principles, considerations and institutional structures discussed in the preceding sections.

This dissertation introduces an approach that emphasises the relationship between the administration and the judiciary as well as the conceptual framework within which the administrative-law system operates. Through the application of this approach to the South African context and to public contracting the key concepts and debates underlying an appropriate administrative-law system in South Africa are identified and investigated. This constitutes a platform for the development of a particular administrative-law system and an exposition of viable alternatives to the conceptual framework within which the system operates.

## OPSOMMING

Hierdie proefskrif ondersoek die vraag of daar lewensvatbare alternatiewe tot die konseptuele raamwerk van die huidige Suid-Afrikaanse administratiefreg-stelsel moontlik is. Dié vraag word gestel teen die agtergrond van die nuwe grondwetlike vereistes en benaderings waaraan administratiewe interaksie moet voldoen. Die bedoeling is nie om aanbevelings vir die bestaande stelsel te maak nie, maar eerder om 'n benadering voor te stel waarin vrae oor die regulering van die administrasie en die administratiewe funksie geakkommodeer kan word.

In die proses skep die proefskrif 'n nuwe konsep: die *administratiefreg-stelsel in konteks*, wat die regsverhouding tussen die administrasie en die regbank beklemtoon, terwyl dit nie beperk is tot die verhouding nie. Uiteraard word die administratiefreg-stelsel beïnvloed deur die konseptuele raamwerk waarin dit funksioneer, terwyl dit verder ook 'n funksie is van sy geopolitiese en sosio-ekonomiese konteks.

Die historiese ontwikkeling van die skeiding van magte, een aspek van die konseptuele raamwerk, word bespreek en daardeur word die normatiewe, dinamiese en buigsame aard van die leerstuk bevestig. Hiermee word die potensiaal en waarde van 'n vierde been, naamlik die administrasie, binne die skeiding-van-magte leerstuk oorweeg, met die implikasie dat die administratiewe funksie 'n onafhanklike, vierde funksie vestig, benewens die wetgewende, uitvoerende en regsprekende funksies.

Die konsep van die administratiefreg-stelsel word gevolglik toegepas op die Suid-Afrikaanse konteks. Eerstens word die ontwikkeling van die Suid-Afrikaanse stelsel uiteengesit en dan tweedens word die administratiefreg-verhouding ontleed. Hierdie bespreking bevestig dat die stelsel gekenmerk word deur 'n onderontwikkelde administratiefreg, die gelykstelling van die administratiefreg en geregtelike hersiening, die beklemtoning van die regstaat en 'n sogenaamde *rooilig*-benadering tot administratiewe regulasie, 'n retoriek van geregtike agting, en die oppergesag van die Grondwet van die Republiek van Suid-Afrika, 1996. Juis as gevolg hiervan moet die stelsel op die Grondwet gegrond word. Daar word ook geargumenteer dat Karl Klare se transformerende konstitusionalisme sowel as Etienne Mureinik se *kultuur van regverdiging* die stelsel vorm behoort te gee.

Die skeiding van magte se inhoud word ook aan 'n historiese ontleding van Franse reg onderwerp om sodoende die rasionaal agter die onafhanklike administratiewe jurisdiksie in Frankryk te verduidelik. Dit behels 'n uiteensetting van die *Conseil*

*d'État* se struktuur, interne organisering en tweeledige funksie. Die beginsels wat die Franse stelsel beskryf, bo-en-behalwe die suiwer skeiding van magte, word bespreek en dit is by name die dualiteit van jurisdiksie, die skeiding van administratiewe en regsprekende owerhede, die skeiding van die administratiewe jurisdiksie en aktiewe administrasie, die leuse *wanneer die administrasie beoordeel word, word daar steeds administreer*, en die gemengde aard van administratiewe regsgedinge.

Die openbare kontrak word bespreek as 'n instrument van administrasie gegewe die konseptuele dubbelsinnigheid van daardie regs-konsep, wat op die grens tussen publiek- en privaatreg lê, en as gevolg van die administrasie se toenemende kontraktuele aktiwiteit. In 'n mate dui die Franse *contrat administratif* daarop dat bepaalde regsreëls 'n uitbreiding van die breër beginsels, oorwegings en institusionele strukture is, soos in die voorafgaande afdelings bespreek word.

Dus stel hierdie proefskrif 'n benadering voor wat die verhouding tussen die administrasie en die regbank, sowel as die konseptuele raamwerk waarbinne die administratiefreg-stelsel funksioneer, beklemtoon. Deur hierdie benadering toe te pas op die Suid-Afrikaanse konteks, en op openbare kontraktering, word die konsepte en debatte geïdentifiseer en ondersoek wat 'n gepaste administratiefreg-stelsel onderskryf. Dit vorm 'n basis vir die ontwikkeling van 'n bepaalde administratiefreg-stelsel en die uiteensetting van lewensvatbare alternatiewe tot die konseptuele raamwerk waarbinne die stelsel funksioneer.

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<i>CAA</i>	<i>Cours administratives d'appel</i>
CC	Constitutional Court
CC decision	<i>Conseil Constitutionnel</i> decision
<i>CE</i>	<i>Conseil d'État</i>
Cf.	Compare
CGPPP	<i>Code général de la propriété des personnes publiques</i>
ch	chapter
CJ	Chief Justice
Constitution	Constitution of the Republic of South Africa, 1996
ed(s)	editor(s)/edition
e.g.	for example
<i>ÉNA</i>	<i>École Nationale d'Administration</i>
et seq.	and the following
i.e.	that is
J	Judge
JA	Judge of Appeal
LGDJ	Librairie Générale de Droit et de Jurisprudence
P	President
PAJA	Promotion of Administrative Justice Act 3 of 2000
para	Paragraph
SCA	Supreme Court of Appeal
s	section
ss	sections
<i>TA</i>	<i>Tribunaux Administratifs</i>
<i>TC</i>	<i>Tribunal des Conflits</i>

## CHAPTER 1

# Investigating an Alternative Administrative-Law System in South Africa

### 1 1 Purpose

How does one approach a question such as the following: “how *should* South African law regulate public contracting”? This dissertation formulates an approach to address inquiries concerning the legal regulation of the administration and administrative function. Thus, in this dissertation no answer is provided to the preceding question. Rather, an approach is formulated, rationalised and applied, by means of which, it will be argued, questions such as “how *should* South African law regulate public contracting” can be addressed.<sup>1</sup>

The central theme is that inquiries concerning the legal regulation of the administration and administrative function are a function of the “contextualised administrative-law system”, a concept introduced by this dissertation. This system has several dimensions. The administrative-law system emphasises the legal relationship and interaction between the public administration and the judiciary. However, the legal relationship is not synonymous with the administrative-law system, but the relationship is an important aspect of the system. The concept has an institutional dimension consisting of the public administration and the courts.<sup>2</sup> The administrative-law system is also characterised by the functions performed by the administration and the judiciary. There is also a doctrinal dimension, comprising the specific legal rules and principles that regulate the relationship of these institutions and their conduct individually. Finally, this system operates within a particular geo-political and socio-

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<sup>1</sup> “Public contracting” refers to the category of contracts where at least one of the contracting parties is a public organ. See ch 5 below.

<sup>2</sup> More specifically, the administrative-law system is concerned with the relationship between the administration and the *administrative jurisdiction*. Administrative jurisdiction refers to the organs that exercise legal control over the administration by performing the jurisdictional function. In South Africa this function belongs to the judiciary. However, in other jurisdictions, such as France, the administrative jurisdiction falls within the administration itself. See ch 4 on the French administrative-law system.

economic context and within a conceptual framework consisting of political and constitutional theory.

Such an approach acknowledges the political theory and legal norms that apply to the administration and the judiciary, without neglecting institutional and contextual considerations that inform the system. Consequently, the concept of the contextualised administrative-law system can be applied to the South African context and employed for comparative purposes. To this end the legal relationship between the administration and administrative jurisdiction in France is considered. On the basis of the chapters on South Africa and France, public contracting as one form of administration is discussed. This constitutes the investigation into an alternative administrative-law system in South Africa.

The purpose of this investigation is to encourage a critical and thorough evaluation of the South African administrative-law system. Such an inquiry is necessary to ascertain whether this system adheres adequately to constitutional imperatives in general and particularly those aimed at addressing socio-economic transformation and administrative justice. The scope of this study is purposefully limited to the administrative-law system and public contracting as one instrument of administrative activity that is employed to realise constitutional imperatives. Even where the state concludes contracts without express socio-economic objectives, public contracting can, and often does, have significant consequences for socio-economic rights and administrative justice. Furthermore, it is argued, the administration cannot escape its obligations relating to socio-economic rights and administrative justice under the Constitution of the Republic of South Africa, 1996. Therefore, even in cases of public contracting that seem to have no direct bearing on the realisation of socio-economic objectives or on administrative justice, constitutional imperatives remain inherently important.

Therefore, traditional approaches to administrative law in South Africa are assessed in the light of new constitutional imperatives and of new methods of administrative engagement. Within this new constitutional context, the study aims to determine, with reference to French law, whether there are viable alternatives to the current South African administrative-law system.

## 1 2 Main Themes

In order to facilitate an understanding of the line of reasoning, the main themes, which encompass the constituent elements of the dissertation, are set out. The administrative-law system represents the central theme. As mentioned, the administrative-law system comprises, but is not limited to, the relationship between the administration and the judiciary. Thus the system is constituted by the administration, the judiciary, and the particular rules regulating these institutions, such as administrative law. Administrative law falls within the system because these rules are directed at the administration as such, generally speaking. However, for the purposes of the administrative-law system, the judiciary and judicial functions are not considered in their totality. For example, the judiciary as an institution is only relevant so far as it interacts with the administration or affects the administration.

The administrative-law system does not operate in a vacuum, though. For instance, considering the administration in isolation cannot reveal whether the administration is realising its objectives in terms of political and constitutional theory. Although political and constitutional theory cannot always be separated completely from particular legal rules, they are distinct. The administrative-law system is informed by choices in political and constitutional theory. Thus, political and constitutional theory can be described as the conceptual framework within which administrative-law systems operate. Therefore, this conceptual framework constitutes a second, broader theme, to the extent that political and constitutional theories shape the administrative-law system. An example of a principle from this conceptual framework is the separation of powers.

Although not addressed in any detail, the socio-economic and geo-political context of a country has a significant effect on the legal relationship between the administration and the judiciary. How the administration operates is a function of its political role in relation to the actualities of the relevant country.

Two subordinate themes emanate from the central theme, namely, socio-economic transformation and public contracting. The former is included because the South African administrative-law system is subject to justiciable Constitutional imperatives and, the latter, because public contracting is an instrument employed by the

administration to realise socio-economic objectives with increasing regularity.<sup>3</sup> All of these themes correspond to the purpose of the dissertation: formulating an approach to questions concerning the legal relationship between the administration and the judiciary by means of the contextualised administrative-law system, in a new South African context. In the following section the content of the themes is explained in more detail.

### **1 3 The Conceptual Framework and Context**

An administrative-law system is moulded by a conceptual framework and by its socio-economic and geo-political context. Constituent parts of this conceptual framework are political theory and constitutional theory. The doctrine of the separation of powers is a key component of the conceptual framework, at least in South Africa and France. The themes identified above all overlap and they stand in interdependent and interactive relationships. Therefore, an analysis of all the elements that inform an administrative-law system and of their role within the administrative-law system is integral to a discussion that evaluates the nature of administrative institutions, rules and practices. However, the meaning of these concepts, though fundamental, is not absolute, static or uncontested. Interpretations, which arguably are more congruent with the transformative concerns of the Constitution,<sup>4</sup> are preferred. The interrelatedness of the contextual framework and context are indicated below.

Firstly, constitutional-law theory, or constitutionalism, comprises “a body of theoretical prescriptions”<sup>5</sup> and “is concerned with the practical ordering of power-wielding institutions and the structures of the relationship of the individual with these

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<sup>3</sup> Bolton P *The Law of Government Procurement in South Africa* (2007) 3-4. See, generally, McCrudden C *Buying Social Justice: Equality, Government Procurement, and Legal Change* (2007) (“[G]overnments play an increasingly important role as an active participant in the market, purchasing public works, supplies, and services.” (3)).

<sup>4</sup> The Constitution of the Republic of South Africa, 1996.

<sup>5</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 10.

institutions”.<sup>6</sup> Therefore, constitutionalism is understood as a prescriptive and normative doctrine rather than merely a descriptive one.<sup>7</sup>

However, in the second place, a constitutional-law theory should not be considered as absolute or existing in a vacuum. It is necessary to take a broader view in order to identify the factors that inform constitutionalism itself. According to Barber all constitutions are subject to political theory.<sup>8</sup> In addition, constitutionalism is informed by the geo-political and socio-economic context. The dominant political theories and the context will consequently define the content of a constitutional theory. Therefore, talking about constitutions in the abstract is inherently a limited exercise.<sup>9</sup> Political theory and constitutionalism are distinguishable, though: Barber differentiates superficially between the two by associating the former with the objectives, “the ends”, of the state and the latter with the means for realising those objectives.<sup>10</sup>

In the third place, the Constitution of the Republic of South Africa, 1996 embodies the normative choices of the South African brand of constitutionalism. The Constitution also expresses choices in political theory. Therefore the Constitution cannot be wholly classified as an incidence of either political or constitutional theory, but contains elements of both. Karl Klare’s interpretation of the Constitution as the embodiment of a project of “transformative constitutionalism”<sup>11</sup> illustrates how constitutionalism and political theory are interconnected. Klare also indicates the interdependence between the socio-economic and geo-political context, on the one

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<sup>6</sup> Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 62.

<sup>7</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 10-13. An example of constitutionalism in a descriptive sense is the Westminster model, Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 13.

<sup>8</sup> Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 63.

<sup>9</sup> Karl Klare is even of the opinion that “constitutional theory *ought* to be written from the acknowledged perspective of a political morality” (emphasis added), Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

<sup>10</sup> Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 62.

<sup>11</sup> The phrase “transformative constitutionalism” was advanced by Karl Klare in “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188.

hand, and political and constitutional theory on the other, at least in the case of South Africa. This is even expressed in the Constitution itself: the Preamble provides that the purpose of the Constitution is to

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;  
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;  
Improve the quality of life of all citizens and free the potential of each person; and  
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

This provision combines various choices in political and constitutional theory, such as the commitment to democratic values, social justice, the rule of law and socio-economic concerns (i.e. “the quality of life of all citizens”).

Finally, the doctrine of the separation of powers is a constitutional tool. Ostensibly, the doctrine of the separation of powers is synonymous with the idea of *trias politica*.<sup>12</sup> Currie and De Waal define the doctrine as follows: the “[s]eparation of powers means that the functions of government must be classified as either legislative, executive or judicial and that these functions must be performed by different branches of government.”<sup>13</sup>

The doctrine of the separation of powers as *trias politica* is accepted almost without reservation in South Africa.<sup>14</sup> The doctrine is most often justified as securing the liberty of individuals against the state: the purpose of the doctrine of the separation of powers is to “maximise individual freedom”<sup>15</sup> by “dividing the functions

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<sup>12</sup> Du Plessis L *An Introduction to Law* (1999, 3<sup>rd</sup> ed) 90; *Re-Interpretation of Statutes* (2002) 171.

<sup>13</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 95.

<sup>14</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 92-93; Davis DM & Klare K “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 403-509 at 509 where they bemoan “the lack of critical sharpness with respect to separation-of-powers issues”.

<sup>15</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 91.



of government and allocating them to different institutions”,<sup>16</sup> i.e. deconcentrating power. To identify these characteristics as the basic tenets of the doctrine without more can be misleading and restrictive.

Whatever the content of the doctrine of the separation of powers may be, the doctrine is entrenched in South African law. Although it is not expressly mentioned in the Constitution the Constitutional Court held, in *South African Association of Personal Injury Lawyers v Heath*,<sup>17</sup> that the doctrine of the separation of powers is an implicit provision,<sup>18</sup> Chaskalson P stating that “[t]here can be no doubt that our Constitution provides for such a separation [of powers]”.

In an attempt to determine a workable and progressive interpretation of the doctrine of the separation of powers, its early origins and its role in political contexts very different to the one in which the doctrine as such was conceived, are discussed. This discussion begins with Montesquieu who is regarded as the father of the doctrine of the separation of powers.<sup>19</sup> He contended that “power should be a check to power”<sup>20</sup> and this is the basis for his doctrine of the separation of powers.

The separation of powers in the South African context is also discussed. By juxtaposing the South African administrative-law system with the French system, I intend to indicate the broad range of different interpretations of the separation of powers that are possible.

#### **1 4 The South African Administrative-Law System**

On the basis of the concept of the administrative-law system and the meaning of the separation of powers in chapter two, the South African administrative-law system is discussed. Firstly, the characteristics of the South African system are identified by means of an historical overview of its development. Secondly, six factors that

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<sup>16</sup> 91.

<sup>17</sup> 2001 1 SA 883 (CC).

<sup>18</sup> 2001 1 SA 883 (CC) paras 18-22.

<sup>19</sup> See Franz Neumann’s explanation as to why Montesquieu deserves this accolade, and not John Locke, in the *Editor’s Introduction* of Montesquieu *The Spirit of the Laws* tr Nugent T (1959) lv-lx. Montesquieu’s classic work, *De l’Esprit des Lois*, in which he sets out his doctrine of the separation of powers, was originally published in 1748.

<sup>20</sup> Montesquieu *The Spirit of the Laws* tr Nugent T (1959) 150.

characterise the relationship between the administration and the judiciary are identified and discussed critically.

South Africa is still in the early stages of a fundamental political transition. It has undergone a political conversion from an administrative-law system characterised by parliamentary sovereignty to one informed by the principles of constitutionalism. The Constitution implies a shift in socio-economic priorities, whereby the entire population stands to benefit, and a move away from an oppressive and elusive administration to one characterised by the notions of participatory democracy, co-operative governance and accessibility.<sup>21</sup> Constitutional imperatives require the establishment of an appropriate administrative-law system.<sup>22</sup> Thus, institutional concerns form part of the response to fundamentally new constitutional imperatives. The doctrine of the separation of powers does not imply that the three classical branches of government are the ideal and final combination to fulfil all the functions of government;<sup>23</sup> especially if one considers how dramatically society has changed since the publication of Montesquieu's *De l'Esprit des Lois*.

The new administrative-law system of South Africa is still in its infancy. It stems from the English model of parliamentary sovereignty and was strongly influenced by Diceyan doctrine, at least until the advent of the Constitution.<sup>24</sup> In South Africa, one set of courts presides over all judicial matters, whether of an administrative or other nature.

## 1 5 The French Administrative-Law System

France has a very developed administrative-law system as opposed to South Africa's, or even the English model.<sup>25</sup> The general position<sup>26</sup> is that the French interpretation of the separation of powers has resulted in a singular system, especially

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<sup>21</sup> See ss 19, 195 and ch 3 of the Constitution of the Republic of South Africa, 1996.

<sup>22</sup> Sections 33 and 195 of the Constitution, for instance, require an efficient administration.

<sup>23</sup> "There is no natural set of institutions which exists prior to the state", Barber NW "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59-88 at 73.

<sup>24</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 40, 45-51, 57-71; Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 13-20.

<sup>25</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 3.

<sup>26</sup> See 4 3 and 4 4 below.

from the perspective of common-law systems steeped in the Diceyan tradition. The unique nature of French administrative law is elucidated in Article 13 of the Law of 16-24 August 1790:

“Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions”.<sup>27</sup>

The *Conseil d’État*, France’s highest administrative court, is a realisation of this approach to administrative adjudication, although the precise role of the Law of 16-24 August 1790 is contested.<sup>28</sup> To this day, the *Conseil d’État* serves as both a judge of the administration and as an advisory institution to the government on legal matters.<sup>29</sup> In line with principles such as *juger l’administration, c’est encore administrer*<sup>30</sup> or the separation of the active administration and administrative jurisdiction, France adheres to the dualist tradition in terms of which *juridictions administratives*, administrative courts, and *juridictions judiciaires*, ordinary courts, preside over cases of an administrative nature and civil cases, respectively. The French comparison provides a variety of different interpretations of the so-called “French separation of powers” an appreciation of which may enrich the principle for the South African context.

It is within this general administrative-law context that the *contrat administratif*,<sup>31</sup> the French administrative contract, exists. The *contrat administratif* is subject to a body of rules separate to that of the *contrat privé* (private-law contract) and “the French regard an administrative contract as essentially an arrangement between

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<sup>27</sup> The English translation is from Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 46.

<sup>28</sup> See ch 4.

<sup>29</sup> Auby J-B & Cluzel-Métayer L in Seerden RJGH (ed) *Administrative Law of the European Union, its Member States and the United States* (2007) 61.

<sup>30</sup> There is no English equivalent for this maxim. It means that “to judge the administration is still administering” (own translation).

<sup>31</sup> In order to avoid any confusion between the terms *contrat administratif*, public contract, state contract, government contract and administrative contract I shall not translate the French terminology when referring to *contrats administratifs*. I shall also refer to *contrats de droit privé*, private-law contracts, as the French administration can enter into *contrats administratifs* and *contrats privé*, Brown LN & Bell JS *French Administrative Law* (1998) 202.

unequal parties”.<sup>32</sup> Therefore, it is regulated by special rules of which the more important are characterised by the inequality of the parties.<sup>33</sup> The administrative courts deal with legal disputes relating to *contrats administratifs*. Thus, it will be argued, the *contrat administratif* can be regarded as part of the doctrinal dimension of the French administrative-law system. Therefore, the rules regulating the *contrat administratif* are an application of the general principles set out in the section on the French system.

## 1 6 Public Contracting

In line with international trends,<sup>34</sup> the South African government has increasingly made use of contracts to realise its mandates, especially in the sphere of service delivery. However, general contract law has failed to account for these changes. In general, whenever the administration concludes a contract either the private law of contract or general administrative law applies. This legal position has resulted in a binary and formalist approach to public contracting. Thus, the specificity of the administration concluding contracts has not been explored in the South African context. The *contrat administratif*, however, provides an example of a developed and sophisticated branch of law that recognises the implications of the administration as contractor. Public contracting is discussed as one form of administration, particularly since the concept of the public contract traverses the boundaries between public law and private law.

This increase in public contracting, the embryonic character of the South African administrative-law system, and the Constitutional imperatives to which the administration and the judiciary are subject require an assessment of the very nature of the South African administrative-law system. Such an approach would heed against potentially unsuitable and undesirable principles and institutional arrangements becoming entrenched further.

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<sup>32</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 202.

<sup>33</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9.

<sup>34</sup> See Auby J-B “Comparative Approaches to the Rise of Contract in the Public Sphere” (2007) *Public Law* 40-57.

## 1 7 Hypotheses

The South African administrative-law system has significant institutional and substantive shortcomings.<sup>35</sup> The South African system stems from English administrative law, which is characterised by the doctrine of parliamentary sovereignty and the primacy of judicial review. Although the introduction of the Constitution has revolutionised this legal position, the administrative and legal structures have remained largely the same.<sup>36</sup> One set of courts still presides over all judicial matters, whether of an administrative or other nature. The Constitution lays out imperatives that the administration and the judiciary must perform, but there is little concrete guidance as to how these imperatives are to be realised, especially on an institutional level. In particular, legal rules pertaining to state contracting fall short of regulating this sphere satisfactorily. Differences in expertise, a lack of understanding of the particular “needs of government”<sup>37</sup> and a limited interpretation of the doctrine of the separation of powers has resulted in a, perhaps unnecessary, tension between the administration and the judiciary.

Although the introduction of the Constitution means that the traditional understanding of the role of the administration, of administrative law and of the institutions that implement administrative law has changed fundamentally, the question of an appropriate alternative system that correlates with this change in understanding is yet to be addressed.

## 1 8 Methodology

I discuss the conceptual framework within which administrative-law systems operate by means of a literature study, with particular emphasis on the nature of the separation of powers. On the basis of the separation-of-powers analysis the South African administrative-law system is discussed by means of a doctrinal methodology. This is followed by a comparative analysis of South African and French

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<sup>35</sup> See Quinot G *The Judicial Regulation of State Commercial Activity* (2007) 28-29.

<sup>36</sup> The establishment of the Constitutional Court being the obvious addition to the institutional body.

<sup>37</sup> Mitchell JDB “The Real Argument about Administrative Law” (1968) 46 *Public Administration* 167-169 at 167.

administrative-law systems. I employ a doctrinal methodology in order to assess administrative law rules that have developed through case law and that are contained in legislation or codes. This assessment is made with reference to relevant public-law and political concepts.

## **1 9 Research Question**

Are there viable alternatives to the conceptual framework within which the South African administrative-law system operates, given that the administration now functions under new constitutional demands and new approaches to administrative engagement? In addressing this question this dissertation does not propose to formulate specific alternatives to the current administrative-law system. The intention is to develop an approach by means of which viable alternatives may be formulated and developed.

## **1 10 Structure**

In chapter two (“The Framework within which Administrative-Law Systems Operate”) I identify elements that constitute part of the conceptual framework of an administrative-law system. They are political theory and constitutionalism. In the South African context one would consider its particular brand of constitutionalism and the geo-political and socio-economic context in giving content to this framework. The different interpretations of the aforementioned concepts are discussed and it is indicated that they do not necessarily impose strict or absolute requirements.

Chapter three (“The South African Administrative Law Regime”) sets out the current administrative-law system in South Africa by means of a literature study. The approach to administrative-law problems employed by the courts is considered, especially where different branches of the law overlap with administrative issues. I discuss this in the light of the fact that the South African administration is required to realise Constitutional imperatives. Pertinent structural and substantive legal shortcomings are identified. I rely on existing studies and on case law to substantiate these arguments as it is beyond the scope of this dissertation to do otherwise.

The abovementioned shortcomings suggest that South African administrative-law requires further development. The ensuing question is: in which direction could

and/or should South African administrative law develop? I submit that a comparative study of South African administrative law and more developed jurisdictions would be a useful point of departure for addressing this question. I propose that the French administrative-law system be drawn upon in order to engage with the shortcomings and challenges facing the South African courts and administration.

Therefore, the investigation into the South African administrative-law system is followed by a discussion of the French administrative-law system in chapter four. The early origins and development of the French administrative-law system are discussed and an exposition of the current legal regime and structures in France is presented. The value of the French administrative system in general (especially the dual court system, the dual role of the *Conseil d'État* as consultative body to the executive and as a court, and the training of the personnel of the *Conseil d'État* as experts in administration) is discussed.

In chapter five (“Public Contracting and the *Contrat Administratif*”) the point of departure is the public contract as an administrative instrument that is employed with escalating regularity worldwide and, specifically, in South Africa. This leads to a discussion and exposition of the *contrat administratif* as a particular aspect of French administrative law and illustrates the application of a very different conception of the administrative-law system in an area of particular conceptual difficulty.

In the final chapter I draw conclusions based on the analyses in the preceding chapters. I intend to indicate how much room there is, in terms of the theoretical and normative framework of administrative law, within which to manoeuvre when deciding on appropriate strategies with which to achieve Constitutional objectives by means of the South African administrative-law system. I argue that, at the very least, the French administrative law model, in general, and the *contrat administratif*, in particular, provide convincing motivation to re-evaluate the current South African system and that it even offers attractive alternatives to the latter.

## CHAPTER 2

### The Framework and Context within which Administrative-Law Systems Operate

#### 2.1 Introduction

This dissertation introduces the concept of “the contextualised administrative-law system”. The administrative-law system emphasises the legal relationship between the public administration and the judiciary. The concept has an institutional dimension consisting of the public administration and the courts.<sup>1</sup> There is also a doctrinal dimension, comprising the legal rules that regulate the relationship of these institutions and their conduct individually. However, only certain aspects of the administrative-law system as a whole are investigated. Since public contracting, as one fast-developing and conceptually challenging area of public administration, operates within this system, the system itself will inform and partially constitute public-contract regulation. After all, administrative law and public contracting presuppose the existence of a public administration. Thus, the concept of the administrative-law system draws attention to the view that public-contract regulation is not reducible to the legal rules applied to contractual disputes, regardless of whether those rules are of a private-law or public-law nature; public-contract regulation is a function of the rules applied in addition to the nature of the institutions which interpret and apply them and the relationships between those institutions. The administrative-law system also emphasises the distinct relationship between the administration and the courts, a relationship obscured by the separation of powers. In

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<sup>1</sup> Or rather, the institutions are the administration and those institutions that apply legal rules to the administration. This distinction is necessary because in some legal systems, jurisdictions separate from or independent of the judiciary preside over administrative litigation. Therefore, defining the administrative-law system as comprising the courts alone would be misleading in not identifying the institutions that apply the law to the administration. For example, in France the *Conseil d’État*, the supreme administrative jurisdiction, is an institution formally within the administration, though independent. Therefore, in discussions on the administrative-law system generally, references to the courts or judiciary do not exclude administrative jurisdictions or other jurisdictional organs which play a central role in applying the law to the administration, such as the *Conseil d’État*, administrative tribunals in the UK.



fact, this relationship *per se* is not identified by the separation of powers whatsoever, because the administration is classified merely as a component of the executive branch. For instance, there are fundamental differences between the function of formulating policy and the function of implementing policy and legislation, but both are the responsibility of the executive in terms of the separation of powers. However, the administration and administrative function in a modern sense only developed after the formulation of the separation of powers. Whether the separation of powers has incorporated this development is an inquiry addressed in this chapter.

Public contracting, a broad term defined in chapter five for the purposes of this dissertation, is one form of administering among various types of administrative acts, whether unilateral or bilateral; thus the contract is an administrative instrument employed by the administration. In South Africa there is no branch of law dedicated to state contracting and so, when the administration concludes contracts, administrative law or (private) contract law could apply. In some jurisdictions, most notably France, there are distinct, general legal rules dedicated to the regulation of public contracting beyond the mere technical rules of public procurement commonly found in most legal systems. However, as mentioned, even the existence of such a dedicated branch of law cannot reveal the nature and extent of public-contract regulation independently. In addition to the administrative-law system adopted by a particular country two other elements mould public-contract regulation. Firstly, the political and constitutional theories adopted by a nation mould the legal regime regulating public contracting. Secondly, the political and constitutional theories are interdependent on the geo-political and socio-economic context. Therefore, the framework within which public contracts are regulated has three dimensions:<sup>2</sup> in the first place, the national geo-political and socio-economic context; secondly, political and constitutional theories; and, finally, the administrative-law system, which

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<sup>2</sup> Naturally, these three concepts overlap significantly. Nevertheless, they are not co-extensive. The conceptual and normative framework and the context are separated from the administrative-law system because the latter is a function of the former: the public administration and the judiciary derive their normative foundation from constitutionalism. In addition, relevant factors to be taken into consideration when making decisions, whether judicial or administrative, on the basis of this normative foundation, are influenced significantly by the context. The administrative-law system is not separated from the rules applied in particular instances, but this should not result in conflation of the doctrinal and institutional dimensions of the system. The very structure of the system can influence the type of rules that are applied and the way in which they are applied.

includes the particular legal rules applicable to public contracting. These three dimensions considered collectively constitute the “the contextualised administrative-law system”. In other words, a clear understanding of public contracting as an act occurring within an administrative-law system is an important step towards an analysis of the law of public contracting.<sup>3</sup> In addition, the administrative-law system itself is dependent on the conceptual and normative framework within which the system operates; in turn, this framework and its context are interdependent.

This dissertation focuses on the legal aspects of these three dimensions, which are identified in this chapter. Thus, the point of departure is the conceptual and normative framework within which administrative-law systems operate. The political and socio-economic context, political theories, and constitutionalism are not discussed in the abstract, however. These topics will be addressed in chapter three on the South African administrative-law system. Below only the interrelatedness of these concepts is indicated.

One central component of constitutionalism constitutes the focus of this chapter, namely, the doctrine of the separation of powers. I discuss the origins and development of the separation of powers from the identification of governmental functions to Montesquieu’s *De l’Esprit des Lois*. In this way the doctrine is defined and differentiated from related theories. This historical perspective reveals the normative foundations and nature of the doctrine. Once the content and the normative nature of the doctrine have been determined the function of the doctrine is clarified. The discussion on the doctrine of the separation of powers concludes with an enquiry into the analytical value of the doctrine. Subsequently, I address the question whether the rise of the administrative state has implications for the doctrine of the separation of powers. More specifically, the question “should the administration constitute a fourth branch alongside the executive, the legislature and the judiciary, in terms of the separation of powers” is addressed.

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<sup>3</sup> Or towards analysing other forms of administration.

## 2.2 Contextualising Constitutional-Law Theory

Constitutionalism is the theory of constitutional law.<sup>4</sup> As mentioned, constitutionalism is normative and is concerned with the institutional structure of the state.<sup>5</sup> The institutional structure is usually informed by certain normative objectives and the structure is intended to contribute to the realisation of these objectives. Thus, constitutionalism is both a normative concept as well as a descriptive concept.<sup>6</sup>

It is important to acknowledge, from the onset, that constitutional-law theories operate within a particular context. No universal or absolute constitutional-law theory exists. As mentioned, the geo-political and socio-economic context of a region informs the constitutional-law theory: as the context changes so do the correlated theories. Therefore, a constitutional-law theory should not be considered as absolute or existing in a vacuum, nor can there be an ideal type.

“Behind every theory of administrative law there lies a theory of the state. As Harold Laski once said, constitutional law is unintelligible except as the expression of an economic system of which it was designed to serve as a rampart. By this he meant that the machinery of government was an expression of the society in which it operated; one could not be understood except in the context of the other.”<sup>7</sup>

Barber also indicates that all constitutions are subject to political theory or theories.<sup>8</sup> Therefore, analysing constitutions in the abstract is inherently a limited exercise.<sup>9</sup>

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<sup>4</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 10.

<sup>5</sup> Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 62; Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 10.

<sup>6</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 10-13.

<sup>7</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 1.

<sup>8</sup> He contends, “[w]ritings about constitutions are always undertaken in the service of political theory” and “[a]ny normative claims made by a constitutional writer must draw on political theory”, Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 63, 68.

In order to analyse a particular constitutional-law theory, or constitutionalism, the factors that constitute and inform it should be identified. It has been shown that political theory and context inform the content of constitutional theory. However, even though constitutionalism is a function of political theory and context, constitutionalism simultaneously attempts to shape the political and socio-economic reality.

## **2 3 The Constitutional Context of South Africa**

### **2 3 1 The Constitution of the Republic of South Africa, 1996**

For the purposes of this dissertation the context is predominantly national, focusing on South Africa.<sup>10</sup> The Constitution of the Republic of South Africa, 1996 is the code that embodies the norms<sup>11</sup> of the South African brand of constitutionalism. It imposes both negative and positive obligations upon the state. For instance, everyone has the right to access to information,<sup>12</sup> to just administrative action,<sup>13</sup> and to bring a matter before the courts or independent tribunals.<sup>14</sup> The Promotion of Access to Information Act<sup>15</sup> and the Promotion of Administrative Justice Act<sup>16</sup> give content to sections 32

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<sup>9</sup> Karl Klare is even of the opinion that “constitutional theory *ought* to be written from the acknowledged perspective of a political morality” (my emphasis), Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

<sup>10</sup> The context that informs a constitutional law theory is not limited to a national context. For instance, the emergence of the European Union has introduced an added dimension to the idea of a political or socio-economic context.

<sup>11</sup> “Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationships between these and the public”, Finer SA, Bogdanor V & Rudden B *Comparing Constitutions* (1995) 1.

<sup>12</sup> S 32 of the Constitution of the Republic of South Africa, 1996.

<sup>13</sup> S 33.

<sup>14</sup> S 34.

<sup>15</sup> Act 2 of 2000.

<sup>16</sup> Act 3 of 2000.

and 33, respectively. Chapter ten of the Constitution sets out values and principles that govern the public administration; section 217 regulates public procurement.<sup>17</sup>

### 2 3 2 Transformative Constitutionalism<sup>18</sup>

Deriving meaning from these broad constitutional provisions has proved challenging. Various interpretive devices have been employed to establish “the” meaning of constitutional texts. Transformative constitutionalism is one approach to interpreting the provisions of the Constitution. It has no absolute definition<sup>19</sup> and its meaning is bound to be dynamic, an appropriate quality in the light of constitutionalism’s interdependency on political theories and context. Nevertheless, Klare’s original “definition” is the point of departure. He describes transformative constitutionalism as:

“[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”<sup>20</sup>

This “project” treats the Constitution as a legal and political instrument that has a significant role to play in transforming South African society comprehensively.<sup>21</sup> It involves striving towards substantive equality and a different legal culture.<sup>22</sup>

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<sup>17</sup> See Bolton P “The Public Procurement System in South Africa: Main Characteristics” (2008) 37 *Public Contract Law Journal* 781-802 (“The public procurement system in South Africa is afforded constitutional status” (802)).

<sup>18</sup> The phrase “transformative constitutionalism” was advanced by Klare in his seminal article “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188.

<sup>19</sup> Langa P “Transformative Constitutionalism” (2006) 17 *Stellenbosch Law Review* 351-360 at 351.

<sup>20</sup> Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

<sup>21</sup> Notably, Klare raises the question whether law can fulfil such a role, Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

The judiciary is tasked with upholding the Constitution,<sup>23</sup> the public administration with the implementation of law and the administration of policy.<sup>24</sup> The public service, as a part of the public administration, “must...execute the lawful policies of the government of the day.”<sup>25</sup> In any event, the public administration as a whole is always subject to the provisions of the Constitution.<sup>26</sup> Therefore, if the Constitution has set in motion, and is steering, the project of transformative constitutionalism, the public administration cannot act contrary to this project; such conduct would be unconstitutional and invalid.<sup>27</sup> The judiciary is under an obligation to determine whether the conduct of the administration, in particular administrative action, is constitutional or unconstitutional.

The public administration and the judiciary play a pivotal role in any democratic state and especially in terms of transformative constitutionalism. Consequently, the relationship between the judiciary and the public administration is pertinent to the success of the project of transformative constitutionalism. In order to determine the content and nature of this relationship, the doctrine of the separation of powers is discussed.

## 2 4 The Doctrine of the Separation of Powers

The separation of powers is a constitutional concept that prescribes specific constitutional structures in order to realise normative objectives.<sup>28</sup> It is an integral aspect of constitutionalism and the wording of Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789 illustrates this emphatically:

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<sup>22</sup> Langa P “Transformative Constitutionalism” (2006) 17 *Stellenbosch Law Review* 351-360 at 352-353.

<sup>23</sup> Ss 165(2), 172(1)(a).

<sup>24</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 6; s 197(1) of the Constitution.

<sup>25</sup> S 197(1) of the Constitution of the Republic of South Africa, 1996. Organs of state, defined in s 239, and the executive are also bound by the Bill of Rights in terms of s 8(1).

<sup>26</sup> S 195(1) of the Constitution of the Republic of South Africa, 1996.

<sup>27</sup> S 172(1)(a).

<sup>28</sup> See Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 4.

“Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.”<sup>29</sup>

Therefore, the doctrine is an essential component of the conceptual framework of the administrative-law system. In this section the origins and development of the separation of powers are discussed. The purpose of the discussion is to indicate the nature of the functions and branches of government, and the nature of the relationships between the branches of government, with the emphasis on the administrative-law relationship.<sup>30</sup> The relationship between the administration and the judiciary, in particular, has fundamental implications for legally conceptualising the conduct of the administration, including state contracting.

The origins and development of the separation of powers are relevant here because they contribute to determining the content of the doctrine. Establishing the content of the doctrine is in itself no mean undertaking as it is neither unambiguous nor static.<sup>31</sup> In fact, much of the original literature does not clearly define the doctrine.<sup>32</sup> Furthermore, associated or even foundational concepts, such as human nature, power, liberty, tyranny, mixed government, balanced government, checks and balances, the branches of government, and the functions of government, have changed meaning over time, have different meanings or have been defined vaguely. Therefore, distinguishing the doctrine from similar concepts is a necessary, preliminary step towards giving content to the separation of powers as related concepts are employed, sometimes indiscriminately, as synonymous<sup>33</sup> to the doctrine.

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<sup>29</sup> The English translation is from Barendt E “The Rule of Law and the Separation of Powers” (1995) *Public Law* 599-619 at 599.

<sup>30</sup> Uhler reasons that

“[i]n order to appraise the influence of the doctrine of the separation of powers upon the formulation of certain concepts of administrative law, it is essential to review its historical evolution. Only complete awareness of the historic political environment attending its reception into a given governmental scheme can insure the requisite definiteness of meaning.” (*Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 3 (footnotes omitted).

<sup>31</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 2.

<sup>32</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 12.

<sup>33</sup> For instance, “modern commentators on the doctrine often follow the lead of Madison and write of political checks and balances rather than the separation of powers, frequently suggesting that

In order to facilitate his explanation of the separation of powers' development, Maurice Vile makes use of a definition he calls the “‘pure’ doctrine”<sup>34</sup> and circumscribes as follows:

“It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.”<sup>35</sup>

The pure doctrine serves as a “bench-mark”<sup>36</sup> or standard edition so that the ambiguous and inconsistent formulations of the doctrine do not impede a coherent discussion of its development. It consists of four elements:<sup>37</sup> one, it is recommended that government agencies are divided among three categories, namely, the legislative, the executive and the judiciary; two, government has three functions which comprise all its activities; three, a separation of personnel is recommended between the branches of government; and, four, if the separation of functions, branches and personnel is maintained then the branches will check one another and not infringe upon the functions of the others.

Ostensibly, the doctrine of the separation of powers is synonymous with the idea of *trias politica*.<sup>38</sup> Accordingly, Currie and De Waal define the doctrine as follows: the “[s]eparation of powers means that the functions of government *must* be classified as either legislative, executive or judicial and that these functions must be performed by

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the two doctrines are identical”, Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 3; for more on the indiscriminate usage of terminology in this regard, also see 26, 26 n 2.

<sup>34</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 13.

<sup>35</sup> 13.

<sup>36</sup> 13.

<sup>37</sup> 14-17.

<sup>38</sup> Du Plessis L *An Introduction to Law* (1999, 3<sup>rd</sup> ed) 90; *Re-Interpretation of Statutes* (2002) 171.



different branches of government.”<sup>39</sup> This interpretation of the doctrine has been endorsed and employed by the South African courts.<sup>40</sup> Defined in this way it is accepted uncritically in South Africa.<sup>41</sup> Yet, to identify these characteristics as the basic tenets of the doctrine without more may be misleading and restrictive.

Whatever the content of the doctrine of the separation of powers may be, it is entrenched in South African law. Although the “separation of powers” is not expressly mentioned in the Constitution the Constitutional Court held, in *South African Association of Personal Injury Lawyers v Heath*,<sup>42</sup> that the doctrine of the separation of powers is an implicit provision, Chaskalson P stating that “[t]here can be no doubt that our Constitution provides for such a separation [of powers]”.<sup>43</sup> The Constitution provides that “[t]he judicial authority of the Republic is vested in the courts”<sup>44</sup> and that the courts are independent,<sup>45</sup> that the “legislative authority of the national sphere of government is vested in Parliament”,<sup>46</sup> and that “[t]he executive authority of the Republic is vested in the President”.<sup>47</sup> By contrast, in the Declaration of the Rights of Man and of the Citizen of 1789 the doctrine is entrenched as such, but not defined at all. Thus, even though the Constitution makes no express reference to the doctrine, the provisions that the Constitutional Court has taken to define the doctrine seem largely to endorse the “pure” doctrine of the separation of powers, or the *trias politica*. Constitutional checks and balances, however, temper these provisions.

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<sup>39</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 95 (emphasis added).

<sup>40</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 45, 106-113; *De Lange v Smuts NO* 1998 3 SA 785 (CC) paras 44, 60; *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 21-22. See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 24.

<sup>41</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 92-93; Davis DM & Klare K “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 403-509.

<sup>42</sup> 2001 1 SA 883 (CC).

<sup>43</sup> 2001 1 SA 883 (CC) paragraphs 18-22.

<sup>44</sup> S 165(1).

<sup>45</sup> S 165(2).

<sup>46</sup> S 43(a).

<sup>47</sup> S 85(1).

Discussions on the origins of the separation of powers usually begin with Montesquieu<sup>48</sup> who is regarded as the father of the doctrine.<sup>49</sup> However, Gwyn and Vile show that the doctrine of the separation of powers did not originate with Montesquieu.<sup>50</sup> In fact, the doctrine of the separation of powers developed over a considerable period of time. The early origins of the separation of powers lie in antiquity where “governmental functions, and the theories of mixed and balanced government, were evolved”.<sup>51</sup> Its development is intertwined with these concepts. Naturally, the meaning of the doctrine is also dependent on other associated concepts that developed under the Greeks and the Romans, especially the rule of law. These concepts have themselves developed and the meanings attributed to them today may be very different to the “original” ones. Nevertheless, it was only during the seventeenth century in England that the fully-fledged doctrine came into being.<sup>52</sup>

Below, the conceptual evolution of governmental functions and branches is discussed on the basis of Vile and Gwyn’s historical exposition of the separation of powers. Subsequently, the theory of mixed government, the theory of balanced government and checks and balances are distinguished from the separation of powers.<sup>53</sup> In relation to this background the normative nature of the separation of

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<sup>48</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 4, 100; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 76.

<sup>49</sup> See Neumann F in the *Editor’s Introduction* of Montesquieu *The Spirit of the Laws* tr Nugent T (1959) lv-lix.

<sup>50</sup> WB Gwyn and Maurice Vile published their classic works on the development of the doctrine of the separation of powers in 1965 and 1967, respectively. Unfortunately, Vile was unaware of Gwyn’s earlier work by the time his book went to press, see the “Preface” in *Constitutionalism and the Separation of Powers* (1967). Vile published a second edition in 1998 wherein he refers to Gwyn in the bibliography, but the original 1967 text was left unrevised, except for the addition of ch 13. *Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) xi.

<sup>51</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 2-3, 21.

<sup>52</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 9; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 3. Note that Montesquieu was discussing the English constitution in formulating the separation of powers.

<sup>53</sup> I rely heavily on Vile’s treatment of this matter in his classic work *Constitutionalism and the Separation of Powers*. This book is considered to be the seminal text on the development, from antiquity to the twentieth century, of the doctrine of the separation of powers.

powers is established. Finally, the relevance of the separation of powers in evaluating constitutional structures in the modern context is analysed.

#### 2 4 1 The Functions and the Branches of Government

Gwyn employs two criteria to determine whether an idea qualifies as a statement concerning the separation of powers:<sup>54</sup> firstly, the separation of powers addresses the powers or functions of government and, secondly, it is normative. Therefore, the origins of the separation of powers lie with the identification of governmental functions.

Today the functions and branches of Western governments are each typically described as threefold: the executive, legislative and judicial functions that correspond to the executive, the legislature, and the judiciary, respectively. This identification and division of the *functions* of government “evolved slowly over many centuries”,<sup>55</sup> but associating a function with a particular agency is a much later development.<sup>56</sup>

Political science has been concerned with the proper functions or activities of government since antiquity.<sup>57</sup> For instance, Aristotle identified three elements of the state, namely, deliberation, magistracy and judicial activity, which are present in all

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<sup>54</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 5.

<sup>55</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 21.

<sup>56</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 22. Sebastian Seedorf and Sanele Sibanda state that “the idea that the accumulation of power can be (best) prevented by the introduction of distinctive institutions with defined functions, areas of competence and jurisdiction, which exercise public power in mutual co-operation, was foundational to the Roman republic of the sixth century BC”, “Separation of Powers” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* (2008, 2<sup>nd</sup> ed) 1 12-1 – 12-98 at 12-4. Taking Vile’s position to be accurate, this statement appears to be incorrect to the extent that Seedorf and Sibanda contend that specific functions of government were allocated to particular agencies in order to promote liberty. Gwyn’s understanding of the separation of powers’ origins endorses this analysis on the basis of the doctrine’s normative character: “[b]ecause it is a normative doctrine, it has been erroneous for some commentators to maintain that the doctrine was known in ancient times on the strength of Aristotle’s classification of governmental functions”, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 9.

<sup>57</sup> Carré de Malberg R *Contribution à la Théorie Générale de l’État II* (2004) 2. This work was originally published in two volumes in 1920 and 1922 by Sirey.

constitutions. In making this distinction Aristotle was concerned only with identifying the numerous activities of state organs;<sup>58</sup> he made no attempt to allocate these functions to specific state organs and he was not opposed to one organ simultaneously participating in all three activities.<sup>59</sup> Therefore, Aristotle did not separate state organs according to their functions and there was no separation of personnel. That there were tasks of a different nature among the activities of the state is clear, though.

Although Aristotle devised a threefold distinction of state activities, they do not correspond to the modern executive, legislative and judicial functions. Instead, Aristotle divided political science into legislative science, the task of the “law-giver”, on the one hand, and politics or policy, which is concerned with action and deliberation, on the other: the threefold classification of state activities was the concern of the former; the latter was subdivided into deliberative and juridical science.<sup>60</sup> Legislative science and politics or policy do not correspond to the modern definitions of the legislative and executive functions either, but Aristotle’s twofold division of political science was concerned with “the difference between making a general rule on the one hand, and judging particular instances, on the other”.<sup>61</sup>

Vile links the concern with the functions of government to the idea of “government according to law”:

“There is an essential connection between the notion of government according to law and the concept of the functions of government. This connection forms the basis of the concern with function down through the ages, and is the explanation of the persistence of this concept in spite of the many attacks made upon it. Government according to law presupposes at least two distinct operations, the making of the law, and putting it into effect.”<sup>62</sup>

Therefore, a twofold classification of governmental functions was passed down by the Greeks: one, the “making” of general rules, which apply generally, and, two, the

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<sup>58</sup> See Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 3-4.

<sup>59</sup> Carré de Malberg *R Contribution à la Théorie Générale de l’État II* (2004) 2. See also Vanderbilt AT *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 39.

<sup>60</sup> Vile *MJC Constitutionalism and the Separation of Powers* (1967) 21.

<sup>61</sup> 24.

<sup>62</sup> 21.

application of those rules to specific cases. The former became known as the legislative function and the latter as the executive function. Thus, governmental functions are closely associated with an awareness of the primacy of “government according to law”; in turn, “government according to law”, constituted by the making of law and administering law, is dependent on the nature of law.

A twofold classification of governmental functions was employed until the publication of *De l'Esprit des Lois* in the eighteenth century, when the modern threefold classification became established.<sup>63</sup> However, the concepts of the legislative and executive functions employed by Locke, for instance, are significantly different from Aristotle's twofold classification of political science. The discrepancies between the ancient and modern understandings of these state functions are linked to the conception of the nature of law. It is the evolution of the view of the nature of law that led, firstly, to a change in the classification of state functions and, then, to associating functions to specific organs of state. Thus, until the Middle Ages these functions could not be associated with a correlating governmental agency because of the reigning conceptions of law and of sovereignty.<sup>64</sup> What, then, was the nature of law considered to be and how did this affect the development of state functions?

Vile explains that law was considered to be “divinely-inspired custom” until the Middle Ages and therefore humankind was incapable of creating law.<sup>65</sup> Consequently the more modern conception of the legislature, an institution constituted of men and women that can actually make law, could not exist.<sup>66</sup> “[t]here could, therefore, be only one ‘function’ of government - the judicial function; all acts of government were in some way justified as aspects of the application and interpretation of the law”.<sup>67</sup> This

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<sup>63</sup> Importantly, some authors maintained that there were only two powers, legislative and executive, and that the judicial function was a form of executive power. See Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 5 (“[I]t is not open to serious doubt that Montesquieu, in keeping with many writers, including John Locke, recognized only two primary powers of the state, the legislative and the executive.” (footnotes omitted)); Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 45-46.

<sup>64</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 24.

<sup>65</sup> 24.

<sup>66</sup> 24.

<sup>67</sup> 24.

judicial function is not synonymous with the modern usage of the term, but it encompassed all the activities of the state, regardless of which agency performed it.<sup>68</sup>

Marsilius of Padua illustrates the transition from this ancient conception of law to a more modern version where the overall judicial function split into executive and legislative functions exercised by distinct agencies.<sup>69</sup> Based on Aristotle's twofold division of political science, Marsilius apportioned the legislative and executive functions to distinct agencies, the former belonging to the people and the latter to the ruler. Placing the legislative power in the people was an important development because, although law was still considered to be divine, the people were responsible for any amendments to and interpretation of the law according to the needs of the time. Marsilius argued that it was more appropriate for the ruler to put this law into effect because "a few" perform this function more efficiently than "the people". Therefore, under Marsilius the legislative function acquired a more modern countenance by being placed with the people, but, more importantly, he placed the so-called legislative and executive functions in distinct hands. This apportionment of powers was based on efficiency grounds and therefore does not adhere to Vile's "pure definition" which requires a separation of powers for the purpose of securing political liberty. Gwyn notes a similar allocation of legislative and executive functions to Parliament and government, respectively, in the first half of the seventeenth century, but his analysis differs from Vile's.<sup>70</sup> Gwyn's twofold criteria for the qualification of an idea as referring to the separation of powers is satisfied here. Thus, the apportionment of functions amounts to the "earliest version of a normative doctrine of a separation of these functions", that of efficiency.<sup>71</sup>

However, it was only in the seventeenth century that the idea that Parliament creates law became established.<sup>72</sup> Concurrently, the meaning of the executive function was virtually equivalent to the modern definition of the judicial function: "[t]he modern notion of an executive power distinct from the machinery of law enforcement through the courts, could hardly be envisaged in an age when almost the only impact

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<sup>68</sup> 24.

<sup>69</sup> 27-28.

<sup>70</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 30-31.

<sup>71</sup> 31-33.

<sup>72</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 25.

of government upon the ordinary citizen was through the courts and the law-enforcement officers.”<sup>73</sup> Based on this twofold legislative-executive classification, the idea of distinct functions performed by separate agencies *in order to limit government* developed in English thought during the seventeenth century.<sup>74</sup> Although the independence of judges was an established idea, the judiciary as an independent branch separate from the executive branch would only appear in the eighteenth century.<sup>75</sup> Thus, “[b]y the time of the English Civil War one of the fundamental elements in the doctrine of the separation of powers, an abstract classification of the functions of government into two or three categories, had been developed to a high degree under the impact of the contest between King and Parliament”.<sup>76</sup> The merging of these ideas with the theory of mixed government led to the apportionment of distinct abstract functions to separate branches.<sup>77</sup>

## 2 4 2 The Theory of Mixed Government

The ancient theory of mixed government, or of the mixed constitution, required the participation of every governmental branch or of every constitutional type in all the activities of the state.<sup>78</sup> The theory has a class basis<sup>79</sup> in terms of which the monarchy, the aristocracy, and the people, as represented by the consul, the senate, and the popular assemblies, respectively, each have selfish interests. Each class is reflected in a type of constitution, namely, monarchy, aristocracy and democracy.<sup>80</sup> Thus,

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<sup>73</sup> 28-29.

<sup>74</sup> 28.

<sup>75</sup> 28-32.

<sup>76</sup> 32-33.

<sup>77</sup> 33.

<sup>78</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 24; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 36.

<sup>79</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 33, 35-36.

<sup>80</sup> This threefold division of the types of constitution was proposed by Polybius, whereas Plato and Aristotle advocated different twofold divisions, Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 24 n 1.

“the major concern of ancient theorists of constitutionalism was to attain a balance between the various classes of society and so to emphasize that the different interests in the community, reflected in the organs of the government, should each have a part to play in the exercise of the deliberative, magisterial, and judicial functions alike.”<sup>81</sup>

It was thought that where the main components of society performed each governmental function collectively, then the various classes, represented by different state organs, would prevent any particular interest from promoting its own agenda at the cost of the others.<sup>82</sup> The rationale for a theory of mixed government was the prevention of arbitrary rule, the limitation of power, and “achieving liberty under law”;<sup>83</sup> it is the promotion of these normative objectives by means of “instituting internal checks within government”<sup>84</sup> which links it to the separation of powers.<sup>85</sup>

Nevertheless, the theory of mixed government and the separation of powers are “logically quite distinct”,<sup>86</sup> even though they are associated with one another and even though the latter evolved from the former: mixed government has a class basis and is concerned with balancing interests by means of collective governance whereas the pure doctrine classifies governmental functions, apportions each to a particular branch and limits the branches to the performance of a single function.<sup>87</sup>

In terms of the theory of mixed government democracy is naturally the stronger element of the legislature and several strategies were developed to limit its impact:<sup>88</sup> bicameral parliament where two houses balance one another, the decentralisation of government, and the apportionment of functions to separate branches so that “popular

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<sup>81</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 23.

<sup>82</sup> 33.

<sup>83</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 26.

<sup>84</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 34.

<sup>85</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 26; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 34, 36.

<sup>86</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 33.

<sup>87</sup> For a list of differences between the theory of mixed government and the separation of powers, see Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 26-27.

<sup>88</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 33-34.



opinion in the legislature can be slowed down”.<sup>89</sup> These modifications to the theory of mixed government gradually resulted in a shift to the more modern idea of the separation of powers.<sup>90</sup> The interests of the state and the monarchy, aristocracy and democracy of mixed government became associated with the executive, judicial and legislative powers of the separation of powers.<sup>91</sup>

This shift from the theory of mixed government to the doctrine of the separation of powers involved two developments: one, during the seventeenth century, the idea that distinct agencies should only perform certain functions and, two, during the eighteenth century,<sup>92</sup> the introduction of the independent judicial branch to prevailing political thought.<sup>93</sup> A corollary of the earlier development was the limitation of the monarch’s power to the execution of law; this signifies “the beginning of the doctrine of the separation of powers, and at the same time the beginning of the end for the doctrine of mixed government.”<sup>94</sup>

Therefore, in the seventeenth century:

“All the elements of the pure doctrine of the separation of powers were now present in the minds of the men who witnessed the struggle between King and Parliament, and who had come to fear the arbitrary rule of either. All that was needed for the doctrine was the idea that the agencies of government should be restrained by each being confined to the exercise of its own appropriate function.”<sup>95</sup>

The catalyst for the further development and establishment of these ideas were the constitutional challenges posed by the English Civil War<sup>96</sup> and the Commonwealth and, therefore, during the seventeenth century, even before the publication of Locke’s *Second Treatise*, the ideas of the separation of powers were already well advanced.<sup>97</sup>

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<sup>89</sup> 34.

<sup>90</sup> 34.

<sup>91</sup> 33.

<sup>92</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 5.

<sup>93</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 36-37.

<sup>94</sup> 38.

<sup>95</sup> 45.

<sup>96</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 37.

<sup>97</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 51.

### 2 4 3 The Theory of the Balanced Constitution

However, even though the ideas of the separation of powers were quite developed and well known during the seventeenth century, it would only become the dominant constitutional doctrine in the eighteenth century.<sup>98</sup> The ideas of the separation of powers, having evolved from the theory of mixed government and, in particular, the circumstances of the English Civil War and the Commonwealth, were at hand during the Restoration. However, this period saw the restoration of Charles II as King. The separation of powers could not be reconciled with this situation because the doctrine did not require the King having a share in the legislative power or having a place in the House of Lords. The theory of mixed government was the more appropriate theory in this context and it was drawn upon again<sup>99</sup> and emphasised between 1660 and the early eighteenth century.<sup>100</sup>

The events of the Civil War had a permanent effect on the ancient theory of mixed government. As a result the theory which reappeared during the Restoration was the familiar theory of mixed government, modified in two respects: one, “the King, although he still had powerful and important prerogatives, must acknowledge the supremacy of the law, and, therefore, of the legislature” and, two, by now “the basic ideas of the doctrine of the separation of powers (although, of course, it was not known by that name) were part of the general currency of English political thought.”<sup>101</sup> Consequently, between 1660 and 1750 the theory of mixed government, legislative supremacy, and the ideas of the separation of powers were merged into the English theory of the balanced constitution, which would provide the foundation for Montesquieu’s “exposition” of the English Constitution in Book XI of *De l’Esprit des Lois*.<sup>102</sup>

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<sup>98</sup> 53.

<sup>99</sup> 53.

<sup>100</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 67-68.

<sup>101</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 53.

<sup>102</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 109-113; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 53-54.

The theory of the balanced constitution developed gradually because the theory of mixed government and the separation of powers could not easily reconcile; also the theory of mixed government rejected a judicial branch.<sup>103</sup> The separation of powers' *twofold* distinction of governmental *functions*, legislative and executive, and mixed government's *threefold* distinction of governmental *agencies*, by now divided into King, Lords and Commons, was an obstacle to their merging. In terms of the theory of mixed government, the addition of a branch made up of independent judges would constitute a fourth branch and the threefold division could not accommodate this. Conceptually, such a development did not make sense, but the Settlement Act of 1701 established the independence of judges nonetheless. However, adherence to the theory of mixed government resulted in the association of the judicial function with the House of Lords.<sup>104</sup>

Reverend George Lawson's work illustrates how the judicial function came to be severed from the traditional twofold division of functions<sup>105</sup> and how the ideas of the Civil War and Protectorate evolved into the theory of the balanced constitution of the eighteenth century.<sup>106</sup> His contribution in this regard lies in his treatment of the "relationships between mixed government and the separation of powers".<sup>107</sup> Lawson reformulated the meaning of the executive power by dividing the traditional executive power into two.<sup>108</sup> His new executive power denoted the "carrying out of judgments, rather than the carrying into effect of the law as a whole"<sup>109</sup> and this signifies a move in the direction of the modern understanding of the executive function as opposed to the judicial function. In addition, he advocated legislative supremacy.<sup>110</sup> John Locke made the subsequent move towards a theory of the balanced constitution in reconciling the idea of legislative supremacy with the ideas of the separation of powers.<sup>111</sup>

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<sup>103</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 54.

<sup>104</sup> 54.

<sup>105</sup> 55.

<sup>106</sup> 57.

<sup>107</sup> 57.

<sup>108</sup> 55-56.

<sup>109</sup> 56.

<sup>110</sup> 57.

<sup>111</sup> 57-58.

Vile characterises the following statement by Locke as “the essence” of the doctrine of the separation of powers:

“[B]ecause it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hand the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community”.<sup>112</sup>

Although Locke’s theory of government did not amount to the “pure doctrine”, the “essential elements” in his theory are the following:<sup>113</sup> one, the executive ruler is *part of* the legislature, not in the sense that the legislative and executive powers are merged or that the king can legislate, but in the sense that the king assents to legislation, and, two, the legislature oversees the execution of the law, but cannot participate in it. Vile describes this view of governmental powers as “the basis of the theory of the balanced constitution, a theory which we may label as a *partial* separation of functions, for there was a sharing of the legislative authority, but a fundamental division of function between executive and legislature.”<sup>114</sup>

Locke, however, neglected the separation of personnel and the judicial function and he failed to allocate a more important role to the theory of mixed government.<sup>115</sup> The later addition of these elements would constitute the English theory of balanced government: “a partial sharing and a partial separation of the functions of government among distinct bodies of persons”.<sup>116</sup> Henry Bolingbroke described the partial sharing and separation as the simultaneous “independency” and mutual “dependency” of the

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<sup>112</sup> Locke J *The Works of John Locke in Nine Volumes* (1824, 12<sup>th</sup> ed) Vol 4 324. Locke and Montesquieu’s ideas on the separation of powers are founded on theories of human nature. This variable is important to bear in mind since these ideas on the separation of powers are a response to particular conceptions of human behaviour in the political context that, so the argument goes, warrant certain institutional arrangements. In a final assessment of the separation of powers none of its various objectives can be left by the wayside.

<sup>113</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 65-66.

<sup>114</sup> 66.

<sup>115</sup> 66, 67.

<sup>116</sup> 73.

parts of government.<sup>117</sup> On the one hand, the mutual dependency of the branches entails that each part of government controls other branches, to a certain extent, and, on the other hand, this interdependence of the branches presupposes their independence,<sup>118</sup> otherwise the dominant branch can act without limitation and the other branches are then completely dependent on that branch, thus disturbing the balance. This arrangement is reminiscent of checks and balances.

The ideas of the separation of powers was fundamental to the theory of the balanced constitution, even though it was but an element of the theory.<sup>119</sup> Vile characterises the dominant constitutional theory of the eighteenth century, the separation of powers featuring prominently, as follows:

“The division of the functions of government among distinct agencies is there, but neither the functions nor the agencies follow the categories of the pure doctrine of the separation of powers, and in one vital function the authority is shared, not divided. The idea of the separation of persons is also very important, demanding at least a partial separation among the agencies of government [...] The idea of checks to the exercise of power, through the opposition of functionally divided agencies of government in distinct hands, is there, but it is a much more positive view of the necessary checks to the exercise of power than the pure doctrine envisaged.”<sup>120</sup>

Montesquieu would build on this foundation in his *De l'Esprit des Lois*, which became the most influential work on the doctrine of the separation of powers. He travelled in England from 1729 to 1731,<sup>121</sup> and his understanding of the separation of powers is an exposition of the English separation of powers, as he saw it.<sup>122</sup>

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<sup>117</sup> See Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 95; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 74.

<sup>118</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 74.

<sup>119</sup> 74.

<sup>120</sup> 74.

<sup>121</sup> Shackleton R *Montesquieu: A Critical Biography* (1961) 117.

<sup>122</sup> Unfortunately, the journal documenting his travels in England is lost, it was probably burnt by his grandson, thereby depriving us of a better understanding of the development of his ideas in the English context (Shackleton R *Montesquieu: A Critical Biography* (1961) 117-118). Nevertheless, Montesquieu's substantial debt to English constitutional thought cannot be denied.

#### 2 4 4 Montesquieu's Separation of Powers

Unfortunately, the extent of Montesquieu's role in the development of the doctrine of the separation of powers is obscure and, before it can be assessed, it must be acknowledged that "[a] remarkable degree of disagreement exists about what Montesquieu actually did say."<sup>123</sup> In this regard, Vile identifies two schools of thought: the one maintains that Montesquieu advocated the pure doctrine of the separation of powers ("a thoroughgoing separation of agencies, functions, and persons") and the other that he was concerned with a "*partial* separation of powers, that is the pure doctrine modified by a system of checks and balances."<sup>124</sup> Vile then assesses these schools of thought in an attempt to determine what Montesquieu said.

Montesquieu's contribution to the doctrine of the separation of powers is threefold; two of his innovations relate to the functions of government and one to a branch of government.<sup>125</sup> Firstly, he uses the term "executive" in a virtually modern sense, that of putting the law into effect. Thus, he finishes the process, illustrated by Lawson, in terms of which the old "executive" power becomes the judicial power. Secondly, his endorsement of the idea of the judicial function having a co-ordinate role with the legislative and executive functions establishes the threefold division of government functions that persists to this day.<sup>126</sup> Finally, he places the judicial function with the ordinary courts, severing its association with the House of Lords.

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<sup>123</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 85; see also Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 3. See Gwyn WB "The Indeterminacy of the Separation of Powers and the Federal Courts" (1989) 57 *George Washington Law Review* 474-505 ("The two or three-fold classification of government authority has been characterized since its origin by ambiguity of meaning." (477)); "The Indeterminacy of the Separation of Powers in the Age of the Framers" (1989) 30 *William & Mary Law Review* 263-268 ("Disagreement about the doctrine is probably inherent because ... a large variety of institutional arrangements can satisfy the separation of powers norm." (265)); Magill ME "The Real Separation in Separation of Powers Law" (2000) 86 *Virginia Law Review* 1127-1198 ("We do not agree on what the principle requires, what its objectives are, or how it does or could accomplish its objectives." (1128-1129)).

<sup>124</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 85-86 (footnotes omitted).

<sup>125</sup> 88, 96.

<sup>126</sup> Cf. Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 45-46.

Montesquieu was not the first to give the executive branch the capacity to veto legislation. Nevertheless, he understood this check of power differently to his predecessors: “[w]hereas the English writers saw the King as an essential part of the legislative *branch* itself, he saw the executive as a separate branch which has a part to play in the exercise of the legislative function.”<sup>127</sup>

Even though all the elements of the pure doctrine of the separation of powers are present in Montesquieu’s work, he was not merely a proponent of the pure doctrine.<sup>128</sup> Building on the foundation of the theory of mixed government Montesquieu combines the pure doctrine with the idea of checks and balances between the legislature and the executive in *De l’Esprit des Lois*, contending that the separation of powers *and* checks and balances are necessary to secure liberty.<sup>129</sup> He argued for both negative and positive checks on the exercise of power, the former effected by a separation or independence of powers and the latter by giving each branch some control over the other.

Building on the English constitutional thought of the seventeenth and early eighteenth centuries, Montesquieu established the doctrine of the separation of powers as *the* constitutional theory to control state power, due to the timing of his publication and his influential innovations. Despite Montesquieu’s indebtedness to the earlier ideas of the separation of powers, he contributed much. He attached less weight to the ideas of mixed government than English writers. But whether either Locke or Montesquieu is the author of the separation of powers really hinges on the definition of the separation of powers. However, as Vile’s exposition of the doctrine’s development indicates, the ideas that constitute the separation of powers were already in currency during the seventeenth century.

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<sup>127</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 92.

<sup>128</sup> 93.

<sup>129</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 111-113. See also Vanderbilt AT *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 45.

## 2 4 5 The Normative Nature of the Separation of Powers<sup>130</sup>

As a constitutional instrument, the separation of powers is, in essence, a normative doctrine. However, constitutionalism as a normative and prescriptive doctrine as opposed to a descriptive one is a relatively modern development. During the seventeenth and eighteenth centuries, while the separation of powers was still in the process of becoming an independent doctrine, the ideas of the separation of powers were more normative than the content of constitutionalism itself. Therefore, the normative character of the separation of powers of the seventeenth and eighteenth centuries makes the doctrine all the more significant because it added a distinctly normative flavour to a taxonomical conception of constitutionalism. Gwyn characterises the separation of powers as “a normative doctrine prescribing certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends”,<sup>131</sup> and, as mentioned above, he regards a normative objective as a prerequisite for the doctrine.

The doctrine is most often explained and justified as securing the liberty of individuals against the state: the purpose of the doctrine of the separation of powers is to “maximise individual freedom” by “dividing the functions of government and allocating them to different institutions”.<sup>132</sup> Montesquieu warns that:

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner”.<sup>133</sup>

He therefore argues for a separation of the legislative and executive, placing each in distinct hands, in order to counter tyranny or to promote political liberty. The idea

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<sup>130</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 8-9, 11.

<sup>131</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 5. See Hough M “Die Ontwikkeling en Kontemporêre Betekenis van die Leerstelling van Verdeling van Staatsgesag” (1978) 11 *De Jure* 346-363.

<sup>132</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 91.

<sup>133</sup> Montesquieu *The Spirit of the Laws* tr Nugent T (1959) Book XI Chapter 6 151-152. Note the reliance on human nature, concerning both the holder of power and the perception of the public.



of promoting liberty or, negatively, countering tyranny or arbitrary rule, is central to the pure doctrine. Montesquieu defines liberty as “a right of doing whatever the laws permit”.<sup>134</sup> In other words:

“To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.”<sup>135</sup>

In terms of Vile’s pure doctrine, the separation of powers is enforced to secure political liberty.<sup>136</sup> If powers are not separated in order to promote political liberty then it is not the pure doctrine of the separation of powers, it seems. Thus, he contends that Marsilius’ separation of the legislative and executive functions does not qualify as the separation of powers because it is concerned with efficiency.<sup>137</sup> Gwyn, however, indicates that the separation of powers has been advocated for promoting the following five normative objectives:<sup>138</sup> firstly, efficiency,<sup>139</sup> secondly, the creation of law in the common interest, thirdly, the impartial administration of the law and the equality of all before the law, including administrators, fourthly, the accountability of the executive to the legislature, and, finally, the balancing of governmental powers. These normative objectives entail five corresponding, what Gwyn calls, “versions” of the doctrine, namely, the efficiency, common interest, impartial rule of law,

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<sup>134</sup> Montesquieu *The Spirit of the Laws* tr Nugent T (1959) Book XI Chapter 3 150 (footnotes omitted).

<sup>135</sup> Montesquieu *The Spirit of the Laws* tr Nugent T (1959) Book XI Chapter 4 150.

<sup>136</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 13.

<sup>137</sup> 28.

<sup>138</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 127-128; for a similar set of values said to be promoted by the separation of powers, see Bellamy R “The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy” (1996) 44 *Political Studies* 436-456 at 255.

<sup>139</sup> Efficiency has been recognised by various other authors as an objective of the separation of powers, for instance, see generally, Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88; Saunders C “Separation of Powers and the Judicial Branch” (2006) 11 *Judicial Review* 337-347.

accountability, and balancing versions.<sup>140</sup> Likewise, Meyerson indicates how the separation of powers promotes the rule of law.<sup>141</sup>

#### **2 4 6 The Relevance of the Separation of Powers in Evaluating Constitutional Structures Today**

Determining whether the separation of powers has a role to play contemporaneously in thinking about constitutional arrangements is problematic. Arguments for and against the doctrine can only square off against one another if they are evaluating the same issues and this requires adequate agreement regarding, at least: the content of the doctrine; to which values the doctrine supposedly contributes; which values should be assessed in order to determine the doctrine's failure or success; which other factors, external to the doctrine, might warp such an assessment or impact upon the same values as the doctrine;<sup>142</sup> the causality between the implementation of the doctrine and its alleged success or failure; whether the separation of powers is the appropriate mechanism to promote certain values; and the emphasis to be attributed to perceptions of the failure or success of the doctrine. And then, of course, there is the matter of the counterfactual, a question which can only be answered with much speculation: what would the control of governmental power and the relationship between the individual and the state have come to, were the doctrine completely absent? Unfortunately, addressing every aspect of such a separation-of-powers appraisal is beyond the scope of this study.<sup>143</sup> Nevertheless, the main points of contention directed at the separation of powers are identified and assessed.

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<sup>140</sup> In terms of Gwyn's analysis, an argument for the separation of powers based on considerations of efficiency, such as that of Marsilius, would certainly qualify as an early incidence of the doctrine.

<sup>141</sup> Meyerson D "The Rule of Law and the Separation of Powers" (2004) 4 *Macquarie Law Journal* 1-6.

<sup>142</sup> For instance, Gwyn points out that ombudsmen and the electorate also participate in securing the accountability version of the doctrine, "The Separation of Powers and Modern Forms of Democratic Government" in Goldwin RA & Kaufman A *Separation of Powers – Does It Still Work?* (1986) 65-89 at 69.

<sup>143</sup> A final assessment of the separation of powers cannot be persuasive without addressing these issues.

Critics of the doctrine of the separation of powers have contended that no material distinction of the functions of the branches of government is possible;<sup>144</sup> that the doctrine does not secure, or even contribute to the achievement of, political liberty;<sup>145</sup> that the doctrine infringes upon legislative supremacy and therefore democracy; and that the doctrine slows down government, leading to inefficiency. The doctrine has also been criticised for being out-dated, implying that as an institutional model it cannot address the aforementioned challenges because it has not adapted or cannot adapt satisfactorily to societal changes since the time of Montesquieu. I do not attempt to discuss each point comprehensively. Instead, general arguments for and against each topic are presented to illustrate their contested status.<sup>146</sup>

In response to Sir Ivor Jennings's view that there is no material distinction between the functions of government,<sup>147</sup> Barendt argues that they can be defined in general terms in a constitution in order to be apportioned to the branches of government.<sup>148</sup> He adds that it is the role of the courts to delineate these functions. Furthermore, the doctrine "is not in essence concerned with the allocation of functions as such" because its primary objective is the prevention of power build-ups which may lead to tyranny and, therefore, "[t]he allocation of functions between three, or perhaps more, branches of government is only a means to achieve that end."<sup>149</sup> One could also mention that the legal or political effect of the various functions is substantively different. This analysis is in agreement with the normative claims of the pure doctrine. Thus, the

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<sup>144</sup> See Bellamy R "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy" (1996) 44 *Political Studies* 436-456 at 256; Barendt E "The Rule of Law and the Separation of Powers" (1995) *Public Law* 599-619 at 603.

<sup>145</sup> See Brennan G & Hamlin A "A Revisionist View of the Separation of Powers" (1994) 6 *Journal of Theoretical Politics* 345-368; Bellamy R "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy" (1996) 44 *Political Studies* 436-456 at 256.

<sup>146</sup> Even though this is not an exhaustive exposition of separation-of-powers criticism, it is significant that but two of Gwyn's five versions are attacked in the literature dealt with below.

<sup>147</sup> As to the contention that there is no material distinction between governmental functions perhaps the emphasis on the mental processes involved is undue, see Green F "Separation of Governmental Powers" (1920) 29 *Yale Law Journal* 369-393 at 373: "[i]t is of fundamental importance to notice that the difference between legislative, executive and judicial action depends upon the kind of action taken and not upon the kind of mental process involved in deciding whether and how to take it."

<sup>148</sup> Barendt E "The Rule of Law and the Separation of Powers" (1995) *Public Law* 599-619 at 605.

<sup>149</sup> 606.

separation of powers prevents an over-concentration of power and the classification of functions is incidental to this. Even though the functions are not absolutely conceptually distinct, for practical purposes the differentiation is useful.

Barber rejects Barendt's overall argument because Barendt "has equated the doctrine of separation of powers with a theory of the state".<sup>150</sup> According to Barber, Barendt's argument is based on two assumptions, upon which he does not elaborate: one, liberty and a powerful state are irreconcilable and, two, the courts must uphold this liberty by ensuring division among the branches of government. This situation has important implications for the balance of power between the branches, but Barendt does not deal with these matters. Ultimately, Barber emphasises the diverse applications of the doctrine in different jurisdictions and that this diversity should discourage granting the courts a "general jurisdiction to police divisions of power within the constitution."<sup>151</sup> Nevertheless, Barber considers the "essence" of the doctrine to be "the meeting of form and function".<sup>152</sup> However, this "meeting of form and function" does not *imply* the fragmentation of power nor that the judiciary decides the content of the separation of powers. He envisages an apportionment of functions to the correlating branches of government being based on allocating functions to those agencies most apt at performing them. Thus, he does not contend that the functions of government cannot be divided into abstract categories, but he bases this division on efficiency rather than the dilution of power; he does not consider the extent of the role courts have to play in this regard to be obvious or universal.

Geoffrey Brennan and Alan Hamlin pose the question "whether the separation of powers contributes to the resolution of the principal-agent problem in favour of the principal" or, in other words, "whether (or when) the separation of powers does, in fact, act as an effective constraint on the abuse of power, and if so, how and why."<sup>153</sup> On the basis of an analogy with economic competition, they then find that there is a presumption against the vertical separation of powers actually protecting citizens from

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<sup>150</sup> Barber NW "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59-88 at 61-62.

<sup>151</sup> 88.

<sup>152</sup> Barber NW "Prelude to the Separation of Powers" (2001) 60 *Cambridge Law Journal* 59-88 at 59. Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 4.

<sup>153</sup> Brennan G & Hamlin A "A Revisionist View of the Separation of Powers" (1994) 6 *Journal of Theoretical Politics* 345-368 at 346 (footnotes omitted).

the abuse of power.<sup>154</sup> The vertical separation of powers results in an externality between the branches, which cannot be internalised.<sup>155</sup> “the separation of powers holds the prospect of exploiting citizens more fully rather than offering any protection from exploitative government.”<sup>156</sup> They summarise their argument as follows:

“[W]herever two (or more) functionally distinct, self-seeking agents are each subject to control mechanisms by the common principal, the principal would not lose – and will benefit in many instances – from integrating the two agencies and subjecting the integrated agency to some subset of the controls previously employed. To put the same point more directly and in constitutional terms: if a constitution is to be designed to protect citizens from exploitation by government, it should not incorporate a functional separation of powers.”<sup>157</sup>

Vile counters that “any theory of politics must begin with a discussion of human nature”,<sup>158</sup> a topic that is not addressed by Brennan and Hamlin at all. Furthermore, he considers the assumptions on which they base their study to be too far removed from reality to make a real contribution.<sup>159</sup>

Brennan and Hamlin evaluate the *separation* of the branches of government’s relationship with the abuse of power. In other words, they only analyse negative checks on power. Already in the eighteenth century Montesquieu realised that separating powers alone would not be an adequate check on power; he therefore combined the pure separation of powers with checks and balances. Furthermore, it is arguable whether state power is by nature divisible, especially in an economic sense. What the separation of powers does is not to divide power or sovereignty itself, but to fragment the mechanisms by means of which that power is exercised; this amounts to functional and institutional separation.

The separation of powers, as a result of the executive’s legislative veto, has also been critiqued for infringing upon legislative supremacy. This dilutes democratic rule.

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<sup>154</sup> Brennan G & Hamlin A “A Revisionist View of the Separation of Powers” (1994) 6 *Journal of Theoretical Politics* 345-368 at 347-352, 367. A separation of power between the legislature, the executive and the judiciary is a vertical separation, 346-347.

<sup>155</sup> Brennan G & Hamlin A “A Revisionist View of the Separation of Powers” (1994) 6 *Journal of Theoretical Politics* 345-368 at 361.

<sup>156</sup> 352.

<sup>157</sup> 363 (footnotes omitted).

<sup>158</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) 407 n 55.

<sup>159</sup> 407 n 55.

Strictly speaking, of course, a power to veto is a check, but more importantly, this critique is debunked by the fact that majority rule is not absolute. The binding legal status of a bill of rights testifies to this. The dangers of majority rule were already documented in Plato's account of mixed government. Similarly, the separation of powers stands for the protection of values that are threatened by competing norms and by the structure of government. Before the rise of parliaments, the implementation of the separation of powers was motivated to counter the dangers inherent to state power vested in the ruler, which is an argument in favour of democratic principles. But, in the context of a different political landscape, the federalists argued in favour of the separation of powers precisely because of the limits of democratic governance:

“Rejecting separation of powers will not make democratic man or bureaucratic man any more capable of rule than he ever was. Our problem is that we want the blessings of a free democracy without any of its difficulties or inefficiencies. The framers wanted democracy in actuality but were profoundly aware of its dangerous propensities, and they created a structure designed to minimize them. We have lost their sober perspective on human affairs and human capacities and have come to believe that altering institutions can not only change the course of events but even alter the nature of man.”<sup>160</sup>

That democratic principles are valuable is by no means thereby denied.

The separation of powers has been critiqued for institutionalising inefficient government, especially in the United States, as it prevents adequate “presidential leadership”.<sup>161</sup> Lloyd N. Cutler strongly advocated this view, saying that “[t]he separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today.”<sup>162</sup> Gwyn offers a reminder that the initial rationale for the separation of powers was

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<sup>160</sup> Anderson AS “A 1787 Perspective on Separation of Powers” in Goldwin RA & Kaufman A (eds) *Separation of Powers – Does It Still Work?* (1986) 138-167 at 159 (footnotes omitted).

<sup>161</sup> Goldwin RA & Kaufman A (eds) “Preface” in *Separation of Powers – Does It Still Work?* (1986) ix.

<sup>162</sup> Cutler LN “To Form a Government” (1980) 59 *Foreign Affairs* 126-143 at 127. Cf. Calabresi SG & Bady K “Is the Separation of Powers Exportable?” (2010) 33 *Harvard Journal of Law & Public Policy* 5-16.

based on efficiency.<sup>163</sup> It was argued at an early stage that law-making is more appropriately performed by a large body, whereas putting it into effect required a small group that could act expediently. Barber goes further than Gwyn, asserting that “the core of the doctrine is not liberty, as many writers have assumed, but efficiency.”<sup>164</sup>

Nevertheless, efficiency in itself cannot be a measure of the validity or invalidity of the separation of powers. A despotic and exploitative government may be extremely efficient. This observation provides some evidence of the separation of powers’ constitutional limitations. However, when efficiency is evaluated as a normative objective, it has to promote additional values determined by political theory. Efficiency as an independent criterion can be misleading. Thus, in the assessment of the separation of powers, efficiency should not be considered in isolation or over-emphasised.

Undoubtedly, the idea of separating or dividing holders of power in order to promote normative objectives has yielded encouraging results. The separation of church and state is a classic example of a separation of power, the necessity of which is widely accepted.<sup>165</sup> Barendt points out that the separation of powers could complement arguments based on a bill of rights in civil liberties cases as has been shown in the United States of America, France and Germany, but neglected in the United Kingdom.<sup>166</sup> The validity of the doctrine of the separation of powers is usually discussed in the context of the branches of the state, but it may be instructive to consider the merits of fragmenting power in a wider sense to appreciate its actual role. Sometimes the lesser of two, or many, evils may be considered to be a successful resolution; perhaps, at worst, the separation of powers slots into this category.

There is no universal model for the application of the doctrine of the separation of

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<sup>163</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 34-35.

<sup>164</sup> Barber NW “Prelude to the Separation of Powers” (2001) 60 *Cambridge Law Journal* 59-88 at 59.

<sup>165</sup> Braithwaite J “On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers” (1997) 47 *University of Toronto Law Journal* 305-361 at 307.

<sup>166</sup> Barendt E “The Rule of Law and the Separation of Powers” (1995) *Public Law* 599-619 at 600.

powers;<sup>167</sup> the Constitutional Court has acknowledged this position.<sup>168</sup> The separation of powers is able to accommodate diverse interpretations, as the constitutional arrangements of the United States of America, the United Kingdom, France and South Africa testify. All of these nations have incorporated the doctrine in their constitutions, in some way or another. The doctrine's flexibility should be emphasised, rather than its supposed incoherence or inconsistency. For instance, Saunders argues that

“[a] doctrine of separation of powers now provides the principal framework within which the relationship of the courts to the other branches of government is resolved in this [the United Kingdom] and many other Commonwealth countries. The courts were not originally the principal focus of the doctrine; clearly, however, it can be adapted to the purpose.”<sup>169</sup>

Essentially, the separation of powers was not about upholding the “pure doctrine” or *trias politica*.<sup>170</sup> The *trias politica* was a solution to the challenges faced by Western governments in their attempts to realise certain normative objectives by structuring the state in such a way that it maintains these objectives itself. What may be asserted with confidence is that the separation of powers does not independently guarantee, for instance, governmental efficiency, political liberty or legislative supremacy. There are simply too many factors that have an effect on these and other outcomes. Similarly, that the separation of powers, in tandem with other constitutional mechanisms, has no significant place in constitutional thought and practice has yet to be shown considering the preceding literature overview.

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<sup>167</sup> O'Regan K “Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution” (2005) 8 *Potchefstroom Electronic Law Journal* 120-150 at 121.

<sup>168</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 108.

<sup>169</sup> Saunders C “Separation of Powers and the Judicial Branch” (2006) 11 *Judicial Review* 337-347 at 347.

<sup>170</sup> See Vanderbilt AT *The Doctrine of the Separation of Powers and its Present-Day Significance* (1963) 50 (“The doctrine of the separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, workaday principle. The division of government into three branches does not imply, as its critics would have us think, three watertight compartments.”).



## 2.5 The Rise of the Administrative State and the Separation of Powers

One of the significant developments, subsequent to the formulation of the separation of powers by Montesquieu, is the rise of the administrative state. In 1941 Carr noted the changing role of the state, a process that took off during the nineteenth century:

“We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge, and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it. The contrast is no recent discovery. De Tocqueville observed in 1866 that the State ‘everywhere interferes more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them.’”<sup>171</sup>

This amounts largely to a description of the rise of the administration, in the modern sense of the word, over the last 200 years in performing administrative functions. In other words, the administration, in particular, embodies these transitions described by Carr. Thus the role of the administration has changed fundamentally in the recent past, a process that is still on-going.

The evolution of administrative law as a distinct and legitimate branch of law has been a parallel process. “Administrative law” presupposes the recognition of “the administration” in a modern sense and, by implication, administrative functions.<sup>172</sup> The concepts of administrative function, administration and administrative law are thus interlinked. Therefore, the recognition of administrative law in a particular national jurisdiction is indicative of the recognition of the administration and administrative function as distinct governmental entities. Determining when the administration was recognised in this way is important in positioning the administration’s development in relation to the separation of powers’ development. Vile shows that the early stages of the separation of powers’ creation involved

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<sup>171</sup> Carr CT *Concerning English Administrative Law* (1941) 10.

<sup>172</sup> However, the converse is not necessarily true: the existence of the administration does not *imply* the existence of administrative law. For example, Dicey argued that there was no separate branch of administrative law applicable to the administration in England. He did, however, acknowledge the existence of the administration.

identifying distinct state functions and, later, allocating these functions to organs of state. This exercise is repeated here: the approximate time periods when the administrative function, the administration and administrative law were established are identified.

In the context of the United Kingdom “it is usual to point to the nineteenth century, especially its second half, as the period of economic, social and legal history which gave birth to the framework of the modern interventionist administrative state”.<sup>173</sup> In South Africa the administration was shaped under British occupation and took on a new role during the nineteenth century, a role that has continued to expand.<sup>174</sup> Thus, in these nations the modern concept of the administration is a relatively recent development and so, by implication, is administrative law.

The essence of administrative law is “law relating to the control of governmental power.”<sup>175</sup> More specifically, Baxter defines administrative law as “that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organizations, or with other public authorities.”<sup>176</sup> In response to Baxter, Hoexter states that “[i]n South Africa today ... it is more accurate to regard administrative law as regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in the strict sense.”<sup>177</sup> However, as the Diceyan position on administrative law has demonstrated, rules governing the administration can exist without recognising administrative law as such.<sup>178</sup> Even though administrative functions, administrative

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<sup>173</sup> Pollard D, Parpworth N, Hughs D (eds) *Constitutional and Administrative Law* (2007, 4<sup>th</sup> ed) 18. See Port FJ *Administrative Law* (1929) 74; Carr CT *Concerning English Administrative Law* (1941) 10; Baxter L *Administrative Law* (1984) 6-7; Wade HWR & Forsyth C *Administrative Law* (2009, 10<sup>th</sup> ed) 3-4; Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 1-3.

<sup>174</sup> Wiechers M *Administratiefreg* (1973) 18; Baxter L *Administrative Law* (1984) 9-10. “The ever-expanding control by public authorities of interests which were purely private interests at the turn of the century has emphasized public law problems in legal practice.” (Preface in Rose Innes LA *Judicial Review of Administrative Tribunals in South Africa* (1963)).

<sup>175</sup> Wade HWR & Forsyth C *Administrative Law* (2009, 10<sup>th</sup> ed) 4.

<sup>176</sup> Baxter L *Administrative Law* (1984) 2.

<sup>177</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 2.

<sup>178</sup> The appellation “law of the administration” can be applied to the same body of rules during the period when administrative law was not recognised as a unique and distinct field of law and the administration was not a distinct organ of state. For instance, Mestre demonstrates that French administrative-law rules existed during the Middle Ages. However, the administrative function

organs and corresponding legal rules probably predate their recognition as such, this chapter is concerned with the identification of the administrative function, the administration and administrative law in the modern sense of these concepts, as distinct notions.

As mentioned, the rise of the administrative state originated in the eighteenth century. Nevertheless, Dicey famously denied the existence of English administrative law as late as 1914.<sup>179</sup> In France, the jurists of the *Ancien Régime* did not formally recognise the autonomy of administrative law and the expression was not employed until the nineteenth century.<sup>180</sup> In fact, traditionally it is only in 1873 that a decision of the *Tribunal des Conflits* formally established the concept of *droit administratif*.<sup>181</sup> Nevertheless, it is accepted that modern French administrative law originated in the aftermath of the French Revolution of 1789.<sup>182</sup>

Given the primacy of Montesquieu's separation of powers in modern constitutions, one should note that the modern conceptions of the administrative function, the administration and administrative law, encapsulated by the phrase "the rise of the administrative state", only developed well after the classic formulation of the separation of powers. In France, Montesquieu's separation of powers precedes a distinct administrative law by at least 50 years. In the United Kingdom, on the basis of Dicey's analysis, the separation of powers precedes administrative law by over 150 years. Thus the rise of the administrative state and the parallel evolution of administrative law can be situated in the nineteenth century. The transition from the "law of the administration" to "administrative law" is emphasised simply to indicate

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and the administration did not yet exist in the modern sense of those terms and, thus, administrative law, in the sense employed contemporaneously, could not have existed either. Nevertheless, rules similar to modern administrative-law rules were applied to organs of state comparable to modern administrative organs. As mentioned, these rules are referred to as the "law of the administration".

<sup>179</sup> *An Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 330.

<sup>180</sup> Mestre J-L *Introduction Historique au Droit Administratif Français* (1985) 12.

<sup>181</sup> *Blanco*, TC 8 February 1873. See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 26-27.

<sup>182</sup> Schwarze J *European Administrative Law* (2006, revised ed) 100; Auby J-B & Cluzel-Métayer L "Administrative Law in France" in Seerden RJGH (ed) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2007, 2<sup>nd</sup> ed) 61-92 at 61.

that the administrative function and the administration were not directly incorporated into classical separation-of-powers theory.

Despite the far-reaching effects of the rise of the administration, the triadic interpretation of the separation of powers has remained dominant. This suggests that the administration has not been incorporated into the separation-of-powers doctrine. In addition, classical separation-of-powers theory precedes other significant developments that took place in the late seventeenth and eighteenth centuries that characterise the modern state and, due to the uncritical acceptance of Montesquieu, have not been incorporated to modify the separation of powers:

“No other field of academic inquiry is so dominated by a single thinker, let alone an eighteenth-century thinker. However great he may have been, Montesquieu did not have the slightest inkling of political parties, democratic politics, modern constitutional designs, contemporary bureaucratic techniques, and the distinctive ambitions of the modern regulatory state. And yet we mindlessly follow him in supposing that all this complexity is best captured by a trinitarian separation of power into the legislative, judicial and executive – with comparative administrative law somehow captured in the last branch of the trinity.”<sup>183</sup>

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<sup>183</sup> Ackerman B “Good-bye, Montesquieu” in Rose-Ackerman S & Lindseth PL (eds) *Comparative Administrative Law* (2010) 128-133 at 128. To this list of developments one could add modern economic structures, institutions and regulation. Similarly, in the American context, see Marshall MH “The Separation of Powers: A Comparative View” in Klaaren J (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2005) 16-26 at 22:

“The Constitution that limits governmental authority today is largely the product of an eighteenth century, Revolutionary War mentality ... As originally written, it condoned slavery and presumed the total disenfranchisement of all women ... It failed utterly to anticipate and account for other dangers that arose soon after its adoption, such as the rise of national political parties and elections based on the cult of personality.”

See Pariente A “Introduction” in Pariente A (ed) *La Séparation des Pouvoirs: Théorie Contestée et Pratique Renouvelée* (2007) (La séparation des pouvoirs est “un principe toujours présent, mais une longtemps mal comprise et peu étudiée.” (3)). For an analysis of the relationship between the separation of powers and political economy, see Reitz JC “Political Economy and Separation of Powers” (2006) 15 *Transnational Law and Contemporary Problems* 579-625. On the interaction between the separation of powers and voter behaviour, see Nzelibe JO & Stephenson MC “Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design” (2010) 123 *Harvard Law Review* 617-654.

Thus, Ackerman argues not only that the separation of powers has not assimilated the administration, but also that other fundamental developments have been ignored by separation-of-powers theory. In short, the separation of powers is out-dated. One example is the separation of power's failure to recognise differences between the parliamentary and presidential systems.<sup>184</sup> This sequence of events demands a serious reconsideration of the traditional separation of powers and invites the question whether the administration has been integrated satisfactorily within the executive branch and function, that is, without undermining the values that the separation of powers strives to promote. If not, can and should the administration be incorporated within the separation of powers? If so, how?

According to Ackerman in his scathing critique of the *trias politica*,

“it is past time to rethink Montesquieu’s holy trinity. Despite its canonical status, it is blinding us to the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial, or executive. Although the traditional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A ‘new separation of powers’ is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes - or maybe more. And so we must say a fond farewell to Montesquieu, and create a new foundation for comparative administrative law that is equal to the challenges of modern government.”<sup>185</sup>

The administration is one such “new institutional form”, that is, new in relation to the separation of powers. Vile elaborates on how the separation of powers has failed to include the administration, despite the rise of the administrative state:

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<sup>184</sup> Ackerman B “Good-bye, Montesquieu” in Rose-Ackerman S & Lindseth PL (eds) *Comparative Administrative Law* (2010) 128-133 at 131-133.

<sup>185</sup> Ackerman B “Good-bye, Montesquieu” in Rose-Ackerman S & Lindseth PL (eds) *Comparative Administrative Law* (2010) 128-133 at 129. Similarly, Harlow and Rawlings claim that “given the present state of fusion between executive and Parliament, the idea of a constitution held in balance by triadic division of functions is quite simply untenable”, *Law and Administration* (2009, 3<sup>rd</sup> ed) 23. For a comprehensive discussion on a new separation of powers informed by contemporary notions of democratic legitimacy, institutional specialisation and human rights, see Ackerman B “The New Separation of Powers” (2000) *Harvard Law Review* 633-729 (“This is an explanatory essay on a big subject, and it will serve its purpose if it jogs us out of ritualistic incantations of Madison and Montesquieu. The separation of powers is a good idea, but there is no reason to suppose that the classical writers have exhausted its goodness.” (727)).

“Bureaucracy has been with us, of course, for more than two hundred years, but the modern administrative state exhibits such complexity of structures and such a proliferation of rules that the earlier conception of an “executive” consisting of a body of civil servants putting into effect, under the direction of ministers, the commands of the legislature is no longer tenable.”<sup>186</sup>

However, this does not mean that functions other than the three separation-of-powers categories were not recognised at an early stage. Even between Locke and Montesquieu there are actually four governmental functions:<sup>187</sup> the legislative, the executive, the prerogative, and the judicial. The merging of the executive and prerogative functions into the single executive function of separation-of-powers analysis “obscures the fact that in large areas of government activity those responsible for day-to-day government decisions will not be ‘executing the law’, but exercising a very wide discretion.”<sup>188</sup> Locke divided governmental functions into two parts, legislative and executive, but he subdivided the executive function: the ruler acting strictly in terms of law, mainly internal affairs, and in terms of his prerogative, mainly foreign affairs. The ruler could exercise his prerogative, or “discretionary power”, for the common good only under certain circumstances:<sup>189</sup> firstly, where the executive was required to act without legislative authorisation for the common good, but because the legislature was only infrequently in session it had failed to provide the necessary legislative authorisation; secondly, where, because of the generality of law which could not provide for all cases, exceptional cases had to be considered on its own merits; and, thirdly, also due to the generality of law, where strict compliance to the letter of the law would result in detrimental consequences for the majority of society. Although the administrative tasks of government are not necessarily directly linked to the prerogative powers of a ruler in the seventeenth or eighteenth century, they are related to the extent that they emphasise discretion, public interest, expedience and aptitude. It is important to note this early recognition of a

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<sup>186</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) 399.

<sup>187</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 87.

<sup>188</sup> 87.

<sup>189</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 78-79.

governmental power that does not fit into the executive category, in the modern sense of the concept.

In the final analysis, Vile argues that the increasing autonomy of the public administration and increasing differentiation between bureaucrats and politicians have resulted in a fourth political branch and function.<sup>190</sup> Political leaders now initiate and formulate policy and legislation whereas the administration puts the law into effect. Therefore, Vile recommends, for analytical purposes, referring to the “policy branch” and the administration instead of to the executive only, as the latter is no longer appropriate for the reasons set out above.<sup>191</sup>

The assertion that there should be four major political branches and functions requires that our understanding of the separation of powers, as a tripartite division for the control of power, be reconsidered. The question now is: how is the administration to be regulated, considering its evolution subsequent to separation-of-powers theory? In the modern constitutional state, this requires not only that citizens be protected from the administration’s abuse of power, a negative form of control, but also ensuring that the administration complies with the positive obligations imposed upon it, a positive form of control.<sup>192</sup>

## 2 6 Conclusion

Once the conceptual framework and context that serve as the basis of the administrative-law system is acknowledged the nature, development and value of that system can be analysed. A discussion on the doctrine of the separation of powers may seem far removed from an investigation into state contracting, but the very occurrence of the conclusion of contracts by government raises fundamental political and constitutional questions. For instance, does the classification of public contractual activity as either a (private-law) contract or administrative action adequately reflect the legal, political and social situation? Are the South African courts the appropriate forum within which to address administrative law issues, especially when they relate

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<sup>190</sup> Vile *MJC Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) 400.

<sup>191</sup> However, such a terminological adjustment may have problematic implications in jurisdictions such as South Africa and the United States of America, where the appellation of “executive” is entrenched in their Constitutions.

<sup>192</sup> See 3 2 5 below on red-light and green-light theories.

to state conduct that exhibits strong commercial form? Is it appropriate to treat organs of state as private individuals when they conclude contracts? How does one regulate the administration's contractual arrangements in order to determine whether it is authorised to participate in particular contractual arrangements? These questions are pertinent to the "functions" of and the relationship between the different branches of government. Put simply, what is the role of the state and, who, in government, is allowed to do what and why? It is suggested that the separation of powers, which has addressed questions of this nature since at least the seventeenth century, is integral to answering these questions from a constitutional perspective.<sup>193</sup> Yet, these questions can only be addressed by the separation of powers once a process of normative prioritisation provides adequate guidance about where a state is headed and wherefrom. In South Africa, the project of transformative constitutionalism provides such a normative framework.

Thus, before administrative-law systems and state contracting can even be discussed directly more fundamental aspects of the administrative-law system require attention. Political theory, context, constitutionalism and the separation of powers are such aspects. The factors I have identified do not constitute an exhaustive or even a comprehensive list. Nevertheless, they are indispensable to a discussion on public contracting.

Context and choices in political theory inform the content of a national, constitutional-law theory. Therefore, an ideal-type constitutional-law theory, independent of space and time, does not exist:

"The great theme of the advocates of constitutionalism, in contrast either to theorists of utopianism, or of absolutism, of the right or of the left, has been the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power."<sup>194</sup>

Whenever meaning is derived from or content given to a constitutional provision the political theories and the political and socio-economic context, which constitute the foundation of the Constitution, or any constitutional law theory, must be factored into the process of interpretation. Transformative constitutionalism is an instrument of

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<sup>193</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 3.

<sup>194</sup> 1.



interpretation in this mould and the value of transformative constitutionalism as an epistemological device is its practical orientation and acknowledgment of the social and political factors which influence decision-making. This idea is emphasised by Klare who advocates a “postliberal reading” of the Constitution<sup>195</sup> and points out that the nature of the Constitution’s provisions supports such a reading:

“In support of a postliberal reading, one would highlight that the South African Constitution, in sharp contrast to the classical liberal documents is *social, redistributive, caring, positive*, at least partly *horizontal, participatory, multicultural*, and *self-conscious* about its historical setting and transformative role and mission. To put it another way, the Constitution embraces a vision of *collective self-determination* parallel to (not in place of) its strong vision of individual self-determination.”<sup>196</sup>

In South Africa, the Constitution embodies this normative framework that regulates the state, individuals and their relationships. The doctrine of the separation of powers is entrenched in the Constitution and it prescribes certain constitutional structures in order to promote specific normative objectives. I have indicated how the doctrine of the separation of powers has developed from the theories of mixed government and the balanced constitution on the basis of Vile’s and Gwyn’s analysis of the subject. Later, after the ideas of the pure doctrine were established, it was combined with the notion of checks and balances. The doctrine has always been in a state of evolution, whether it is the development of the content of the doctrine itself, or whether it is the way the doctrine is interpreted and applied. Today, the doctrine of the separation of powers is present in some form or another in the constitutional-law theory of all Western nations.

The public administration and the judiciary play pivotal roles in realising political and socio-economic objectives set by the Constitution and, therefore, their relationship is of the utmost importance. It has been shown how the administrative-law system is informed by the normative content of constitutionalism. In addition, I have discussed the separation of powers as a distinctly constitutional instrument that promotes constitutional norms by means of institutional arrangements.

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<sup>195</sup> Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 151-156.

<sup>196</sup> 153 (footnotes omitted; emphasis in original).

The rise of the administrative state has arguably introduced a fourth function and branch to the classical threefold division of the separation of powers. The separation of powers should be drawn upon to determine the nature of the administration's relationship with the other branches, especially with the judiciary, and to evaluate alternative forms of administrative accountability, such as administrative courts. To this end the French administrative-law system will be discussed. I have emphasised context and the national character of constitutionalism, therefore my purpose in considering French administrative law is not to propose the importation of the *droit administratif*. Rather, its relevance to this dissertation lies with the fact that in France administrative action and public administration have been recognised as a function and branch, respectively, of a fundamentally different character for over one-hundred-and-fifty years. The French have the benefit of having grappled with the conceptual difficulties of incorporating an administrative-law system into their legal framework. In the United Kingdom and South Africa the administrative-law system was left virtually unattended until sixty years ago. However, broadly speaking, the challenges faced by modern regulatory states are the same problems faced in all Western nations since antiquity:

“Western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote.”<sup>197</sup>

The Constitution has entrenched the normative objectives and values of South Africa and the project of transformative constitutionalism describes the role of these norms. How these norms are realised from a legal perspective depends to a significant extent on the public administration, the judiciary and, by implication, their relationship. Since the conceptual and normative framework within which they operate has been established the administrative-law system itself can be assessed in the following chapter.

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<sup>197</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1967) 1.

## CHAPTER 3

### The South African Administrative-Law System

#### 3 1 Introduction

I have defined the administrative-law system as comprising the public administration, the judiciary and the adjudication of the public administration. The purpose of the definition is to draw attention to the legal relationship between the judiciary and the public administration, particularly, for the purposes of this dissertation, when the latter concludes contracts or participates in state commercial activity. The definition also confines the discussion to the issues most pertinent to this dissertation, in an area where many disciplines are relevant and overlap.<sup>1</sup>

An analysis of the administrative-law system reveals the legal and political context within which state contracting operates. This context moulds state contracting. The purpose of discussing the administrative-law system is to determine how this context moulds state contracting by setting out the characteristics of the administrative-law system and the legal relationship between the judiciary and the public administration. Once the taxonomy and dynamics of the South African administrative-law system are determined, the system can be used as a framework for comparison with the French administrative-law system and as the legal and political framework that moulds and contains state contracting.

In this chapter I discuss the South African administrative-law system in two parts. Firstly, I trace the origins and development of the system and, secondly, I consider the legal relationship between the judiciary and the public administration. The development of the administrative-law system involves three stages and each is dealt with separately. The first stage is the coming into being of administrative law as an independent and recognised field. The second concerns the ideological transformation of the administrative-law system. This transformation entails the transition from an

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<sup>1</sup> Not only are philosophy, economics, sociology, the science of public administration, jurisprudence, political science, political theory, political philosophy etc. relevant in analysing this relationship, but relationships of a different nature exist between the public administration and the judiciary, for example, political, strategic or illicit relationships.

administrative-law system informed by parliamentary sovereignty to one informed by constitutionalism, specifically transformative constitutionalism. The third stage concerns the evolution of an alternative role for the administrative-law system in society. This new role enables the public administration to achieve its extensive mandates subject to the constraints of administrative justice, as opposed to a system of mere control by judicial review. The purpose of discussing the origins and development of the administrative-law system is to facilitate a determination of the nature, elements and characteristics of the legal relationship between the judiciary and the public administration.

In the second part of the chapter, the legal relationship between the public administration and the judiciary is discussed in terms of six elements which inform this relationship. These are: one, the constitutional mandates of the South African courts and public administration; two, the South African understanding and application of the doctrine of the separation of powers; three, the idea of deference or respect; four, the public/private-law distinction; five, democracy and the counter-majoritarian dilemma; and, six, co-operative government. Of these six elements, the idea of deference seems to dominate discussion in South Africa regarding the relationship between the judiciary and the administration and this element will consequently be assessed in greatest detail.

## **3 2 The Origins and Development of the South African Administrative-Law System**

### **3 2 1 The Origins of the South African Administrative-Law System**

The predominant influence on the South African administrative-law system has been English administrative law, or rather, the traditional English attitude towards administrative law. Although Roman-Dutch law has had some influence, mainly on administrative remedies, the origin of South African administrative law is England.<sup>2</sup> Therefore, the establishment and development of administrative law in South African is intertwined with the recognition of administrative law in England.

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<sup>2</sup> See generally Wiechers M *Administratiefreg* (1973) 19, 34-36; Baxter L *Administrative Law* (1984) 27-35; Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 14.

Consequently, South African administrative law, as an independent and legitimate branch of law, has laboured under a relatively late start. Perhaps it could be argued that French administrative law enjoyed an early and pioneering start, ahead of South Africa and England.<sup>3</sup> But, by the 1950s, the Industrial Revolution had come and gone, the nature and functions of the state had changed fundamentally, and were rapidly changing still, and the rise of the welfare and administrative state was already well on its way; in other words dramatic socio-economic and political changes had occurred that necessitated a complementary administrative-law system. Yet, although these changes catalysed the development of administrative law in all these countries, the very status of administrative law in England and South Africa was still dubious. The recognition of administrative law was inhibited thereby. Therefore, the development of South African administrative law should be characterised as having a *late* start in relation to England and, especially, France.

This late start and the subsequent slow development of South African administrative law are due to English conceptions of the state as embodied in Westminster constitutionalism.<sup>4</sup> Foundational to Westminster constitutionalism is the doctrine of parliamentary sovereignty. For over a century, the great proponent of parliamentary sovereignty, Albert Venn Dicey, has been roundly condemned for his restraining influence on administrative law.<sup>5</sup> In fact, he denied its very existence.<sup>6</sup> His role is significant in the South African context because, unlike other branches of South African law, such as the law of sale or *emptio venditio*, constitutional law, in a descriptive sense, and administrative law have an English law foundation.<sup>7</sup> Therefore,

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<sup>3</sup> See 4.2 below on the early origins of the French administrative-law system.

<sup>4</sup> For an overview of Westminster constitutionalism, see Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 12-16.

<sup>5</sup> See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 21; Parker EM “State and Official Liability” (1906) 19 *Harvard Law Review* 15-19.

<sup>6</sup> Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 330.

<sup>7</sup> Beinart B “Administrative Law” (1948) 11 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 204-233 at 206; Wiechers M *Administratiefreg* (1973) 19; Boule L, Harris B & Hoexter C *Constitutional and Administrative Law: Basic Principles* (1989) 107-110; Du Plessis L *An Introduction to Law* (1999, 3<sup>rd</sup> ed) 53-54; Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 14.

in relation to the development of administrative law, South Africa has followed in England's footsteps:<sup>8</sup>

“South African administrative law before 1990 bore all the hallmarks of the English common-law based approach as it had developed prior to the middle of the twentieth century: distrust of the administration, over-reliance on judicial review of administrative action, an artificially drawn distinction between review and appeal, and a stultified formula of the grounds of review.”<sup>9</sup>

### 3 2 2 Dicey, Administrative Law and the *Droit Administratif*

Dicey based his view of administrative law on the primacy of the rule of law and parliamentary sovereignty. In his influential work, *Introduction to the Study of the Law of the Constitution*,<sup>10</sup> which has shaped English and South African legal thinking for over a century, he defined these concepts. His understanding of the rule of law entailed three elements: the supremacy of law, equality before the “ordinary” law as declared by the “ordinary” courts, and the constitution as a product of judicial decisions.<sup>11</sup> Under Westminster constitutionalism the rule of law is understood in terms of the principle of parliamentary sovereignty:

“Parliamentary sovereignty means ... that Parliament ... has, under the English Constitution, the right to make or un-make any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>12</sup>

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<sup>8</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 21-22.

<sup>9</sup> Corder H “Reviewing Review: Much Achieved, Much More to do” in Corder H & Van der Vijver L (eds) *Realising Administrative Justice* (2002) 1-19 at 2-3 (footnotes omitted). See also Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 14 (“[T]he influence of English constitutional doctrines and grounds of review was enormous. Indeed, this influence is still apparent throughout South African administrative law.” (Footnote omitted)).

<sup>10</sup> First published in 1885. All references to his book are from Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed).

<sup>11</sup> Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 187-196. For a thorough discussion on Dicey's conception of the rule of law see Wade ECS “Introduction” in Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) xevi-eli. See also Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 6; Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 75-76.

<sup>12</sup> Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 39-40.

Thus, parliamentary sovereignty “is best understood as the absence of substantive constraints on the power of Parliament.”<sup>13</sup>

In the light of Dicey’s views, the public administration and its associated administrative power are elements which require legal control.<sup>14</sup> Control over the public administration is effected by the judiciary in the form of judicial review of administrative action. In terms of the rule of law every person, whether citizen or administrator, is equal before the law. This means that every person is subject to the same legal rules as the ordinary courts declare them.<sup>15</sup> Thus, Dicey emphasised “the concept of formal or procedural equality” as integral to the rule of law,<sup>16</sup> preferring “a unitary court structure, in which administrative cases are handled by ‘ordinary’ courts and judges and public officials stand at least theoretically on an equal footing with private persons.”<sup>17</sup>

Dicey thought that his position, as set out above, was irreconcilable with his understanding of the *droit administratif*. He understood French administrative law as the application of a separate branch of law, *droit administratif*, a subsection of public law, to public officials by separate courts that have exclusive jurisdiction over administrative law matters; there was certainly no such law in England. This perception is not incorrect, but his emphasis on comparing *droit administratif* to the common law was misplaced.

Dicey deemed that the *droit administratif* “rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law.”<sup>18</sup> The fact that a public official would appear before an administrative court instead of an ordinary court, his alleged transgression to be evaluated in terms of administrative-law rules instead of ordinary legal rules, defied Dicey’s element of equality before the law. He was under the impression that the French approach afforded less protection to the citizen than was the case in England.

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<sup>13</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 14.

<sup>14</sup> See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 139-140.

<sup>15</sup> Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 193-194.

<sup>16</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 8.

<sup>17</sup> 9.

<sup>18</sup> Dicey AV *Introduction to the Study of the Law of the Constitution* (1959, 10<sup>th</sup> ed) 329.

Dicey's denial of the existence<sup>19</sup> or desirability of administrative law in England stemmed from this hostility towards and misconception of the *droit administratif*. Although he came to tentatively acknowledge the development of an English administrative law of sorts in 1915,<sup>20</sup> his hostile attitude towards administrative law had become entrenched in the minds of common-law lawyers and in common-law legal culture. This led Beinart in 1948 to describe the South African perception of administrative law as follows:

“[R]eared and nurtured in the traditional Diceyan concept of the rule of law and the individualistic conception of society, the South African lawyer like his English counterpart, is still wont to regard administrative law as an undesirable outcrop, and has given it scant attention”.<sup>21</sup>

Clearly, Dicey has left a robust legacy:<sup>22</sup> his “*Introduction to the Law of the Constitution* ... acts almost as a substitute for a written constitution.”<sup>23</sup> This Diceyan ideology “left English administrative law with a great mistrust of executive or administrative action but without any theoretical basis for its control.”<sup>24</sup> Thus, in the context of the changing nature of Western governments,

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<sup>19</sup> 390.

<sup>20</sup> See Dicey AV “The Development of Administrative Law in England” (1915) 31 *Law Quarterly Review* 148-152 (“Modern legislation and that dominant legislative opinion which in reality controls the action of Parliament have undoubtedly conferred upon the Cabinet, or upon the servants of the Crown who may be influenced or guided by the Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards the introduction among us of something like the *droit administratif* in France, but the fact that the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true *droit administratif*.” (152)).

<sup>21</sup> Beinart B “Administrative Law” (1948) 11 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 204-233 at 206.

<sup>22</sup> See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 21.

<sup>23</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 4.

<sup>24</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 16. See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 145.



“Dicey’s mistrust of discretionary power was to become ... a theme dominating administrative law in the second half of the twentieth century. It started administrative law on a collision course with governments that wish to use administrative law ‘instrumentally’ for socialist or welfare-oriented purposes”.<sup>25</sup>

This has been the experience in South Africa and the Diceyan tradition continues to exert a significant influence on the South African administrative-law system, even during the constitutional dispensation.

### 3 2 3 Judicial Review

According to Innes CJ’s established classification in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,<sup>26</sup> judicial review refers to three distinct processes, namely, the review of inferior courts of justice,<sup>27</sup> the review of administrative bodies<sup>28</sup> and special statutory reviews.<sup>29</sup> Only the second type of review is relevant for the purposes of this discussion.

The primacy of the rule-of-law doctrine and apartheid policies promoted judicial review as the dominant form of control over the public administration.<sup>30</sup> Furthermore, in South Africa, administrative law originated from judicial review itself and is largely constituted by it, as a consequence.

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<sup>25</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 18.

<sup>26</sup> 1903 TS 111 at 114-117. See also Rose Innes LA *Judicial Review of Administrative Tribunals in South Africa* (1963) 2-12.

<sup>27</sup> 1903 TS 111 114 (Review “denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings.”).

<sup>28</sup> 1903 TS 111 115 (“Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.”). Although now quite dated, see LA Rose Innes’s seminal work dealing specifically with this type of review, namely, *Judicial Review of Administrative Tribunals in South Africa* (1963).

<sup>29</sup> 1903 TS 111 116-117.

<sup>30</sup> That is, in the absence of a bill of rights, judicial review was a powerful instrument with which to attack the administration of discriminatory policies.

“In the use of this inherent review jurisdiction the various divisions of the Supreme Court developed a body of principles that came to be called administrative law. In this they relied heavily on the English administrative law that was part of South Africa’s colonial heritage, and to a lesser extent on principles of Roman-Dutch law.”<sup>31</sup>

In fact, “the terms ‘administrative law’ and ‘judicial review’ have often been synonymous.”<sup>32</sup>

Before the democratic dispensation, judicial review had special resonance as the instrument of judicial activists and liberals. Judicial review was virtually the only judicial restraint on administrative power during the pre-democratic period.<sup>33</sup>

“In the absence of other effective safeguards and procedures, judicial review had a crucial role to play in the administrative system. Its importance was further exaggerated by the absence of a democratic and supreme constitution with a justiciable Bill of Rights. Legal education, too, tended to emphasise judicial review.”<sup>34</sup>

Judicial review continues to occupy a central role in South African administrative law as the principal form of legal control over the public administration. This is the case despite the promulgation of the Promotion of Administrative Justice Act 3 of 2000.<sup>35</sup> PAJA reinforces the primacy of judicial review rather than a broader conception of administrative justice. This is evident in the definition of “administrative action” in section 1 and the grounds of review in section 6 of PAJA.

### **3 2 4 From Parliamentary Sovereignty to Constitutionalism**

Parliamentary sovereignty, an element of Westminster constitutionalism, establishes that parliament can make or un-make any law, that is, without substantive

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<sup>31</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 14 (footnote omitted).

<sup>32</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 485.

<sup>33</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 13. See also Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 484.

<sup>34</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 59.

<sup>35</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 particularly at 519.

constraints. Westminster constitutionalism was introduced to South Africa by the promulgation of South Africa's first constitution, the Union Constitution of 1909.<sup>36</sup> Thus, Westminster constitutionalism would come to dominate South African administrative law and judicial review until the democratic dispensation:

“The doctrine of parliamentary sovereignty ... was a fundamental constraint on the powers of the courts in the pre-democratic era – and, what is worse, on their enthusiasm for protecting rights.”<sup>37</sup>

The promulgation of the Constitution of the Republic of South Africa Act 200 of 1993 and then of the Constitution of the Republic of South Africa, 1996 ushered in a new era of rights-based administrative law and judicial review. The democratic foundation laid by the Constitution also legitimised and defined the mandates of the executive.

Section 33 of the Bill of Rights entrenches a right to administrative justice, in terms of which:

“[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair.”<sup>38</sup>

PAJA gives effect to section 33(3) of the Constitution that requires that legislation be enacted to give effect to this right. Administrative law and judicial review are empowered by the Constitution itself and by PAJA:

“This flows from the Constitution's subordination of Parliament and all other organs of state to the supremacy of the Constitution. The review power of the courts is no longer grounded in the common law and subservient to the authority - or whim - of the legislature.”<sup>39</sup>

Klare's “transformative constitutionalism” describes South African constitutionalism. Transformative constitutionalism has been welcomed by South

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<sup>36</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 12.

<sup>37</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 14.

<sup>38</sup> S 33(1) of the Constitution of the Republic of South Africa, 1996.

<sup>39</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 18.

African academics as an ideological compass for the constitutional project.<sup>40</sup> According to Klare transformative constitutionalism is a “project” of comprehensive social and political transformation.<sup>41</sup> In terms of this project the Constitution is a legal and political instrument that has a significant role to play in transforming South African society.<sup>42</sup> Thus, the Constitution is placed in historical, geo-political and socio-economic context and the function of the Constitution is derived from this context. Transformative constitutionalism provides an approach to constitutional interpretation that is based on the general goal of transforming South African society. The right to administrative justice should be viewed as an integral part of this project, given the central role of the public administration in realising socio-economic change and the judiciary’s role as the guardian of the Constitution. In addition, in giving content to the right to administrative justice one should draw on the ideas of transformative constitutionalism.

### 3 2 5 Red and Green-Light Theories

The nature of one administrative-law system under parliamentary sovereignty is vastly different to the nature of the same system under constitutionalism. However, the constitution of a nation is not the only significant determinant of how that system

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<sup>40</sup> Klare’s seminal article on transformative constitutionalism, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188, has enjoyed an enthusiastic response; see, for instance, the impressive list compiled by AJ van der Walt in “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court Review* 77-128 at 91 n 56. Subsequent responses to Klare’s transformative constitutionalism include Roux T “Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?” (2009) 20 *Stellenbosch Law Review* 258-285; Van Marle K “Transformative Constitutionalism as / and Critique” (2009) 20 *Stellenbosch Law Review* 286-391. Recently, Dennis Davis and Karl Klare have also assessed the progress of the project of transformative constitutionalism, Davis DM & Klare K “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 403-509. See also Dennis Davis’s short response to Roux, Davis DM “Transformation: The Constitutional Promise and Reality” (2010) 26 *South African Journal on Human Rights* 85-101 at 100 n 60.

<sup>41</sup> “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

<sup>42</sup> See, regarding the question whether law can fulfil this role, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 150.

operates. Another important determinant of an administrative-law system is the political function, and nature, of administrative law, the judiciary and the public administration. In this section I examine the evolution of an alternative role for the administrative-law system in society. This role *enables* the public administration to achieve its extensive mandates subject to the constraints of administrative justice, as opposed to a retrospective system of mere control by judicial review.

Harlow and Rawlings's objective in the first edition of *Law and Administration* was "to reinstate the link between public law and politics, restoring an essential dimension of administrative law".<sup>43</sup> To this end, they identified two schools of thought on the nature of administrative law and the control of state power: "red light theory" and "green light theory".<sup>44</sup> Although both theories were based on governmental responses to the emerging welfare state, they are fundamentally different.<sup>45</sup> The differences between the theories are summarised as follows:

"Red light theorists believed that law was autonomous to and superior over politics; that the administrative state was dangerous and should be kept in check by law; that the preferred way

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<sup>43</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 44.

<sup>44</sup> See Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) ch 1. They coined the terms red-light and green-light theories in the first edition of *Law and Administration*, which was published in 1984. Harlow and Rawlings do not characterise administrative-law systems as either red or green, nor do they support the one or the other (see xvi, 48). They are not

"against accountability and control. [Their] position is as it always has been that control of the executive and administration can and should be exercised in ways complementary to judicial review that may be more effective." (xvi).

Thus, red-light theory and green-light theory can be seen as two extremes on a continuum, see Klaaren J "Redlight, Greenlight" (1999) 15 *South African Journal on Human Rights* 209-217 at 210, between judicial review as the primary form of control over the administration, on the one hand, and judicial review as one form of control that is complemented by other control mechanisms, on the other. For Harlow and Rawlings the distinction is still valid, "[e]ven if the battle has migrated" (Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 45). Cf. in the South African context, Klaaren J "Redlight, Greenlight" (1999) 15 *South African Journal on Human Rights* 209-217 ("[T]he traffic-light metaphor has become ill-suited for the administrative law challenges presently facing South Africa." (2009)).

<sup>45</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 31-32, quoting Taggart M "Reinvented Government, Traffic Lights and the Convergence of Public and Private Law. Review of Harlow and Rawlings: *Law and Administration*" (1999) *Public Law* 124-138.

of doing this was through adjudication; and that the goal should be to enhance liberty, conceived in terms of the absence of external constraints. Green light theorists ... believed that law was not autonomous from politics; that the administrative state was not a necessary evil, but a positive attribute to be welcomed; that administrative law should seek not merely to stop bad administrative practice, and that there might be better ways to achieve this than adjudication; and that the goal was to enhance individual and collective liberty conceived in positive and not just negative terms.”<sup>46</sup>

On the one hand, red-light theory assigns to administrative law, as its primary concern, the control of state power and the ordinary courts enforce this control.<sup>47</sup> Red-light theorists advocate a liberal state where *ultra vires* is the watchword for state conduct.<sup>48</sup> Therefore, the rule of law and judicial control are central to red-light theorists. The views of Dicey and Wade fall into this school.<sup>49</sup> On the other hand, green-light theory conceptualises administrative law as “a vehicle for political progress and welcomes the ‘administrative state’.”<sup>50</sup> Both theories are concerned with the control of state power but where “[r]ed light theory prioritises courts ... green light theory prefers democratic or political forms of accountability.”<sup>51</sup>

The difference between red and green-light theories is essential to analysing the legal relationship between the public administration and the judiciary. Each theory apportions a fundamentally different role to the public administration and, consequently, to the judiciary. Thus, courts have a different role to play in relation to the public administration. However, it is not simply the list of tasks that is allocated to each “branch” that differs, but the way the administration and judiciary interact and the nature of their functions. This emphasises the interdependence of the branches of the state and the conceptual and contextual framework within which they operate.

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<sup>46</sup> Tomkins A “In Defence of the Political Constitution” (2002) *Oxford Journal of Legal Studies* 157.

<sup>47</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 23; Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 139.

<sup>48</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 139.

<sup>49</sup> Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 22-25.

<sup>50</sup> 31.

<sup>51</sup> 38.

Red-light theorists see courts as apolitical, even above politics, independent, impartial and objective.<sup>52</sup> The conception fits a pure separation-of-powers doctrine, with clearly differentiated branches and correlating functions: courts merely apply the law and cannot usurp the functions of the executive, which are policy formulation and public administration.<sup>53</sup> Thus courts may review the legality of decisions, but may not pronounce on the merits, thereby maintaining the distinction between review and appeal.<sup>54</sup>

Under green-light theory, courts are less interventionist and actually support the executive in the implementation of policy objectives:<sup>55</sup>

“[l]egislation and administrative action are given priority over judicial scrutiny and judicial lawmaking, not only because they are more efficient and systematic but also because they are more democratic.”<sup>56</sup>

Green-light theorists favour internal control for the administration as opposed to traditional and external judicial control.<sup>57</sup> Internal controls are potentially a more prospective form of control, as opposed to the external and backward-looking control of judicial review,<sup>58</sup> although jurists may assert that judicial decisions influence the conduct of administrators.<sup>59</sup> Therefore, green-light theory can be seen as a response to the counter-majoritarian dilemma.

In the South African context red-light theory characterises administrative law, especially if one considers the primacy of judicial review.<sup>60</sup> This is the result of South Africa’s English administrative-law heritage and the emphasis on the rule-of-law

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<sup>52</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 140.

<sup>53</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 140. See 2.4 above on the pure separation of powers.

<sup>54</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 140.

<sup>55</sup> 140.

<sup>56</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 140. However, whether the legislature and the administration are more efficient, systematic and democratic is arguable in terms of political theory and is also a factual enquiry; these qualities cannot be assumed.

<sup>57</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 141.

<sup>58</sup> See Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 40; Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 141 n 184.

<sup>59</sup> See Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 40.

<sup>60</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 143.

doctrine which still dominates legal education.<sup>61</sup> Hoexter adds to this that green-light theory has possibly been on the backburner in South Africa due to the

“negative connotations attached to state intervention in the apartheid era, a period in which interventionist government was inevitably associated with repressive rather than responsive government. Liberal commentators tended to reject both the outdated red-light theory and the more interventionist green-light view, and argued instead for a far more interventionist and creative *judiciary* in order to soften the blows of repressive government.”<sup>62</sup>

Hoexter concludes that “the rule of law model [or, red light theory] provides an increasingly unhelpful and unrealistic theoretical framework for judicial review”<sup>63</sup> and this holds for administrative law in general. Three reasons are advanced for this conclusion.<sup>64</sup> Firstly, red-light theory ignores “fluctuations in the courts’ attitudes towards the administration”<sup>65</sup> such as judicial activism or restraint. This undermines red-light theory’s claims of an objective and apolitical judiciary. Secondly, red-light theory operates from the Diceyan point of departure that the administration is not to be trusted, rather than viewing courts as facilitating the tasks of the administration.<sup>66</sup> Finally, distinctions that are foundational to the rule-of-law model and that mould administrative-law systems are being undermined: for example distinctions between public and private, appeal and review, substance and process, and merits and legality are increasingly cosmetic.<sup>67</sup> Nevertheless, these concepts and their supposed differences continue to play a major, and sometimes decisive, role in the analysis of administrative-law systems, especially judicial analysis.

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<sup>61</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 143. See Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 487-488. (“[A]nti-apartheid lawyers of the pre-constitutional era presided over a strangely truncated system of administrative law and subscribed to a highly *interventionist* or ‘red-light’ model of judicial review.” (Footnote omitted; emphasis added)).

<sup>62</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 143-144 (footnotes omitted, emphasis in original).

<sup>63</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 144. See Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 8.

<sup>64</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 144-146.

<sup>65</sup> 144.

<sup>66</sup> 145.

<sup>67</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 145-146; Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 18-22.



Hoexter then asks what should replace the “threadbare” rule-of-law theory and suggests that one should look to the 1996 Constitution.<sup>68</sup> For her the crux of the matter is the development of “a theory of judicial intervention and non-intervention”, in other words, “a theory of deference or respect”, to determine the new and constitutional role of courts.<sup>69</sup>

In the following part of this chapter the legal relationship between the public administration and the judiciary is discussed. The purpose of the preceding discussion on the origins and development of the administrative-law system is to facilitate a determination of the nature, components and characteristics of that legal relationship.

### **3 3 The Legal Relationship between the South African Public Administration and the Judiciary**

This legal relationship is characterised and informed by numerous factors. I have identified six elements which inform the legal relationship between the public administration and the judiciary: one, the constitutional mandates of the South African courts and public administration; two, the South African understanding and application of the doctrine of the separation of powers; three, the idea of deference or respect; four, the public/private-law distinction; five, democracy and the counter-majoritarian dilemma; and, six, co-operative government. These elements shape the nature, components and characteristics of the administrative-law system. These elements are indicative of the judiciary and public administration’s competences and legal and political functions, how they interact and should interact, how it is determined whether public or private law applies, and how the principle of democracy informs the administrative-law system in a constitutional democracy.

#### **3 3 1 The Constitutional Mandates of the South African Courts and Public Administration**

The Constitution assigns both positive and negative duties to the judiciary and the public administration. As the supreme law of South Africa, any law or conduct that is

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<sup>68</sup> Hoexter *C Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 146.

<sup>69</sup> 146.

inconsistent with the Constitution is void.<sup>70</sup> Therefore, the constitutional mandates which courts and administrative agencies are bound to perform define the functions of each branch. Thus, the constitutional allocation and nature of functions are the starting point to understanding the legal relationship between the judiciary and the public administration. In addition, these constitutional mandates affect the South African separation of powers and, consequently, checks and balances and deference.

Section 165(1) of the Constitution places the judicial function, or authority, in the courts. The judicial function or mandate is to apply the Constitution “impartially and without fear, favour or prejudice.”<sup>71</sup> Furthermore, the Constitution is the supreme law of South Africa<sup>72</sup> and it applies to all law and binds all the branches of the state.<sup>73</sup> The Constitution is justiciable<sup>74</sup> and any law or conduct that is inconsistent with the Constitution is legally indefensible.<sup>75</sup> Court orders are binding, even if it applies to an organ of state.<sup>76</sup> Therefore, the South African courts are the guardians of the supreme Constitution.

The jurisdiction of the South African courts is unitary. The judicial system consists of the Constitutional Court, the Supreme Court of Appeal, High Courts, Magistrates’ Courts and “any other court established or recognised” by an Act of Parliament.<sup>77</sup>

The public administration is not defined in the Constitution and is “generally understood to mean the organs and functionaries of the executive branch of the state that are concerned with the day-to-day business of implementing law and administering policy.”<sup>78</sup> The public administration meets the constitutional definition of “organ of state”, though.<sup>79</sup> Section 195 of the Constitution sets out the basic values and principles that govern the public administration such as democratic values,<sup>80</sup>

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<sup>70</sup> Ss 2, 172(1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>71</sup> S 165(2).

<sup>72</sup> S 2.

<sup>73</sup> S 8(1).

<sup>74</sup> S 165(2).

<sup>75</sup> S 172(1)(a).

<sup>76</sup> S 165(5).

<sup>77</sup> S 166.

<sup>78</sup> Hoexter *C Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 6 (footnote omitted).

<sup>79</sup> S 239 of the Constitution of the Republic of South Africa, 1996.

<sup>80</sup> S 195(1).

efficiency,<sup>81</sup> accountability<sup>82</sup> and transparency.<sup>83</sup> In addition, the public administration must be development-orientated.<sup>84</sup> The public administration includes the public service.<sup>85</sup>

### **3 3 2 The Doctrine of the Separation of Powers and Checks and Balances in South Africa**

The pure doctrine separates government into distinct branches and apportions different governmental functions to each branch.<sup>86</sup> Checks and balances modify the pure doctrine by enabling each branch to exercise some control over the functions of the other branches. This has fundamental implications for the interaction between the judiciary and the public administration: not only does the pure doctrine determine what each branch may and may not do, checks and balances qualify the pure doctrine to a limited extent. Furthermore, the doctrine of the separation of powers is not an end in itself, but an institutional strategy to achieve normative objectives.<sup>87</sup> Therefore, the separation of powers and checks and balances are foundational to the legal relationship between the judiciary and the public administration. They are also intertwined with the constitutional mandates imposed upon the judiciary and the public administration, the idea of deference, the public/private-law distinction and co-operative government.

Constitutional Principle VI, which had to be incorporated into the final Constitution for the Constitution to be valid, read as follows:

“There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”<sup>88</sup>

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<sup>81</sup> S 195(1)(b).

<sup>82</sup> S 195(1)(f).

<sup>83</sup> S 195(1)(g).

<sup>84</sup> S 195(1)(c).

<sup>85</sup> S 197.

<sup>86</sup> See 2 4 above on the pure doctrine of the separation of powers.

<sup>87</sup> See 2 4 5 above.

<sup>88</sup> Sch 4 of the Constitution of the Republic of South Africa Act 200 of 1993. See O’Regan K “Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution” (2005) 8 *Potchefstroom Electronic Law Journal* 120-150.

However, in the Constitution there is no express reference to the “separation of powers”. Nevertheless, in *South African Association of Personal Injury Lawyers v Heath*<sup>89</sup> Chaskalson P found, on behalf of a unanimous court, that the doctrine of the separation of powers is an “implicit” or “implied” term of the Constitution.<sup>90</sup> Thus, the requirement that Constitutional Principle VI be incorporated in the Constitution is satisfied.

In the light of the normative nature of the doctrine of separation of powers, it is noteworthy that Constitutional Principle VI indicates that accountability, responsiveness and openness are “ensured” by a separation of powers and checks and balances. The absence of efficiency from these normative objectives is conspicuous.<sup>91</sup>

The Constitution provides for the separation of powers by apportioning functions to the governmental branches. In the national sphere, the legislative function is vested in parliament,<sup>92</sup> the executive function is vested in the president<sup>93</sup> and the judicial function is vested in the courts.<sup>94</sup> In other words, the separation of powers “is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle.”<sup>95</sup> Basically, the constitutional provisions relating to the separation of powers amount to a pure doctrine in terms of which three branches, each with a particular and exclusive function, are identified. The normative objectives that this particular governmental arrangement seeks to promote or secure are not expressly identified in the Constitution.

In the analysis of what the competences of the executive and judiciary are, the inquiry is what is included in the judicial function and the executive function, respectively. The Constitution provides little assistance in this regard because these functions are not defined. From sections 85 and 165 one can deduce that the judiciary

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<sup>89</sup> 2001 1 SA 883 (CC).

<sup>90</sup> Paras 18-22.

<sup>91</sup> However, efficiency as a normative objective of the public administration is entrenched in s 195(b) of the Constitution of the Republic of South Africa, 1996.

<sup>92</sup> S 43 of the Constitution of the Republic of South Africa, 1996.

<sup>93</sup> S 85.

<sup>94</sup> S 165.

<sup>95</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 21. See Langa P “The Separation of Powers” in Klaaren J (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 27-34 at 29-32.

should neither execute laws, its own judgments nor formulate policy and the executive should not decide legal disputes.<sup>96</sup>

Checks and balances are a legitimate exception to the pure separation of powers. Checks and balances grants each branch limited capacity or competence to encroach upon the other branches' functions. In this way each governmental branch can exercise some control over the other branches. According to Currie and De Waal, one incidence of checks and balances is the competence of the executive to execute court orders.<sup>97</sup> Another control is the executive's part in appointing judges.<sup>98</sup>

In terms of checks and balances, the judiciary can exercise control over the executive and public administration by means of judicial review.<sup>99</sup> Courts are empowered to review administrative action by section 33 of the Constitution and section 6 of PAJA. Therefore, the power to review administrative action is derived from the Constitution and PAJA, which gives effect to section 33 of the Constitution.<sup>100</sup>

### 3 3 3 Deference and Respect

Deference has proven to be the key analytical concept describing the legal relationship between the public administration and the judiciary. The significance of

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<sup>96</sup> See Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 108.

<sup>97</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 112. The interdependence of the two processes of adjudication and of the subsequent execution of the judgment is reminiscent of Henry Bolingbroke's simultaneous "independency" and mutual "dependency" of the parts of government, Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 95; Vile MJC *Constitutionalism and the Separation of Powers* (1967) 74.

<sup>98</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 113. See ss 174(3), (4), (6) and 175 of the Constitution of the Republic of South Africa, 1996. From a democratic perspective the question to what extent the appointment of judges differs from the appointment of administrators, both by the executive, deserves attention.

<sup>99</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 113.

<sup>100</sup> *Pharmaceutical Manufacturers of SA; In Re: Ex Parte Application of the President of RSA* 2000 2 SA 674 (CC) paras 32-45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 22.

deference lies in its focus on the relationship between the administration and the judiciary<sup>101</sup> and on a particular aspect of it, namely, determining when judicial intervention or non-intervention with administrative action is appropriate.<sup>102</sup> How the judiciary should intervene, once it is has been decided that it is appropriate to do so, is equally relevant; the manner of intervention is largely concerned with the degree of judicial scrutiny. There are two prevailing arguments<sup>103</sup> justifying the adoption of a theory of judicial deference: one, courts lack democratic legitimacy in relation to the executive and administration and, two, courts have inferior institutional capacity or competence in relation to the political branches. Nevertheless, the precise content of deference and the manner in which deference can guide the courts in determining whether intervention is appropriate or not in a particular case are uncertain.

In this section Hoexter's understanding of deference and the judicial notice of her ideas are discussed. The emphasis overall is on deference in South Africa. Subsequently, the theoretical foundation of deference as received in South Africa is set out. Dyzenhaus and Mullan's views on deference are discussed, despite the fact that they write in the Canadian context, because their ideas are foundational to the deference debate in general. Other non-South African sources are discussed to the extent that they identify the nature of deference, the boundaries of deference itself and the scope of the deference debate. An attempt to formulate a theory of deference is not made; attempts at formulating actual, fully-fledged theories of deference, as opposed to theorising about deference, are not summarised or analysed, except as far as they relate to deference as presently applied by the South African courts.<sup>104</sup>

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<sup>101</sup> See, for instance, Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012).

<sup>102</sup> Hoexter, referring to Cockrell, identifies the problem of judicial review in an un-integrated administrative-law system as one requiring "principles of restraint or deference to guide the courts' intervention in administrative law" (Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519 at 500).

<sup>103</sup> Lenta P "Judicial Deference and Rights" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 456-467 at 456.

<sup>104</sup> Therefore, Daly's *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) and McLean's *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) are not analysed. Daly's argument is expressly aimed at the contexts of the UK, Canada and the USA. McLean has not dealt with Hoexter's understanding of deference, which this section takes as the point of departure for evaluating deference in the South African context.

### 3 3 3 1 Hoexter on Deference

In the wake of the enactment of PAJA in 2000, Hoexter published an important article<sup>105</sup> on the future of judicial review under this new statute. In this article, her discussion on a “theory of deference” established deference as a prominent topic in South African administrative law.

Hoexter describes the nature of the type of deference she advocates as follows:

“[T]he sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”<sup>106</sup>

In *Logbro Properties CC v Bedderson NO*,<sup>107</sup> the first South African case<sup>108</sup> to address “Hoexter’s deference”, Cameron JA cited and endorsed this description of deference.<sup>109</sup> Subsequently, Schutz JA in *Minister of Environmental Affairs and*

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<sup>105</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519.

<sup>106</sup> 501-502 (footnote omitted).

<sup>107</sup> 2003 2 SA 460 (SCA).

<sup>108</sup> See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 152.

<sup>109</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) paras 21-22. Subsequent cases where Hoexter’s conception of deference enjoyed judicial notice include *Nyathi v MEC for Department of Health, Gauteng* 2008 5 SA 94 (CC); *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA); *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental*

*Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*<sup>110</sup> also cited Hoexter's take on deference with approval, adding that:

“[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.”<sup>111</sup>

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>112</sup> O'Regan J agreed with Schutz JA's understanding of deference and paraphrased Hoexter's description, stating that:

“[i]n treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.”<sup>113</sup>

Hoexter points out that O'Regan J, however, preferred the use of the word “respect” to “deference” in her judgment.<sup>114</sup> O'Regan J, citing Dyzenhaus, states that:

“The use of the word ‘deference’ may give rise to misunderstanding as to the true function of a review Court ... [T]he need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.”<sup>115</sup>

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*Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) (see Quinot G *Administrative Law Cases and Materials* (2008) 581-582).

<sup>110</sup> 2003 6 SA 407 (SCA).

<sup>111</sup> Para 50. This statement does not express more than the pure separation of powers.

<sup>112</sup> 2004 4 SA 490 (CC).

<sup>113</sup> Para 48.

<sup>114</sup> Hoexter *C Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 152; “Standards of Review of Administrative Action” in Klaaren J (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2005) 61-72 at 71.

<sup>115</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 46 (footnote omitted).



In light of the prominent judicial notice<sup>116</sup> which Hoexter's article, "The Future of Judicial Review in South African Administrative Law", has received, it is necessary to consider the article's import in depth. The article's discussion on deference forms part of a broader topic: what is the future of judicial review under the recently enacted PAJA? Hoexter contends that what administrative law needed at that time was "an integrated system of administrative law in which judicial review could play a more suitable and more limited role" and "the construction of an appropriate theory of deference."<sup>117</sup> These changes are still required by the South African administrative-law context. The South African context is characterised by the equating of judicial review and administrative law, by the over-emphasis of judicial review as a constitution during the absence of a bill of rights and, generally, by lawyers who are pro-review and anti-administration. This contrasts with other common-law jurisdictions where the primacy of review has been challenged increasingly and where judicial review is described as marginal, peripheral and undemocratic.<sup>118</sup> In South Africa, the role of judicial review has been more prominent. South Africa's administrative-law past, the over-emphasis on judicial review and the commitment to socio-economic transformation combine to invite the question "[h]ow should we respond to this depressing charge-sheet?"<sup>119</sup> PAJA has failed to address this question satisfactorily which means that the system of administrative law has not been integrated and judicial review maintains its prominence.<sup>120</sup> It is within this context and in response to the preceding question that Hoexter discusses deference.

Deference is concerned with "when and to what extent judges should intervene" with administrative action.<sup>121</sup> In the South African context this question is significant

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<sup>116</sup> See the discussion below, 3 3 3 2 Judicial Notice of Deference.

<sup>117</sup> Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519 at 484.

<sup>118</sup> See Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519 at 486, 488-495.

<sup>119</sup> Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519 at 492. Hoexter does qualify the shortcomings of South African administrative law, see 492-494. Importantly, judicial review is not criticised in order to have it eradicated, but, instead, to identify a suitable role for review in an integrated system of administrative law.

<sup>120</sup> Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519 at 499.

<sup>121</sup> 500.

because of the primacy of judicial review as a controlling mechanism of administrative action and the resulting, potentially undesirable, judicial activism. Subsequently, Hoexter outlines the nature of the version of deference<sup>122</sup> she would advocate; she identifies and examines three themes that inform and constitute a South African theory of deference, namely, variability,<sup>123</sup> the scope of “administrative action”, and reasonableness review.<sup>124</sup> Variability means that “the principles of legality (or negatively, the grounds of review) need not be applied in an all-or-nothing fashion, and that the intensity of judicial scrutiny may vary according to the context.”<sup>125</sup> This approach can be applied to various components of the administrative-law system such as natural justice, fairness, reasonableness, and the duty to give reasons.<sup>126</sup> Hoexter identifies factors that can vary the “intensity of the court’s scrutiny and its willingness to intervene in a particular case”:<sup>127</sup> the factors include the policy content of the decision, the latitude of discretion available to and the expertise of the decision-maker, and the impact of the decision. Variability in this sense is incongruent with a classification of government functions, with formalism and with conceptualism.<sup>128</sup>

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<sup>122</sup> 501-502.

<sup>123</sup> On the notion of variability as an incidence of deference, see Taggart M “Proportionality, Deference, *Wednesbury*” (2008) *New Zealand Law Review* 423-482; Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) ch 4. See also the response to Taggart’s article, Craig P “Proportionality, Deference, *Wednesbury*: Taking up Michael Taggart’s Challenge: Proportionality, Rationality and Review” (2010) *New Zealand Law Review* 265-301; Hickman T “Proportionality, Deference, *Wednesbury*: Taking up Michael Taggart’s Challenge: Problems for Proportionality” (2010) *New Zealand Law Review* 303-326; King J “Proportionality, Deference, *Wednesbury*: Taking up Michael Taggart’s Challenge: Proportionality: A Halfway House” (2010) *New Zealand Law Review* 327-367; Knight DR “Proportionality, Deference, *Wednesbury*: Taking up Michael Taggart’s Challenge: Mapping the Rainbow of Review: Recognising Variable Intensity” (2010) *New Zealand Law Review* 393-431; Mullan D “Proportionality, *Wednesbury*: Taking up Michael Taggart’s Challenge: Proportionality - A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?” (2010) *New Zealand Law Review* 233-264.

<sup>124</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 502-519.

<sup>125</sup> 502.

<sup>126</sup> 502-503.

<sup>127</sup> 503.

<sup>128</sup> 503-505.

The scope of administrative action is pertinent to deference because it is a precondition for judicial review and for the application of section 33 of the Constitution and of PAJA.<sup>129</sup> During the pre-constitutional period, South African courts defined “administrative action” widely to compensate for the absence of a bill of rights,<sup>130</sup> facilitated by the absence of a statutory definition. However, under the constitutional dispensation, administrative action need not serve as an instrument of judicial activism.<sup>131</sup> The Bill of Rights, legislation giving effect to the Bill of Rights and the separation of powers require a more nuanced understanding of the scope of administrative action.

Hoexter justifies the inclusion of the third theme, reasonableness review, by its dubious reputation as a ground of review: “such scrutiny is often thought to breach the distinction between appeal and review”.<sup>132</sup> Overstepping the line between review and appeal conflicts with the idea of deference. Reasonableness requires administrative action that is, at least, rational<sup>133</sup> or justifiable. In order to determine whether administrative action is rational, the merits of administrative decisions will have to be scrutinised.<sup>134</sup> As for respecting the distinction between review and appeal when scrutinising the merits, Froneman DJP’s admonishment in *Carephone (Pty) Ltd v Marcus NO*<sup>135</sup> should be kept in mind:

“[i]n determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”<sup>136</sup>

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<sup>129</sup> 502.

<sup>130</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 173.

<sup>131</sup> 174.

<sup>132</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 502. For the distinction between appeal and review see Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 65-67, 108-111.

<sup>133</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 340.

<sup>134</sup> 351-352.

<sup>135</sup> 1999 3 SA 304 (LAC).

<sup>136</sup> *Carephone (Pty) Ltd v Marcus NO* 1999 3 SA 304 (LAC) para 36.

An outline of the idea of deference can be drawn from the foregoing discussion: deference requires judicial respect for the constitutional competence bestowed on the executive, without compromising its own competence, and is informed by three themes, variability, the scope of “administrative action”, and reasonableness review. Also, deference itself derives its force from the separation of powers.<sup>137</sup>

Evidently, Hoexter expressly attempted to introduce a debate on deference in the wake of the promulgation of PAJA, because, she speculated, “what ought to have been a rich debate about deference may never take place at all.”<sup>138</sup> In other words, at the time of writing her article, such a debate, in Hoexter’s view, had not yet taken place; and PAJA had disappointed in not introducing or furthering that debate. Hoexter describes the nature of deference, as she understands it, and roughly demarcates its boundaries without claiming to mark out deference completely.<sup>139</sup> This is clear from the language she employs in discussing deference. For example, the heading of the section dealing with deference reads “*towards* a theory of deference”.<sup>140</sup> She talks about “the *sort* of deference we should be *aspiring to*”.<sup>141</sup> She suggests that “we *may perhaps* take inspiration from Dyzenhaus’s exploration of the idea of deference”.<sup>142</sup> Hoexter employs open language that encourages further debate on deference, rather than proposing to define deference or determine its content. It is

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<sup>137</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 500 (“If we are to take seriously the separation of powers dictated by our Constitution, then we must embrace a more balanced vision of the role of review. This means shaking off the anti-administration ethos and abandoning the intuition that judicial intervention is automatically and inevitably a desirable thing. As Cockrell suggests, it means admitting the need for principles of restraint or deference to guide the courts’ intervention in administrative law.”).

<sup>138</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 485.

<sup>139</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 501 (“Whatever deference means – and I shall now say in broad terms what I think it means ...”). Cf. Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) 208: “I recognise that adopting my ideal-type in its entirety may not be immediately feasible, but courts may be able to accommodate it partially, within existing judicial review doctrine.” Hoexter makes no such claim.

<sup>140</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 499 (emphasis added).

<sup>141</sup> 501 (emphasis added).

<sup>142</sup> 501 n 79 (emphasis added).

advisory and directive rather than prescriptive and preceptive. She does not attempt to formulate a definition of deference or proffer her version of an established legal principle. Ultimately, Hoexter refers to her “view of deference” because “‘theory’ is too ambitious a word”.<sup>143</sup>

### 3 3 3 2 Judicial Notice of Deference

Despite Hoexter’s intention to introduce a debate, the South African courts have applied her description of deference as a legal definition and legal principle. In *Logbro Properties CC v Bedderson NO*,<sup>144</sup> Cameron JA identifies the task before the decision-maker<sup>145</sup> as a “prime instance of what commentators have dubbed ‘polycentric decision-making’.”<sup>146</sup> The decision was characterised as polycentric because various public interests had to be balanced against one another, such as the “fair reconsideration of the appellant’s tender” and the “broader responsibilities” of the decision-maker.<sup>147</sup> Cameron JA finds that “[i]t is in just such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted” the decision-maker.<sup>148</sup> Thus, where a decision-maker is confronted with a polycentric issue the court should act with judicial deference because of the complexity of the decision.<sup>149</sup> Cameron JA quotes from Hoexter’s “The Future of Judicial Review in South African Administrative Law”<sup>150</sup> and endorses her

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<sup>143</sup> Hoexter C *Administrative Law in South Africa* (2007) 143; *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 151. Note that Hoexter has not changed her wording (“view of deference” rather than “theory”) in the second edition, suggesting that, in her view, deference has not as yet progressed to the level of a “theory” of deference.

<sup>144</sup> 2003 2 SA 460 (SCA).

<sup>145</sup> The KwaZulu-Natal assets committee, represented by the first respondent.

<sup>146</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 20.

<sup>147</sup> Para 20.

<sup>148</sup> Para 21.

<sup>149</sup> Consequently, it seems that an applicant who feels aggrieved by a polycentric administrative act is more vulnerable, or less likely to enjoy the protection of the courts, than an applicant affected by a simple administrative act. If this is not the case, then it is difficult to see whether deference plays an independent role. In turn, determining whether an administrative decision is polycentric is itself a difficult inquiry.

<sup>150</sup> (2000) 117 *South African Law Journal* 484-519.

description<sup>151</sup> of judicial deference. On this basis, Cameron JA finds that the “conclusion is unavoidable” that the decision-maker “acted unimpeachably” in taking supervening circumstances into consideration.<sup>152</sup> He makes this finding without explaining why deference is required at polycentric decision-making, why deference is appropriate under the circumstances of the particular case, or what precisely the role of deference is in the case. Cameron JA could have reached the same conclusion on the basis of the distinction between appeal and review.

In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*,<sup>153</sup> Schutz JA reviewed a decision on reasonableness grounds,<sup>154</sup> amongst others. He found that since the decision-maker “[had] a wide discretion to strike a balance, in furtherance of the objectives and principles” of the relevant legislation and was “[giving] effect to government economic policies”, “judicial review of the exercise of powers calls for deference, in the sense stated in *Logbro Properties CC v Bedderson NO*”.<sup>155</sup>

Schutz JA quotes<sup>156</sup> from *Du Plessis v De Klerk*<sup>157</sup> and *S v Lawrence*<sup>158</sup> for authority that courts are not adept at factual, economic or political inquiries,<sup>159</sup> that courts should therefore exercise restraint in making findings on them and that this restraint is linked to the different roles of the court and the other branches.<sup>160</sup> Schutz

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<sup>151</sup> 501-502.

<sup>152</sup> Arguably, the same conclusion could have been reached without referring to deference. For instance, the argument could have been formulated in terms of the separation of powers or the distinction between appeal and review.

<sup>153</sup> 2003 6 SA 407 (SCA).

<sup>154</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 45 (“Were the decisions capricious or based upon arbitrary or irrelevant considerations?”).

<sup>155</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 47.

<sup>156</sup> Paras 48-49.

<sup>157</sup> 1996 3 SA 850 (CC) para 180.

<sup>158</sup> 1997 4 SA 1176 (CC) para 42.

<sup>159</sup> See, generally, Fuller LL “The Forms and Limits of Adjudication” (1978) 92 *Harvard Law Review* 353-409.

<sup>160</sup> Considered in isolation, this suggests that the courts are limited when it comes to these matters. However, arguably it is only when *the administration* has made factual, economic or political inquiries that the judiciary is required to show deference. Should the courts show deference to the

JA elaborates along this vein in characterizing the decision as polycentric and in stating that the court cannot prefer one decision over another on the basis that the one is better than the other.<sup>161</sup> As authority for this latter statement, he quotes<sup>162</sup> from *Bel Porto School Governing Body v Premier, Western Cape*<sup>163</sup> where Chaskalson P said that “[c]ourts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.”<sup>164</sup> The court’s function is not to test the correctness or the “substance” of the decision, but the “procedure by means of which it was arrived at”,<sup>165</sup> otherwise the distinction between review and appeal is lost.<sup>166</sup>

Schutz JA points out that judicial deference “simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.”<sup>167</sup> This is a clear statement of the pure doctrine of separation of powers in terms of which different functions are apportioned to different branches of the state.

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findings of private institutions such as banks or doctors? Since deference flows from the separation of powers it would seem that this is not the case. However, if the reason is simply that the courts are not adept at these sorts of inquiry why is deference only appropriate in the one case and not the other? In medical cases for instance the court has no specialised medical knowledge and the opposing parties bring expert witnesses to testify before the court, taking opposite views on the same matter. Why is it unproblematic for courts to take such cases on appeal, but not assess administrative arguments purely on the merits at judicial review? There should be some concern when deference is shown to the party who has allegedly infringed the right to just administrative action on the basis not of the argument alone, but factors external to the facts. In the light of the Preamble, ss 1(a), 1(c), 2 7, 165 and 172 such a stance amounts to impartiality or non-justiciability where the case has already reached court and the judge is asked to review the case. This does not go against Hoexter’s general argument that there is an over-reliance on review. However, the problem is not solved by diluting the review process on the basis that other forms of protection are desirable and that the system itself must balance the need for administrative freedom and independence, on the one hand, and the protection of individuals, on the other. These issues require systemic changes.

<sup>161</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 51.

<sup>162</sup> Para 51.

<sup>163</sup> 2002 3 SA 265 (CC) para 87.

<sup>164</sup> Para 45.

<sup>165</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 52.

<sup>166</sup> Para 52.

<sup>167</sup> Para 50.

In concluding the discussion on the alleged capriciousness of the decision, Schutz JA summarises the preceding arguments:

“Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director [the decision-maker]. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds.”<sup>168</sup>

With that he finds that the application on reasonableness grounds fails. Deference and rationality are interwoven in this discussion. Although Schutz JA clearly identifies the facts upon which the decision was made,<sup>169</sup> why they were relevant<sup>170</sup> and why the decision-maker dealt with them rationally in the circumstances,<sup>171</sup> it is unclear what role deference plays or should play in the analysis of the reasonableness of decisions or how the analysis would have differed without deference.

*Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*<sup>172</sup> was taken on appeal to the Constitutional Court. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*<sup>173</sup> O’Regan J discusses deference<sup>174</sup> under the

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<sup>168</sup> Para 53.

<sup>169</sup> See, for instance, Schutz JA’s approval of the reasons furnished by the decision-maker (*Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) paras 39-45).

<sup>170</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 54.

<sup>171</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) paras 41-43, 45, 51 (The decision-maker “[was] obliged to have regard to a broad band of considerations and the interests of all that may be affected”).

<sup>172</sup> 2003 6 SA 407 (SCA).

<sup>173</sup> 2004 4 SA 490 (CC). The *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) case has subsequently become the standard case on deference. See, for instance, *Nyathi v MEC for the Department of Health Gauteng* 2008 5 SA 94 (CC) where Madala J held that “[t]he separation of powers doctrine needs to be respected and due deference afforded to the other arms of government, especially when the matter relates to complex procedures beyond the expertise of this Court” (para 208). Madala J refers to *Bato Star* as



heading “[t]he ‘reasonableness’ of the ... decision”.<sup>175</sup> Thus, deference is discussed in the context of reasonableness review. In terms of O’Regan J’s treatment of deference in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>176</sup> what is the content of deference, or rather, what is said about deference? The placement of her discussion on deference suggests that it is an aspect of reasonableness review or that it plays a role in reasonableness review.

O’Regan J mentions Schutz JA’s reference to Hoexter’s “The Future of Judicial Review in South African Administrative Law”<sup>177</sup> and quotes the latter’s description of the nature of deference. O’Regan J endorses<sup>178</sup> Schutz JA’s negative description of deference: “[j]udicial deference does not imply judicial timidity or an unreadiness to

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authority for the meaning of deference and for the contention that deference flows from the separation of powers (para 88).

<sup>174</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) at paras 46-48.

<sup>175</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) at para 41. O’Regan also discusses deference under reasonableness in “Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law” (2004) 121 *South African Law Journal* 424-437 at 435-437. Deference is described as a “ground rule” of reasonableness review (435). O’Regan also identifies several factors that inform deference, with reference to the Canadian system. She reasons

“The challenge that lies ahead requires the development of determining how many levels of scrutiny there should be, their precise form, and which levels of scrutiny are appropriate to which types of jurisdiction. The factors that I outline in commencing my discussion - expertise of the tribunal, polycentric decisions, the need for an efficient administration, the constitutional commitment to responsiveness, transparency and accountability - must all feature in this development.”

Corder responds to O’Regan’s article in “Without Deference, with Respect: A Response to Justice O’Regan” (2004) 121 *South African Law Journal* 438-444. He agrees with O’Regan J that “an emphasis on approach or philosophy is what is needed now in South African administrative law” (442), but raises several questions concerning the difference between reviewing executive and administrative acts and concerning the nature of reasonableness review.

<sup>176</sup> 2004 4 SA 490 (CC).

<sup>177</sup> (2000) 117 *South African Law Journal* 484-519.

<sup>178</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) at para 46.

perform the judicial function.”<sup>179</sup> Also, the word deference itself may detract from the “true function of a review court”;<sup>180</sup> “[t]his can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.”<sup>181</sup>

O’Regan J clearly states that deference or respect derives from the doctrine of separation of powers. She quotes from the House of Lords judgment, *R (on the application of ProLife Alliance) v British Broadcasting Corporation*,<sup>182</sup> where Lord Hoffmann indicates that

“[i]n a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.”<sup>183</sup>

Thus,

“[t]he allocation of these decision-making responsibilities is based upon recognised principles ... [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.”<sup>184</sup>

Therefore, where a court determines the decision-making competence of another branch of government, it is merely deciding the law. The decision-making competence of a branch is determined by the separation of powers. Where a court determines the content of the separation of powers and other law in the context of

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<sup>179</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) at para 50.

<sup>180</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) at para 46.

<sup>181</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) at 46 (footnote omitted). Citing Dyzenhaus (para 46 n 32), O’Regan J employs “respect” as an alternative term for “deference” (46).

<sup>182</sup> [2003] 2 All ER 977 (HL).

<sup>183</sup> [2003] 2 All ER 977 (HL) para 75.

<sup>184</sup> [2003] 2 All ER 977 (HL) para 76.

allocating powers it is not acting with deference and is not required to act out of deference.

O'Regan J adopts this analysis and applies it in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>185</sup> “[i]n treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution.”<sup>186</sup> In other words, respect amounts to an appreciation of and compliance to competence. This is nothing more than an application of the separation of powers and other principles, such as checks and balances, which determine the allocation and scope of state functions.

The question remains what is the relation between deference and reasonableness review? The preceding quotation of O'Regan J sets out the content of deference or respect: there is appropriate respect when courts, in evaluating the decisions of administrative agencies, recognise the proper role of the executive within the Constitution.<sup>187</sup> O'Regan J reasons that respect entails that judges should not endow themselves with superior judgement regarding the functions of other branches; this can be avoided by “[giving] due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.”<sup>188</sup> In turn, due weight is a function of the character of the decision and the identity of the decision-maker.<sup>189</sup> Thus, it would appear, the more complicated a decision is and the more of an expert the decision-maker is, the more weight courts should attach to findings of fact and policy decisions. However, O'Regan J immediately qualifies the importance of the complexity of a decision and the identity of a decision-maker:

“A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”<sup>190</sup>

Therefore, the character of the decision and the identity of the decision-maker are factors that assist the court in determining the weight to be attached to findings of fact and policy decisions. These factors are not decisive, though. The decisive criterion is

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<sup>185</sup> 2004 4 SA 490 (CC) paras 48-54.

<sup>186</sup> Para 48.

<sup>187</sup> Para 48.

<sup>188</sup> Para 48.

<sup>189</sup> Para 48.

<sup>190</sup> Para 48.

the reasonableness of the decision and there is not necessarily a direct relationship between the complexity of the decision and the identity of the decision-maker. Therefore the link between deference and reasonableness review could lie in the courts' very attachment of weight to findings of fact and to policy decisions in the courts' determination of the reasonableness of decisions, for this acknowledgement is an incidence of the courts' recognition of the proper role of the executive.<sup>191</sup> This is so regardless of whether that weight turns out to be decisive or not.

O'Regan J attempts to combine the idea of respect and reasonableness review:

“A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area *must be shown respect by the courts*. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a *court should pay due respect* to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court *may not review* that decision.”<sup>192</sup>

O'Regan J has already indicated that respect requires courts to acknowledge the proper role of the executive. How are courts to acknowledge the proper role of the executive where an executive decision is scrutinised, or where there is a call for it to be scrutinised? This question seems to be the crux of how respect and reasonableness review overlap. In the preceding quotation, O'Regan J says that where the executive has a polycentric issue before it or has a discretion regarding the route to be taken courts must respect the *decision*. Thus, courts can respect the proper role of the executive by respecting the executive's decision. However, this is unhelpful to the inquiry. Now, the question is merely how do courts respect executive decisions under reasonableness review. In addition, O'Regan J finds it necessary to qualify this point by adding that the respect owed by courts to the executive's decisions does not preclude unreasonableness review.

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<sup>191</sup> Or the proper role of the legislative branch. See Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303.

<sup>192</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48 (emphasis added).

If the decision-maker “did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed”<sup>193</sup> with reasonable review. Thus “[t]he court’s task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.”<sup>194</sup> Therefore, regardless of the respect owed by the courts to executive decisions, such decisions will be subject to reasonableness review in any case. Initially, O’Regan J seems to state that respect is a factor in deciding whether a decision is reviewable at all. By subsequently negating this assertion respect becomes a factor in reasonableness review. The question remains, how does respect operate in reasonableness review?

Thus, O’Regan J partially detracts from her original position that respect originates in the doctrine of separation of powers and that respect is concerned with competence: she explicitly considers respect and reasonableness review together. Lord Hoffmann also analyses deference as a principle determining and allocating the competences of the branches of government. O’Regan J, however, applies Lord Hoffmann’s argument in the context of reasonableness review which is concerned not with the allocation of power, but with the manner in which that power is exercised. The allocation of power and the content of that power are related but distinguishable. For instance, where the separation of powers allocates the judicial function, i.e. the function of stating the law, to the judiciary this allocation in itself does not define the content of the judicial function. However, where deference informs reasonableness review, the content of the judicial function, in relation to the administrative function, is affected. This raises the question whether deference is concerned with the allocation of powers, the scope of powers or both? Seemingly, deference is a principle that permeates law in a very wide sense, from the inquiry of the allocation of functions to the content and application of that function.

A variable standard of review is based on the idea that there is a spectrum of reasonableness, between irrationality and perfect proportionality, within which there is scope for different decisions that are all reasonable. That one option is more or less reasonable than another is beside the point. Reasonableness review is an exercise in

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<sup>193</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 50.

<sup>194</sup> Para 49.

determining whether a decision falls within the spectrum or not.<sup>195</sup> The decisive inquiry is where the boundaries of reasonableness lie. In terms of reasonableness review, all decisions within the boundaries of rationality and proportionality are reasonable.

The fact that courts cannot interfere with different options falling within the spectrum between the cut-off for reasonableness and proportionality, even where one decision is patently better than another, is in itself an acknowledgement of the constitutionally ordained function of the executive branch and, therefore, an incidence of deference as employed by O'Regan J. The scope of reasonableness review derives from the nature of judicial review, which maintains the difference between review and appeal. In this sense, deference does nothing new. Thus, is deference merely descriptive, describing the courts' position in relation to the executive during review proceedings as opposed to appeal or does it add something new to judicial review?

In *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management*,<sup>196</sup> Harms JA summarises the decision of the court *a quo*<sup>197</sup> as follows: Van Zyl J found that “the review application was an appeal in disguise” and “that this was one of those cases in which due judicial deference should be accorded to policy-laden and polycentric administrative acts that entail a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have”;<sup>198</sup> the act to which the court *a quo* deemed deference was due was the algorithm that had been developed by a professor of mathematics.<sup>199</sup> On appeal the appellant asked for the mechanical application of the formula to be reviewed in terms of section 6(2)(h) of PAJA.<sup>200</sup> The formula itself was not challenged.<sup>201</sup>

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<sup>195</sup> Obviously, if a decision is more than simply reasonable, i.e. proportional, it will pass the test of reasonableness review.

<sup>196</sup> 2006 2 SA 191 (SCA).

<sup>197</sup> 2004 5 SA 91 (C).

<sup>198</sup> *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA) para 2.

<sup>199</sup> Para 8.

<sup>200</sup> Paras 11-14.

<sup>201</sup> *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA) para 13 (“[T]he appellant ... did not pursue the attack on OMP-02 or the decision to use a single allocation. (It

Harms JA explains his understanding of deference, citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>202</sup>

“In exercising its review jurisdiction a court must treat administrative decisions with ‘deference’ by taking into account and *respecting the division of powers* inherent in the Constitution.”<sup>203</sup>

Here, once again, an aspect of the definition of the pure separation of powers is stated succinctly. Thus, Harms JA does not contribute to the content of deference. It seems, however, that deference is a feature of the review process itself and its content amounts to recognition of the allocation of functions.

After considering the outcome of the formula’s application, Harms JA responds to Van Zyl J’s view on deference:

“[o]ne does not need to understand the ‘complex processes, mathematical or otherwise’ ... to realise that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable.”<sup>204</sup>

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should be noted that the minister’s determination of the TAC has never been in contention.) The use of a formula to determine the allocation of fishing rights is also not in issue.”).

<sup>202</sup> 2004 4 SA 490 (CC).

<sup>203</sup> *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA) para 12 (emphasis added).

<sup>204</sup> *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA) para 18. Harms JA does not explain at all why the results are irrational. He states that the appellant was “prejudiced” without explaining why (para 19). He notes certain differences in allocation and that there were “glaring anomalies” (paras 14-18). He does not explain why these differences amount to anomalies. In this context, it is rather puzzling that Harms JA concludes that the “simple application of the formula” was unreasonable. Assuming that “some” of the results were “irrational and inexplicable”, and Harms JA does not specify whether he means inexplicable in terms of formal logic, statistics, mathematics, law or a combination of the aforementioned, this does not necessarily make the decision unreasonable in terms of administrative law: Harms JA would have to explain why some distorted results render the decision unreasonable in law. He reasons that

“A reasonable decision-maker would, in [his] judgment, have used a formula to make a provisional allocation but would have considered the output as a result of the application of the

It seems that Harms JA accepts Van Zyl J's understanding of deference in principle. In other words, the court would have had to accord due deference to the expert assessment of the administration if the unreasonableness inquiry depended on an analysis of "complex processes". However, on the facts the unreasonableness of the decision could be ascertained without engaging with the "complex processes, mathematical or otherwise". Thus, where the unreasonableness of the decision is apparent without the need for non-judicial expertise, little or no deference is due, it would appear. This approach accords with the variable standard of review. However, it raises several questions. If deference flows from the separation of powers, why is it not relevant whenever the administration performs an administrative function? Why should the court not defer to the administration's decision to apply the formula mechanically? These questions are not addressed by the court, unfortunately, despite Harms JA's reference to the separation of powers and the allocation of functions.

In *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management*,<sup>205</sup> the formula for the allocation of fish was developed by the Department of Environmental Affairs and

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formula and then have considered whether the output gives reasonably justifiable results bearing in mind the facts. That the results were distorted would have been patent to anyone applying his or her mind to them. Some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced, but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for. If the problem had not been solved thereby, the results would have been adjusted to make some sense." (Para 19).

It could be that some distorted results are unavoidable given the complexity of the matter. It could be that this formula produced the least distorted output. Strangely, having said that the formula itself is not at issue, Harms JA mentions that noticing the anomalies would have called for "[a] reconsideration of the formula". Perhaps the final results could not be adjusted. Above all, it is unclear how one could know that the output is irrational without knowing exactly how the mathematical formula producing the output operates; the terms of the formula would at least partially dictate whether any result was distorted or not. Furthermore, whether these inconsistencies result in prejudice and favour is not a given. Also, as mentioned, this does not necessarily make the application of the formula unreasonable in law. Occasional mathematical or statistical inconsistency does not automatically amount to unreasonableness in law. Cf. the opinion of the experts who created and applied the formula, Butterworth DS, De Oliveira & De Moor CL "Are South African Administrative Law Procedures Adequate for the Evaluation of Issues Resting on Scientific Analyses?" (2012) 129 *South African Law Journal* 461-477.

<sup>205</sup> 2006 2 SA 191 (SCA).



Tourism in terms of the Marine Living Resources Act 18 of 1998 with the expert assistance of a mathematician.<sup>206</sup> Thus the administration was closely involved in the process leading to the final formula. Consequently, considering the crucial link between the separation of powers and deference that was established in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>207</sup> the presence of administrative expertise and experience is apparent and the reference to deference understandable, even though Harms JA did not rely on it directly to come to his decision.

In the case of *Associated Institutions Pension Fund v Van Zyl*<sup>208</sup> the link between administrative expertise and deference appears more tenuous. The central issue was the methodology adopted by the actuary for the appellants in the determination of a formula for the transfer of pension funds.<sup>209</sup>

Brand JA explains the relevance of deference to the case as follows:

“Particularly in the light of the training, skills, experience and intricacies involved in the application of actuarial science, I believe that this is a matter where judicial deference is appropriate.”<sup>210</sup>

This is a curious comment as courts are required to show deference to the executive branch or, more specifically, the public administration itself. The actuaries that represented the respondents would have had the same qualities identified in the preceding quotation and their findings have enjoyed no special recognition. As mentioned, deference is based on the separation of powers and requires respect for the findings of fact and policy decisions of the executive precisely because of the executive’s function and its position as an elected branch tasked with balancing various factors in making political decisions and implementing legislation. Arguably the issue is not purely whether De Wit, the actuary for the appellants, acted rationally, but also whether the information he furnished to the decision-maker was dealt with reasonably as it was the task of the decision-maker to transfer an amount calculated in

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<sup>206</sup> Paras 1, 3-4, 8.

<sup>207</sup> 2004 4 SA 490 (CC).

<sup>208</sup> 2005 2 SA 302 (SCA).

<sup>209</sup> *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA) paras 9, 17-18, 35.

<sup>210</sup> Para 39.

terms of the regulations. Ultimately, the core of the argument proffered here is that deference is appropriate where the public administration takes a decision that is essentially linked to its function. This makes the following remark, made with reference to the deference owed to the decision-maker's actuary, all the more puzzling:

“In these circumstances it is *almost self-evident*, I think, that the respondents have failed to make out a case that De Wit's methodology was not one which an actuary could reasonably have adopted, ie that De Wit had failed to act rationally in the execution of his brief.”<sup>211</sup>

It appears that Brand JA introduces deference simply to reinforce his finding that De Wit's methodology was rational. If this is in fact so, it is questionable whether deference plays any role here at all since the reasonableness of De Wit's methodology was established without reliance on deference.

Furthermore, the decision-maker in this case had little scope for discretion in terms of regulation 2(4)(b) of the transfer regulations at issue here:

“[T]he AIPF had to make available to a member who elected to terminate his membership, an amount ‘*equal to the funding percentage multiplied by the actuarial obligation of the [AIPF] in respect of that member as determined by the actuary on the date on which his membership of the fund is terminated, with interest thereon calculated at the bank rate from that date to the date on which the amount is paid ...*’”<sup>212</sup>

The empowering provision virtually obliged the decision-maker, AIPF, to accept the amount determined by the actuary. The amount calculated by the actuary was not one of several factors to be considered by the decision-maker in determining the amount to be paid over nor was the decision one of a range of potentially reasonable decisions to be taken under these circumstances. Deference is partly a strategy to avoid crossing over from review to appeal by acknowledging different purposes for scrutinising the merits of a decision.<sup>213</sup> Hoexter argues that

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<sup>211</sup> Para 39 (emphasis added).

<sup>212</sup> Para 9.

<sup>213</sup> See *Carephone (Pty) Ltd v Marcus* 1999 SA 304 (LAC) para 36.

“it is, in fact, quite impossible to judge whether a decision is within the limits of reason or ‘defensible’ without looking closely at matters such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision. Only cases decided on the *narrowest and most technical of grounds will not entail such scrutiny*: for instance, review for failure to comply with a *mandatory formality* will not necessarily involve scrutiny of the merits.”<sup>214</sup>

If the administrator in this case had no particular expertise or discretion in relation to the decision to be made and there was no need to scrutinise the merits of the administrator’s decision, why is deference relevant here at all? This case raises a number of questions concerning the content of deference, particularly where expertise in a particular field is required, but it is neither the administrator that possesses that expertise nor is it clear that the expertise relates to the administrative function. The case law discussed above indicates that in certain circumstances the court should defer to the relative expertise of the administrator. However, in the *Van Zyl* case, the court purports to defer to actuarial determinations<sup>215</sup> with little or any involvement of administrators. This points to an unresolved inquiry in the application of deference: once it has been shown that courts should defer to relative expertise the questions “expertise in relation to what is relevant” and “the expertise of whom” remain. A principle of deference to mere expertise as such could entail absurd implications: the administration could, for example, consult or employ experts simply to activate due deference. The statutory mandates imposed upon the administration concern many functions and activities. Whether the subject matter of a given statute requiring implementation by the administration amounts to the administrative function *per se* and administrative expertise requires further investigation.

In *MEC for Education KwaZulu-Natal v Pillay*<sup>216</sup> Langa CJ dealt with deference in the context of discrimination. The applicants contended that deference should be shown to school authorities<sup>217</sup> and that it was a factor to be taken into consideration in determining fairness.<sup>218</sup> They also linked deference to the doctrine of the “margin of

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<sup>214</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 351 (footnotes omitted; emphasis added).

<sup>215</sup> *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA) para 39.

<sup>216</sup> 2008 1 SA 474 (CC).

<sup>217</sup> *MEC for Education KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 26, 80.

<sup>218</sup> Para 79.

appreciation” applied by the European Court of Human Rights and the House of Lords.<sup>219</sup> Langa CJ firstly pointed out that “the doctrine [of the margin of appreciation] is not a useful guide when deciding either whether a right has been limited or whether such a limitation is justified.”<sup>220</sup> Then he succinctly disposed of the contention that deference is appropriate in the circumstances:

“This Court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well-qualified to decide. It is true that the Court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this Court, however, is whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the School bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the School’s view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the School to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.”<sup>221</sup>

Langa CJ acknowledges the role of deference in the context of judicial review of administrative decisions. However, he seems to indicate that the weight that should be attached to the determination of experts depends on the “cogency” of those determinations.<sup>222</sup> Thus, it is unclear what the role of deference is since deference seems to be no more than according due weight to arguments based on their cogency. However, where human rights are concerned, no deference is due.<sup>223</sup> Thus, section 33 of the Constitution appears to be an exception to this position.

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<sup>219</sup> Para 80.

<sup>220</sup> Para 80.

<sup>221</sup> Para 81 (footnote omitted).

<sup>222</sup> See Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695.

<sup>223</sup> See Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) ch 5.

### 3 3 3 3 The Canadian Connection

Hoexter and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*<sup>224</sup> have established deference as a prominent topic and legal principle, respectively. In doing so, both Hoexter and O'Regan J draw on the work of Dyzenhaus: the former in writing her seminal article on deference<sup>225</sup> and, the latter, in preferring the word “respect” to “deference”.<sup>226</sup>

Dyzenhaus’s conception of deference as respect is his response to the following questions:

“How should judges in common law jurisdictions respond to administrative determinations of the law? Should they defer to such determinations or evaluate them in accordance with their sense of what the right determination should have been?”<sup>227</sup>

Significantly, he points out that these questions are interwoven with political and legal theory.<sup>228</sup> Dyzenhaus is critical of formalistic arguments for the justification of judicial review, such as the *ultra vires* or common-law justifications,<sup>229</sup> because they do not assist courts in resolving administrative-law disputes and they do not recognise the legitimate place of the public administration in the legal order.<sup>230</sup>

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<sup>224</sup> 2004 4 SA 490 (CC).

<sup>225</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 151 n 245.

<sup>226</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 46 n 32.

<sup>227</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 279.

<sup>228</sup> 279.

<sup>229</sup> For a critical discussion and comparison of the *ultra vires* and common law justifications for review, see Jowell J “Of Vires and Vacuums: The Constitutional Context of Judicial Review” (1999) *Public Law* 448-460.

<sup>230</sup> De Ville JR “Judicial Deference and Différance: Judicial Review and the Perfect Gift” (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 42-43. In terms of this position, the question “what is the constitutional place of the administration within the legal order” should be posed. In South Africa, the constitutional place of the administration certainly entails a stringent code of conduct, see ss 8(1), 33 and 195 of the Constitution of the Republic of South Africa, 1996.

The function of judges has been contested because of disagreement over the question whether the legislature is the only source of law.<sup>231</sup> The result is two “camps” which are “poles on a continuum between which debate still moves today.”<sup>232</sup> There is, on the one side, the “democratic positivists” and, on the other, the “liberal antipositivists”.<sup>233</sup> The former argues that judges may merely apply the law promulgated by the legislature, the only law, while the latter sees “the common law as the value-laden background against which legislation [is] to be interpreted”.<sup>234</sup> Naturally, each view is based on a different understanding of the will of the people with different implications for judicial deference. The “task” before both “is no less than providing a theory of democratic legal order, one which justifies a workable account of the role for judicial review in the new political context” which is “one in which it is assumed that administrative agencies legitimately have power to make and interpret law at the same time as administrative power is increasingly devolved on quasi-public and private entities.”<sup>235</sup> The importance of this observation should not be overlooked: the respective functions of the judiciary and the administration are a function of politics and political theory. Consequently, the choice exercised regarding political theory will determine the nature of judicial review.

Thus, Dyzenhaus’s point of departure is that “the justification of review and guidance on how such review should proceed can only be found in a political theory of the rule of law.”<sup>236</sup> He has adopted the legal and political stance of anti-positivist and proceduralist democrat.<sup>237</sup> With this outlook he has developed a model of judicial review which is founded on reasonable justification, a particular theory of democracy and of the rule of law.<sup>238</sup> “[his] thesis is that the substance of the rule of law is the equality of all citizens before the law and that the form of the rule of law is the

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<sup>231</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 279.

<sup>232</sup> 280.

<sup>233</sup> 280.

<sup>234</sup> 280.

<sup>235</sup> 286.

<sup>236</sup> De Ville JR “Judicial Deference and Différance: Judicial Review and the Perfect Gift” (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 43 (footnote omitted).

<sup>237</sup> 41.

<sup>238</sup> 41.

procedures whereby public officials demonstrate that they have lived up to – are accountable to – that substance.”<sup>239</sup>

Dyzenhaus attempts “to show that a close examination of some leading Canadian decisions, mainly on the topic of judicial deference to administrative decisions, can assist us in this task [of providing a theory of democratic legal order].”<sup>240</sup> He identifies two types of judicial deference, namely, “submissive deference” and “deference as respect”.<sup>241</sup> On the one hand, submissive deference is based on the Diceyan model of law and “what it requires of judges is that they submit to the intention of the legislature, on a positivist understanding of intention.”<sup>242</sup> On the other hand,

“[d]eference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency.”<sup>243</sup>

Furthermore:

“Deference as respect ... provides an ideal which can inform an attempt to rearticulate the relationships between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as the ultimate authority on the interpretation of law.

In statutory interpretation, this ideal requires of judges that they determine the intention of the statute, not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best justify having that statute.”<sup>244</sup>

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<sup>239</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 307 (footnote omitted).

<sup>240</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 286. The discussion focuses on *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 and *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 SCR 311.

<sup>241</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 286.

<sup>242</sup> 286.

<sup>243</sup> 286.

<sup>244</sup> 303.

Dyzenhaus explains that this involves judges setting out the best reasoning that resulted in the final statute and where the meaning of legislation is contested this process will contribute to giving meaning to the legislative provisions.<sup>245</sup> Thus,

“[w]hen the statute is one that sets up a regulatory regime and a tribunal to decide disputes that may arise out of the regime, this interpretative approach requires judges to take the tribunal’s decision seriously ... because what they are primarily concerned to do is to find the reasons that best justify any decision, whether legislative, administrative or judicial. And, if the court has before it not only a statute to interpret, but also a tribunal’s interpretation of that statute, then the tribunal’s interpretation makes a difference to the structure of the interpretative context.”<sup>246</sup>

Reasons for adopting this “attitude” of judicial deference include the legislature’s choice of the tribunal as the primary forum, the relative speed and economy with which it can dispose of matters and its possible expertise.<sup>247</sup> This attitude involves treating the tribunal’s reasoning with respect, regardless of the subject matter of the reasoning, whether factual or legal, “by asking whether that reasoning *did in fact and also could in principle* justify the conclusion reached.”<sup>248</sup>

Finally, the “principle” of deference as respect

“is inherently democratic. It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.”<sup>249</sup>

Dyzenhaus’s model of deference is formulated within the Canadian context, which has a developed principle of judicial deference. Therefore, it is instructive to properly

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<sup>245</sup> 303.

<sup>246</sup> 303.

<sup>247</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303-304. See Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) ch 2 on the central importance of the “declared constitutional principle” of “legislative intent” and ch 3 on the “practical justifications for curial deference” such as expertise and complexity.

<sup>248</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 304 (emphasis added).

<sup>249</sup> 305. See also 307.



contextualise deference as respect. To this end David Mullan has usefully considered the exportability of Canadian judicial deference in a critical analysis of the principle.<sup>250</sup>

Mullan indicates that judicial deference to administrative decisions is an established and developed principle in Canadian law.<sup>251</sup> In order to determine whether and to what degree deference is appropriate, the circumstances of the case are subjected to a pragmatic and functional analysis that the Supreme Court introduced and has been modifying for over twenty years.<sup>252</sup> The elements of this analysis are:

- “1. The presence or absence of a privative clause or statutory right of appeal (or any other statutory scope of review indicator, including, in the case of discretionary authority, the width of the discretion and the language in which it is conferred).
2. The expertise of the reviewing court relative to that of the statutory authority in relation to the matter in issue.
3. The purposes of the legislation and the relevant provision(s) in particular.
4. The nature of the question in two senses. Is it a question of law, mixed law and fact, fact, or discretion? Is the question one that relates to the very reasons for the conferral of the statutory authority and the core of that authority's expected area of expertise?”<sup>253</sup>

Importantly, the outcome of this analysis is highly dependent on the context.<sup>254</sup> Once the court has completed the analysis and balanced the factors against each other

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<sup>250</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61. On the role of deference in Canada, see also, Mullan DJ “Judicial Deference to Administrative Decision-Making in the Age of the Charter” (1985-1986) 50 *Saskatchewan Law Review* 203-223; “The Future of Canadian Administrative Law” (1991) 16 *Queen's Law Journal* 77-94; “Judicial Deference to Executive Decision-Making: Evolving Concepts of Responsibility” (1993) 19 *Queen's Law Journal* 137-178.

<sup>251</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 42. For further discussion on deference in the Canadian context see Lewans M *Administrative Law and Curial Deference* (2010) available at <[https://tspace.library.utoronto.ca/bitstream/1807/24813/6/Lewans\\_Matthew\\_R\\_201006\\_SJD\\_the\\_sis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/24813/6/Lewans_Matthew_R_201006_SJD_the_sis.pdf)> (accessed 26.08.2013), Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012), Lewans M *Administrative Law and Judicial Deference* (forthcoming 2014).

<sup>252</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 42, 42 n 2.

<sup>253</sup> 50-51.

<sup>254</sup> 51.

a standard of review<sup>255</sup> is determined and only then applied to the issue before the court.<sup>256</sup>

Mullan indicates that judicial deference is criticised for various reasons.<sup>257</sup> Firstly, the concept of deference *per se* is challenged on the following grounds: a Diceyan understanding of the rule of law undermines the constitutional foundation of deference; the role of the courts of law as guardians of administrative justice is compromised; deference, as a response to institutional competence, sometimes overrates the expertise of administrative decision-makers or misconceives the nature of decisions as *bona fide*; and the pragmatic and practical factors are flexible to the extent that judges can come to any conclusion. Secondly, the Canadian version of deference is contested: it is too complex, time-consuming, and unpredictable; “the extension of the pragmatic and functional analysis to review for abuse of discretion was inappropriate”;<sup>258</sup> the constitutionalisation of judicial review with the advent of human rights legislation is problematic in relation to administrative discretion; “the Supreme Court itself has come to question the universality of the need to conduct a pragmatic and functional analysis in all cases in which judicial review is being sought on substantive grounds.”<sup>259</sup> Thirdly, it is argued that deference should be intensified: “there is no reason to exempt procedural decision-making from the pragmatic and functional analysis”;<sup>260</sup> courts too readily classify issues as purely legal or precedential thus asserting its superior competence in relation to such issues; “there are also problems in reconciling the possibility of the application of a standard of

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<sup>255</sup> Originally the pragmatic and functional analysis could result in one of three standards of review, namely, correctness, reasonableness or patent unreasonableness. Subsequently, with the dismissal of the standard of patent unreasonableness, the number of standards were reduced to two. See Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) 16.

<sup>256</sup> Mullan DJ “Deference: Is it Useful outside Canada?” (2006) *Acta Juridica* 42-61 at 51. “[T]he Supreme Court now holds lower courts to the responsibility to conduct a pragmatic and functional analysis and establish a standard of review as a precondition to moving to the consideration of the merits of any application for judicial review on substantive grounds” (49).

<sup>257</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 51-55.

<sup>258</sup> 53.

<sup>259</sup> 54.

<sup>260</sup> 54.

[in]correctness or unreasonableness to an exercise of discretion with the catchall *Wednesbury* standard of review of the merits of discretionary decision-making.”<sup>261</sup>

The origins and development<sup>262</sup> of judicial deference in Canada reveal “what in its detail is an indigenous system of judicial review, the precise parameters of which are unlikely to commend themselves to the courts of other jurisdictions.”<sup>263</sup> However, there are common philosophical considerations at the foundation of Canadian judicial review which have much to offer:<sup>264</sup> an increasingly plural legal reality demands respect for administrative agencies because such a legal context cannot accommodate courts as the supreme authority on all questions of law, fact and the interpretation of law; the more administrative decision-makers develop and improve internal systems that address their shortcomings, the more respect is appropriate; to relieve the pressure on the judiciary, courts should primarily hear issues of jurisprudential and constitutional significance; and the exorbitant costs of judicial review necessitates alternative mechanisms that secure administrative justice and equality.

However, Mullan notes that these factors cannot in themselves justify the Canadian version of judicial deference, although they make a case for limits in the judicial review of administrative action.<sup>265</sup> Deference must be justified by “a coherent conception of the proper constitutional role of the courts in relation to statutory and prerogative decision-making.”<sup>266</sup> This reiterates Dyzenhaus’s argument that deference is a function of a choice in political theory. It is only once certain choices in political theory have been made and a certain conception of the rule of law adopted that deference can be explained and justified. Thus, the parameters and objectives of the administrative-law relationship are a function of political theory and the rule of law.

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<sup>261</sup> 54-55 (footnote omitted).

<sup>262</sup> See Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 55-56. It is noteworthy here that the attitude towards review assumed by the United States Supreme Court for scrutinising administrative agencies during the New Deal is foundational to Canadian judicial deference (56). This resonates with Dyzenhaus’s assertion that judicial review can only be given meaning on a foundation of political and legal theory.

<sup>263</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 56.

<sup>264</sup> 57-58.

<sup>265</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 58. Cf. Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) chs 2, 3.

<sup>266</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 58.

### 3 3 3 4 Critiques of Deference

Dennis Davis attempts to contextualise judicial review in the manner suggested by Dyzenhaus and Mullan.<sup>267</sup> He identifies judicial review as an important mechanism for enhancing transparency, accountability and participation in order for government to justify its decisions.<sup>268</sup> With reference to Murray Hunt, Davis says that “the central question of a system of administrative law, particularly when located within a constitutional dispensation, is ‘what are the proper boundaries to the respective powers of different branches of government, and who decides on where those boundaries are drawn?’”<sup>269</sup> Davis argues that “the development of administrative law in the 21<sup>st</sup> century is to be located within the context of constitutional rights.”<sup>270</sup> This statement in itself is a choice in political theory. Thus, in the light of Mullan’s contention that deference is justified by the constitutional role of the courts, Davis identifies the promotion of transparency, accountability and participation and the guardianship of constitutional rights as that role. Within this context “the key question concerns the function of the judge in mediating between the law and legislative and executive politics.”<sup>271</sup> The concept of judicial deference is a relatively recent response to this question.<sup>272</sup> Deference, however, merely leads to a further inquiry, namely, “[w]hat enquiry must be undertaken which will inform the court as to the level of

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<sup>267</sup> Davis DM “To Defer and then When? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 23-41.

<sup>268</sup> 23.

<sup>269</sup> 23 (footnote omitted).

<sup>270</sup> Davis DM “To Defer and then When? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 23-41 at 25. The advent of human-rights law has resulted in a new dimension for judicial review and, by implication, deference that requires serious attention. Jowell states the significance of deference, in this context, powerfully: “the most difficult question for the courts in the interpretation of the Human Rights Act 1998 (HRA) is the extent to which they should defer to Parliament and other institutions of government on matters relating to the public interest” (Jowell J “Judicial Deference: Servility, Civility or Institutional Capacity” (2003) *Public Law* 592-601 at 592).

<sup>271</sup> Davis DM “To Defer and then When? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 23-41 at 25.

<sup>272</sup> 25.

scrutiny which must then be employed to review the particular decision on the facts placed before the reviewing court?”<sup>273</sup>

Davis concludes that

“the concept of deference which has earned such enthusiastic judicial mention has not been based on clear principle nor on a recognition that administrative law is now located within the context of a rights culture, as opposed to the context of the earlier two periods of the classical and the social. A central problem has been the absence of an engagement with the implications for a body of law constructed initially in the classical period and developed in the social period but which must now be used by courts which function in the rights period.”<sup>274</sup>

In other words, the justification for deference required by both Dyzenhaus and Mullan has not been satisfied in the South African context. As mentioned, Mullan argues that deference is justified by “a coherent conception of the proper constitutional role of the courts in relation to statutory and prerogative decision-making”<sup>275</sup> and Dyzenhaus argues that “the justification of review and guidance on how such review should proceed can only be found in a political theory of the rule of law.”<sup>276</sup> Thus, in the first place, according to Davis judicial review and administrative law in general have not as yet been integrated in a rights culture and context. This has implications for the very nature of administrative law and therefore, in this sense, administrative-law theory is outdated. Secondly, on Mullan’s interpretation, the constitutional role of the courts cannot be determined in isolation: the judiciary’s

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<sup>273</sup> 33.

<sup>274</sup> Davis DM “To Defer and then When? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 23-41 at 39. Davis argues that, in South Africa, “a theory of deference fails to capture the positive, dialogic role that a court is required to play within the scheme of socio-economic rights”, merely entails that courts defer to superior institutional competence in determining socio-economic policy, and “within the South African historical context ... is far too closely aligned with the jurisprudence of apartheid to constitute a model for the transformation of the legal landscape” (Davis DM “Adjudicating the Socio-economic Rights in the South African Constitution: Towards ‘Deference Lite’?” (2006) 22 *South African Journal on Human Rights* 301-327 at 319-320 (footnote omitted)). See Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 305 on the public administration and the courts as elements in “a web of public justification”.

<sup>275</sup> Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 58.

<sup>276</sup> De Ville JR “Judicial Deference and Différance: Judicial Review and the Perfect Gift” (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 43 (footnote omitted).

function is also defined in relation to the functions of the other branches, which reiterates the importance of the relationship between the branches. Simply put, the judicial role is a function of the executive and legislative functions.

TRS Allan goes further than Davis in questioning the foundation of a theory of deference.<sup>277</sup> While Davis asserts that deference in South Africa is not informed by the correct legal context, i.e. constitutional democracy and a rights culture, Allan is sceptical of the very enterprise of judicial deference and he argues that “[t]here is no logical space for any free-standing *doctrine* of deference”.<sup>278</sup>

In relation to a specific case before the court, Allan says that the scope of judicial review and of administrative discretion cannot be determined or balanced in the abstract, that is, without considering the applicable legal questions in all the circumstances.<sup>279</sup> In other words:

“Insofar as talk of ‘deference’ promises to short-circuit such analysis, suggesting a direct linkage between deep-level constitutional theory and the resolution of particular rights-claims, it generates only confusion and misunderstanding.”<sup>280</sup>

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<sup>277</sup> See Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306; “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695; “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59; “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) 127 *Law Quarterly Review* 96-117.

<sup>278</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 694 (emphasis in original). See Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306 at 305-306.

<sup>279</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 676; “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59 at 49. Regarding the primacy of context, see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45; Mullan DJ “Deference: Is it Useful Outside Canada?” (2006) *Acta Juridica* 42-61 at 51. See also Jowell J “Judicial Deference: Servility, Civility or Institutional Capacity” (2003) *Public Law* 592-601 at 598-599 where he contends that, regarding institutional capacity, “there is no magic legal or other formula to identify the ‘discretionary area of judgment’ available to the reviewed body” (599) (footnote omitted).

<sup>280</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 676.

Allan characterises the factors which are indicative and supportive of a measure of due deference<sup>281</sup> as “plainly *external* to the intrinsic quality of the decision under review”.<sup>282</sup> This is deeply problematic because due deference requires of a court to evaluate the arguments before it in the light of the decision-maker’s characteristics instead of that of the decision<sup>283</sup> and is tantamount to non-justiciability.<sup>284</sup> In addition, deferring to administrative decision-makers on the basis of expertise or superior access to information compromises judicial independence and neutrality.<sup>285</sup> The external questions are distinguished from the “*internal* questions of expert judgement and procedural diligence, *as demonstrated in relation to the matter in issue*”.<sup>286</sup> Anyhow, the criteria which make up a doctrine of deference are incorporated in “ordinary judicial procedures, which do not try to replicate ... decision-making processes”,<sup>287</sup> and in the distinction between appeal and review which prevents judges substituting their own decisions for those of administrative decision-makers. Judicial review’s emphasis on the context of the decision also incorporates these criteria.<sup>288</sup>

The courts’ main concern must be the reasons for the decision:

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<sup>281</sup> Such as the decision-maker’s expertise or thorough procedures. See Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 687-688.

<sup>282</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 688. See Allan TRS “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59 at 51.

<sup>283</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 688.

<sup>284</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 689.

<sup>285</sup> Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306 at 289-290.

<sup>286</sup> Allan TRS “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59 at 59 (emphasis in original).

<sup>287</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 692. See Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306 at 306; “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59 at 43 (“What is really needed is a reminder that even a proportionality test need not (and generally should not) amount to the substitution of a judicial view for the public body’s opinion on the merits”).

<sup>288</sup> Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306 at 295, 297.

“A ‘legal culture of justification’ demands the supremacy of reason; and reason is satisfied by nothing less than persuasive argument, closely tailored to the circumstances of the particular case in question.”<sup>289</sup>

Ultimately, “[t]here can be no presumption of superior institutional competence”<sup>290</sup> without which there can be no real doctrine of judicial deference. As for constitutional competence,<sup>291</sup>

“[t]he allocation of scarce resources is a matter for which primary responsibility must lie with the political branches of government; but any complaint of illegality must be examined on its own terms.”<sup>292</sup>

Allan states his position succinctly thus:

“Deference is not due to an administrative decision merely on the ground of its source or ‘pedigree’, but only in the sense (and to the extent) that it is supported by reasons that can withstand proper scrutiny.”<sup>293</sup>

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<sup>289</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 694 (footnote omitted).

<sup>290</sup> 692.

<sup>291</sup> See Jowell J “Of Vires and Vacuums: The Constitutional Context of Judicial Review” (1999) *Public Law* 448-460 at 451-452.

<sup>292</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 693. The adjudication of justiciable socio-economic rights complicates this scenario.

<sup>293</sup> Allan TRS “Common Law Reason and the Limits of Judicial Deference” in Dyzenhaus D (ed) *The Unity of Public Law* (2004) 289-306 at 291-292. For Allan, deference entails that the reasons provided for a decision are not evaluated objectively, but from the perspective of the decision-maker that relied on those reasons to take a decision, that relies on them in judicial proceedings and has a direct interest in the dispute. Where the court accepts those reasons on face value the maxim *nemo iudex in sua causa* is implicated and could be compromised. On this interpretation deference implies “taking the administration’s word for a decision”. However, deference here could also refer to courts not taking a hostile stance to explanations which are unfamiliar or political, i.e. not strictly legal, which is what Dyzenhaus advocates, at least in the sense that such explanations can and should contribute to the meaning of legal texts.



A further concern is that deference contributes to a misleading rhetoric of judicial restraint. Lenta explains that, in South Africa, “judicial decisions are punctuated by a rhetoric of restraint that is intended to allay concerns about the court’s usurpation of political functions that fall properly within the domain of the legislature or the executive.”<sup>294</sup> Nevertheless, the Constitutional Court is attacked from two sides.<sup>295</sup> On the one hand, when the Constitutional Court refrains from entering into the political realm it is criticised for not protecting socio-economic rights sufficiently. On the other hand, when it allegedly trespasses onto the functions of the legislature or executive it is accused of usurping their functions, which is undemocratic and, hence, illegitimate behaviour.<sup>296</sup> In other words, the Constitutional Court is simultaneously accused of both exercising too little and too much restraint. Courts, instead of articulating the constitutional foundation from which they intervene with administrative decisions and “sensing that they are on thinner constitutional ground in substantive review than on procedural review, do all they can to cover their tracks by laying false clues and donning elaborate camouflage”,<sup>297</sup> such as the employment of a rhetoric of deference.

### **3 3 3 5 Deference, the Separation of Powers, and the Question of a Fourth Branch**

The strategy of “camouflage” is apparent when the rhetoric of deference is contrasted with the separation of powers. Deference is often associated with the doctrine of separation of powers. Quite how deference or respect relates to the separation of powers is uncertain. O’Regan J says that deference flows from the separation of powers,<sup>298</sup> but what does this mean? O’Regan J does not explain how deference derives from the separation of powers, or whether the ideas of the separation of powers simply support deference. Is the idea of deference an aspect of the separation of powers? Does deference supplement the separation of powers? Or is

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<sup>294</sup> Lenta P “Judicial Restraint and Overreach” (2004) 20 *South African Journal on Human Rights* 544-576 at 544.

<sup>295</sup> 544-545.

<sup>296</sup> 544-545.

<sup>297</sup> Jowell J “Of Vires and Vacuums: The Constitutional Context of Judicial Review” (1999) *Public Law* 448-460 at 454.

<sup>298</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 46.

deference merely congruent with the separation of powers? These distinctions are relevant because they affect the content of deference and the way content can be given to deference.

For instance, the notion of checks and balances is additional to the separation of powers because it is not necessarily a part of the pure doctrine, but it relies on the existence of the doctrine. Whereas the pure doctrine limits the power of any one branch, checks and balances ensure that the branches are directly answerable to one another. Thus, the idea of checks and balances modifies the pure doctrine and it complements the pure doctrine. In other words, conceptually the doctrine can exist without checks and balances, but the opposite is impossible. Likewise, the inquiry here is whether deference is an expression of the separation of powers itself, whether deference complements the doctrine, or whether deference merely relies on the separation of powers.

Apportioning functions to different state branches in order to achieve certain normative objectives is precisely the concern of the separation of powers, even of the pure doctrine. In terms of the pure doctrine, the judiciary is not permitted to encroach upon the executive function. Therefore, if deference merely “consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies”,<sup>299</sup> implies “recognising the proper role of the Executive within the Constitution”<sup>300</sup> or “manifests the recognition that the law itself places certain administrative actions in the hands of the executive”<sup>301</sup> it is arguable whether deference contributes anything beyond the content of the pure separation of powers.

Unlike the doctrine of the separation of powers, which addresses a wide range of political and legal relationships, deference focuses on, but is not limited to, the relationship between the public administration and the judiciary. This focus is useful especially where a fourfold classification of state branches and functions in terms of the separation of powers is not employed. The executive branch and function has limited analytical potential because of its dual nature. The executive function includes

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<sup>299</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 501.

<sup>300</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48.

<sup>301</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 50.

both policy formulation and the administration or implementation of policy and legislation. The executive branch includes both the Cabinet and the public administration which are powerful and divergent organs of state. The Constitution, however, only provides for the executive authority which is vested in the president<sup>302</sup> and which the president exercises with the Cabinet.<sup>303</sup> In the light of the case for a separation of powers that accommodates four branches of government<sup>304</sup> this is unfortunate. The Constitution has been interpreted as providing a threefold distinction of government branches and functions.<sup>305</sup> On this interpretation the Constitution does not reflect the rise and importance of the public administration in the welfare or administrative state. However, the Constitution can be read to require a threefold division of branches and functions as a minimum requirement. This is plausible considering the Constitution's express recognition of the administration and its role.<sup>306</sup>

It is also not clear at what stage of the judicial process deference should be employed. Potentially it could be employed in the determination of what constitutes administrative action, in deciding the intensity of judicial scrutiny and in deciding whether and how to intervene with administrative action. This implies a wide role for deference as it would feature, perhaps decisively, in deciding whether section 33 applies, how it applies, and whether and how it should be enforced. Deference could possibly also be employed at the same stages of legality enquiries.

If a fourth branch of the state is introduced for purposes of state-power analysis and the control of that power, then deference is largely an aspect of the separation of powers. The fact that deference focuses on a particular relationship within the separation of powers, namely the relationship between the public administration, as part of the executive, and the judiciary, will be largely subsumed by the addition of a fourth branch. The fourth branch acknowledges that the public administration is distinguishable from the executive precisely because of its quotidian functions and nature. Because of the rise of the public administration's mandate and impact it

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<sup>302</sup> S 85(1) of the Constitution of the Republic of South Africa, 1996.

<sup>303</sup> S 85(2).

<sup>304</sup> See 2.5 above on the reasoning behind a fourth branch, or multiple branches.

<sup>305</sup> See *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 18-22.

<sup>306</sup> See s 195 of the Constitution of the Republic of South Africa, 1996.

requires more analysis than afforded in previous periods. Nevertheless, deference can still make a valuable contribution by providing actual guidance on how to determine the competencies of the branches of government and the legitimate scope of checks and balances. Then deference would serve to determine when courts may, and how courts should, intervene in administrative action. To be precise, deference would serve to determine when scrutiny is appropriate, the standard or manner of scrutiny and how the court should intervene with administrative action.

If the threefold distinction of government branches and functions persists, then deference will have an even more valuable role to play. Under the threefold division, deference addresses the relationship between the public administration and the judiciary. Deference can play two roles: one, deference can draw attention to the importance of the public administration-judiciary relationship and, two, deference can serve as a gauge for when and how the judiciary should scrutinise administrative action and how it should intervene. Then it is a term that admits of the limits of the separation of powers, as presently understood in South Africa, and makes a contribution by providing guidance where the separation of powers is silent. For, although the separation of powers and checks and balances are concerned with the competencies of the branches of government, the separation of powers provides little guidance as to how competencies are determined, how they should be apportioned and how they should be balanced. This is where deference can contribute to the conceptual analysis of the relationship between the public administration and the judiciary.

### **3 3 3 6 A Culture of Justification and Deference?**

Dyzenhaus's central argument on deference is that courts must take administrative decisions seriously.<sup>307</sup> This amounts to a "new understanding of the deference principle", namely, "deference as respect" as opposed to "deference as submission".<sup>308</sup> What the serious consideration of administrative determinations entails requires elaboration. Firstly, Dyzenhaus argues that judges should give

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<sup>307</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303.

<sup>308</sup> 302-303.

“independent weight” to the reasoning of administrative tribunals.<sup>309</sup> Secondly, this “acknowledgement” of administrative determinations nevertheless requires “the close judicial scrutiny of the tribunal’s reasoning”, which Dyzenhaus describes as a “curious feature”.<sup>310</sup> Thirdly, such close consideration of administrative determinations raises the “paradox of rationality”, but *close scrutiny and deference are compatible* where deference is understood as respect, as opposed to submission.<sup>311</sup> Finally, deference as respect changes the “interpretive context”: rather than relying on a positivist understanding of the law, the meaning of a statute is determined by reference to the best reasons for having that statute.<sup>312</sup> Determining the meaning of a statute in this manner is a “reconstructive project” and the reasons may be “legislative, administrative or judicial”.<sup>313</sup> According to Dyzenhaus, this change in the “interpretive context” makes a significant difference to a court’s range of decisions.<sup>314</sup>

In addition to the implications of deference as respect, Dyzenhaus describes the nature of his conception of deference as follows:

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<sup>309</sup> 302.

<sup>310</sup> 302.

<sup>311</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 302-303. This suggests that deference is not limited to determining the intensity of review, cf. Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) ch 4, nor does close scrutiny of the facts exclude deference.

<sup>312</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303.

<sup>313</sup> 303.

<sup>314</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303-304. Taking administrative determinations seriously, in the sense advocated by Dyzenhaus, reinforces both red-light and green-light theories of administrative law. On the one hand, administrative acts are scrutinised closely and the administration is required to justify its acts. This can be characterised as a form of control. On the other hand, the administration, as the branch specialised in administrative matters, is entitled to justify its actions with reference to the reasons that best justify the decision, even of those reasons are administrative or other reasons.

“[d]eference as respect ... provides an ideal which can inform an attempt to rearticulate the relationship between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as the ultimate authority on the interpretation of the law.”<sup>315</sup>

Significantly, deference as respect emphasises the relationship between the branches of state.<sup>316</sup> Therefore, Dyzenhaus does not merely try to identify the functional sphere of each branch<sup>317</sup> and exceptions to that sphere.<sup>318</sup> He goes further by pointing out that deference is concerned with the interaction between the branches; and it is argued that this interaction can be shaped by deference. Deference can inform the reshaping of the relationship, but does not necessarily constitute the reshaping itself. He also explains the rationale for this argument: factors such as the rule of law, equality and democracy affect the relationship and must inform the relationship.<sup>319</sup> Thus factors external but related to the separation of powers and checks and balances inform the relationship. This reinforces the argument in favour of evaluating the administration, as well as judicial review, as a component of an administrative-law system, rather than compartmentalising the branches and their functions as an end in itself. The wording in the preceding quotation, “can inform an attempt to rearticulate the relationship”, also suggests that the “attempt” is yet to be made and that the role of deference, at this stage at least, is relatively modest as an informing ideal.

Thus, deference as respect is a guiding principle rather than a legal rule.<sup>320</sup> As mentioned, deference “provides an ideal which can inform an attempt to rearticulate the relationship” between branches of state; deference is limited to the extent that the judiciary remains the “ultimate authority on the interpretation of the law”.<sup>321</sup> The

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<sup>315</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303.

<sup>316</sup> Dyzenhaus argues that only deference as respect can “rearticulate the proper relationship between the legislature, administrative agencies and the courts” (“The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 286).

<sup>317</sup> On the basis of the separation of powers or legislative authorisation.

<sup>318</sup> In the form of checks and balances, for instance.

<sup>319</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303-305.

<sup>320</sup> 286.

<sup>321</sup> 303.

status of the judiciary is thereby preserved, but the scope of legal argument is broadened.

Therefore, attempts to describe deference as equating administrative and judicial conclusions of the law are incongruent with Dyzenhaus's position. Likewise, arguments where courts are only required to cast a cursory glance over administrative determinations are also inconsistent with Dyzenhaus's position. The emphasis is rather on the value of administrative arguments, instead of the author of the argument. It is the judicial approach to administrative decisions that is challenged: the emphasis is on which reasons are relevant and how courts should assess reasons, rather than the source of the reasons. The emphasis is on what constitutes valid legal argument, rather than treating the administration leniently. Dyzenhaus advocates an integrated approach where democracy, the rule of law and equality play a role in forming judicial decision-making. Thus, the emphasis is on how courts treat administrative arguments, rather than how courts treat the administration.

Dyzenhaus does not claim that his exposition of deference as such can provide answers in particular cases, in the sense of the scope of reasonableness, for instance. Decisions must be "supportable", not necessarily supported.<sup>322</sup> Where the administration is concerned, courts must determine whether a decision is "supportable by the reasons it [administrative tribunal] in fact and could in principle have offered"<sup>323</sup> and "even if the reasons in fact given do not seem wholly adequate to support the decision, *the court must first seek to supplement them* before it seeks to subvert them."<sup>324</sup> Thus, where administrative decisions are before the court, the court goes the extra mile to determine whether the decisions are supportable or justifiable, but does not thereby evade close judicial scrutiny.

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<sup>322</sup> 304-305.

<sup>323</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 305. Dyzenhaus reiterates this point: in the event of recourse to a court "that recourse must be on the basis of the question whether the tribunal's decision was supportable by the reasons it in fact and could in principle have offered." (305). See De Ville JR "Judicial Deference and Différance: Judicial Review and the Perfect Gift" (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 53 ("Asking whether a decision is justifiable is also different from asking whether a decision is justified.").

<sup>324</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 304 (emphasis added).

On the whole, Dyzenhaus makes a claim similar to the one made by Hoexter.<sup>325</sup> Hoexter also sees Dyzenhaus's contribution in this light, referring to his "*exploration of the idea of deference*".<sup>326</sup> They both discuss in broad terms what deference should be and why, rather than what deference implies in a particular case. Nevertheless, in cases like *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>327</sup> deference is drawn upon in a manner that suggests Dyzenhaus and Hoexter formulated factors that are directly applicable to reasonableness review of administrative action.

Whether the judiciary can simply take administrative determinations of the law seriously by choice from one day to the next is debatable. At least, it cannot be assumed that the judiciary have the capacity to effect such a change by the mere assumption of a new approach *ceteris paribus*. For instance, the French administrative-law system suggests that the legal assessment of the administration and administrative function requires both doctrinal and structural innovation.<sup>328</sup> Simply obliging judges to take these determinations "seriously" will not necessarily solve the problem. How are judges without any required training in public administration, economics or political theory supposed to take these determinations seriously? Is it different from expecting a senior administrator to judge a complex legal case? In France, for example, the legal scrutiny of administrative matters requires specialised judges, rigorously trained in administration and also involved in administration, as we shall see in the next chapter. Taking administrative determinations seriously amounts to a change in legal culture, i.e. "a new imagination and self-reflection about legal method, analysis and reasoning",<sup>329</sup> potentially also on the institutional level.

Dyzenhaus does not advocate taking the administrator's word at face value; rather, administrative and other justifications require recognition as legally legitimate justifications for certain decisions. Administrative determinations form part of the context within which the legal validity of administrative decisions are assessed. This

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<sup>325</sup> In her article, "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519.

<sup>326</sup> 501 n 79 (emphasis added).

<sup>327</sup> 2004 4 SA 490 (CC).

<sup>328</sup> See chs 4 and 5 below on the French administrative-law system and the *contrat administratif*, respectively.

<sup>329</sup> Klare K "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights* 146-188 at 156.



is the core of deference as respect, rather than avoiding engagement with administrative decisions. This approach does not point in one direction or the other when viewed in the abstract; this would be the case where the seniority of the administrator plays a role regardless of the facts of a particular case.

Therefore, on the whole, both Dyzenhaus and Hoexter call for a developed theory of deference, but do not claim to have formulated it. Rather, they describe the nature of the deference they have in mind. This is significant in the South African context in particular because their discussions have been employed as final claims about deference. In addition, deference as respect should be understood in the light of Etienne Mureinik's "culture of justification". Dyzenhaus says that the "idea of a legal culture of justification ... is of crucial importance to [his] own work."<sup>330</sup> He specifically acknowledges his debt to Mureinik.<sup>331</sup> More particularly, Dyzenhaus's "thesis depends on a theory which connects the value of equality with the rule of law through the idea of a legal culture of justification."<sup>332</sup> Considering the central role of the idea of a legal culture of justification, arguments suggesting that deference entails a superficial approach to the administration seem inaccurate. Dyzenhaus underlines the importance of deference as a democratic principle:

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<sup>330</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 279 n \*; see De Ville JR "Judicial Deference and Différance: Judicial Review and the Perfect Gift" (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 41.

<sup>331</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 279 n \*, 302 n 62.

<sup>332</sup> Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 302 (footnote omitted). Regarding his "thesis", Dyzenhaus states:

"In an era where agencies are going to face complex questions about the relationship between private and public power, and may increasingly differ among themselves about how to resolve such questions, judges will have to be alert to both the substance and the form of the rule of law. My thesis is that the substance of the rule of law is the equality of all citizens before the law and that the form of the rule of law is the procedures whereby public officials demonstrate that they have lived up to – are accountable to – that substance.

It is an anti-positivist thesis in that it claims a distinct moral content to the rule of law. But it is also a democratic thesis, in that it requires that the content be developed through the institutions of government and not determined by abstract philosophising." (307, footnote omitted).

“[deference as respect] adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

The legislature, the administration and the courts are then just strands in a web of public justification. The courts’ special role is as an ultimate enforcement mechanism for such justification. When administrative tribunals make decisions on points of law, those subject to the decision are entitled to require that the tribunal should offer reasons that in fact justify the decision. Should they not be satisfied, recourse to the courts should be available. But that recourse must be on the basis of the question whether the tribunal’s decision was supportable by the reasons it in fact and could in principle have offered.”<sup>333</sup>

Allan also emphasises the role of a culture of justification as he argues against a doctrine of deference. It is surprising that he also refers to Dyzenhaus with approval. Allan’s central argument is not only that a freestanding doctrine of deference is undesirable, but virtually a theoretical impossibility.<sup>334</sup> He assesses the cogency specifically of a freestanding, independent doctrine or theory, which determines the scope of review and can limit the judiciary’s control of the political branches regardless of the merits of the particular case.

He is adamant that factors external to the case at hand, which delineate the functional spheres of the branches of state, are inherent to the judicial review process<sup>335</sup> and so dependent on context that they have little, if any, meaning in the abstract. Citing Dyzenhaus, Allan argues that

“[i]f the protection of individual rights is to be compatible with the exercise by public authorities of discretionary powers to act in furtherance of the general interest, there must be

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<sup>333</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 305.

<sup>334</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 672, 675, 694. Allan certainly has critics, some of whom seem to qualify as detractors. For Allan’s response to his critics see “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) 127 *Law Quarterly Review* 96-117. Also see Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012) 26-35.

<sup>335</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 679-680, 694.

some division of competence between the legal and political branches of state. The courts must cede to Parliament and government an appropriate sphere of decision-making autonomy, protected from judicial interference. The boundaries of that sphere of autonomy, however, cannot be settled independently of all the circumstances of the particular case; for only the facts of the particular case can reveal the extent to which any individual right is implicated and the degree to which relevant public interests may justify the right's curtailment or qualification. The balance of judgment, as between judicial opinion and that of the legislature or public officials, will depend on the range of discretion applicable in all the circumstances: judges should "defer" to the conclusions of other persons only to the extent that the reasons offered in support of those conclusions prove persuasive. There is, then, no means of defining the scope of judicial powers, or prescribing the limits of official discretion, as regards the details of any particular case, without examination of the specific legal issues arising in all the circumstances."<sup>336</sup>

Thus, Allan recognises a sphere of administrative autonomy.<sup>337</sup> He also recognises

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<sup>336</sup> Allan TRS "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 *Cambridge Law Journal* 671-695 at 676 (footnote omitted).

<sup>337</sup> Allan TRS "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 *Cambridge Law Journal* 671-695 at 673. In order to argue that administrative autonomy has been infringed upon by the judiciary, one would have to determine the content and scope of the administrative function. The administration has a constitutional mandate to perform an administrative function; therefore, the independence of the administration, in terms of the separation of powers, is limited to the performance of that function. Likewise, the judiciary is constrained by the separation of powers, as well as checks and balances, to remain separate, both institutionally and functionally, from the legislature and executive. In other words, the separation of powers protects the independence of the branches so far as their relative functions are concerned. The legislative function is protected from executive or judicial interference. Although the content of a particular function itself and the boundaries between the functions are difficult to determine, a branch is shielded from undue interference with its *own* function. When the administration strays into the executive sphere by formulating policy, for instance, the administration cannot rely even on its demonstrated expertise or its actually reasonable assessment of the information before it. Here, expertise in the administrative function itself is all that is relevant. Where the administration employs experts, such as economists or actuarial scientists, the administration does not thereby become an expert in economics or actuarial science, nor are those functions necessarily part of the administrative function. Though their findings may play a critical role, the administrative function relates to how that information is utilised in order to realise policy and implement legislation. Thus deference is only due to the administration in relation to the administrative function. See Anthony RA "Which Agency Interpretations Should get Judicial Deference? – A Preliminary Inquiry" (1988) 49 *Administrative Law Review* 121-137 ("This study

that factors, such as the relative expertise of the decision-maker, are relevant in the determination of constitutional boundaries. However, such factors only have meaning in relation to the particular facts of a case.<sup>338</sup>

It is interesting to note that Allan consistently refers to Dyzenhaus with approval,<sup>339</sup> since Dyzenhaus is generally referenced as an advocate<sup>340</sup> of deference and Allan an opponent<sup>341</sup> of deference. Notably, Allan limits his critique to “an independent *theory* or *doctrine* of deference”,<sup>342</sup> even though this does not necessarily explain Allan’s reliance on Dyzenhaus. Allan’s endorsement of Dyzenhaus’s position, and by implication deference as respect, supports the reading of Dyzenhaus set out above. Thus, Dyzenhaus and Allan’s positions are not necessarily opposed and can be read as complementary.

Furthermore, Allan indicates that his critics do not seem to disagree with his contention that these factors are dependent on context.<sup>343</sup> However, even if they are assessed in isolation from the facts, Allan contends that the judiciary would be compromising its independence, impartiality, neutrality and objectivity.<sup>344</sup> Where deference is employed as a separate enquiry, independently of the facts,<sup>345</sup> “[t]he

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considers the extent to which ... various *forms* of agency interpretive expression should be “accorded” deference by the courts that review them.” (121, emphasis added)).

<sup>338</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 690.

<sup>339</sup> See, for instance, Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 676 n 16, 694 n 69; “Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review” (2010) 60 *University of Toronto Law Journal* 41-59 at 47, 54, 57.

<sup>340</sup> See, for instance, Taggart M “Proportionality, Deference, Wednesbury” (2008) *New Zealand Law Review* 423-482 at 455.

<sup>341</sup> See, for instance, De Ville JR “Judicial Deference and Différance: Judicial Review and the Perfect Gift” (2006) 9 *Potchefstroom Electronic Law Journal* 41-89 at 41.

<sup>342</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 672 (emphasis in original).

<sup>343</sup> Allan TRS “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) 127 *Law Quarterly Review* 96-117 at 3 n 15.

<sup>344</sup> 116.

<sup>345</sup> The so-called “two-stage analysis”, Allan TRS “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) 127 *Law Quarterly Review* 96-117 at 108.

effect is precisely the same as the application of a doctrine of non-justiciability”.<sup>346</sup>

Allan’s position can be read as largely congruent with the South African position in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>347</sup> O’Regan J makes it clear that institutional considerations cannot be decisive.<sup>348</sup>

“Section 2 of the Act requires the decision-maker to *have regard to*<sup>349</sup> a range of factors which are to some extent in tension. It is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The court’s task is merely to determine whether the decision made is one which achieves a reasonable equilibrium *in the circumstances*.”<sup>350</sup>

In the final analysis, Allan’s rejection of factors operating in isolation from the facts, such as those identified by Hunt that include the decision-maker’s “relative

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<sup>346</sup> Allan TRS “Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory” (2011) 127 *Law Quarterly Review* 96-117 at 108.

<sup>347</sup> 2004 4 SA 490 (CC) paras 48-54.

<sup>348</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48:

“A court should ... give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”

<sup>349</sup> Emphasis in original.

<sup>350</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 49 (emphasis added).

expertise” and democratic accountability,<sup>351</sup> is in line with Dyzenhaus’s plea to take administrative determinations seriously and to justify incidences of public power through justification; Allan’s position is also congruent with a culture of justification.<sup>352</sup>

### 3 3 4 The Public/Private-Law Distinction

When a court presides over a case to which the public administration is party, either public law or private law could apply.<sup>353</sup> This in itself is significant because the same scenario could be assessed in terms of one of two different sets of rules depending on the judge’s classification of the dispute:

“Disputes flowing from state commercial activity are hence treated by courts as either a matter of administrative law or of contract. The classification of the action under scrutiny consequently becomes all-important.”<sup>354</sup>

In addition, when administrative agencies act they may themselves have to decide which rules are applicable to the action in determining how to proceed. Their understanding of the distinction between public and private law will have an effect on which rules they believe are applicable. Thus, the public/private-law distinction impacts on the relationship between the judiciary and the public administration by determining which legal rules apply in a particular case, how to make the choice between the two basic sets of rules and by potentially affecting the behaviour of the public administration. The distinction is linked to the constitutional mandates of the judiciary and public administration because the distinction determines whether public or administrative-law rules apply or not. The distinction may also have an effect on deference. For instance, where it has been decided that the nature of state conduct is

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<sup>351</sup> Allan TRS “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 *Cambridge Law Journal* 671-695 at 687.

<sup>352</sup> 694.

<sup>353</sup> See Quinot G *State Commercial Activity: A Legal Framework* (2009) chapter 3. On the value of the distinction between public-law and private-law regulation, without resorting to a dogmatic approach, see Woolf H “Public Law - Private Law: Why the Divide? A Personal View” (1986) *Public Law* 220-238.

<sup>354</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 128.

private in a contractual issue involving an organ of state, the implication is often that the contract was concluded on a platform of equality and that the administrative agency did not act with state power or from a position of authority.<sup>355</sup> Since deference flows from the separation of powers one could argue that deference would not apply in such a case, even though the administration is a party acting with expertise.

Traditionally, administrative law and constitutional law are classified as subcategories of public law.<sup>356</sup> More specifically, administrative law is that branch of public law that governs the legal relationships of state authorities, whether with private subjects or other state authorities.<sup>357</sup> The other grand category is private law, which governs the relationships between private subjects. However, the activities of public authorities are not always categorised as of a public nature, nor are the activities of private subjects always of a private nature. Therefore, the question of what characterises law or conduct as public or private requires elaboration and the exercise of distinguishing between public and private activities for the purposes of either applying public or private law is of critical importance. This involves two inquiries: what characterises public and private law, respectively, and how does one determine which branch applies in a particular case.

Attempts to distinguish between public law and private law date from the Roman Empire, at least.<sup>358</sup> Over the centuries various standards have been formulated to distinguish between the two types of law, but their boundaries have remained nebulous. The function, usefulness and desirability of the distinction have also been subjected to regular scrutiny.

The simplest distinguishing factor is the identity of the parties:<sup>359</sup> where the state is party to a legal relationship, public law applies and if not, private law applies. Public and private law are also distinguished according to the primary concern of each branch of law:<sup>360</sup> public law is primarily concerned with the public interest, whereas

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<sup>355</sup> See *Cape Metropolitan Council v Metro Inspection Services Western Cape* CC 2001 3 SA 1013 (SCA) para 18; Quinot G *State Commercial Activity: A Legal Framework* (2009) 139-140.

<sup>356</sup> Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 117.

<sup>357</sup> Baxter L *Administrative Law* (1984) 2. See Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 118.

<sup>358</sup> Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 115 (“The dichotomy, public and private law ... is found in the *Digesta* of Justinian”).

<sup>359</sup> Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 116.

<sup>360</sup> 116.

private law is primarily concerned with private interests. Another traditional distinction hinges on the presence or absence of governmental authority:

“[P]ublic law relates to the distribution and exercise of governmental authority. Whereas private law governs the legal relations between subjects, being on an equal footing, public law governs the relations of governmental bodies among themselves or with subjects in a relationship of subordination.”<sup>361</sup>

In these terms, whereas private law regulates equal and voluntary relationships, public law regulates unequal and authoritative relationships.<sup>362</sup> The inequality of the public law relationship is defined by the presence of state authority.<sup>363</sup>

Even though under the traditional distinctions the expansion of public law has been acknowledged,<sup>364</sup> they have not proven to be sufficiently flexible to accommodate the expansion conceptually. Possibly, the traditional distinctions overemphasise the significance of an organ of state’s presence, even where the criterion is the presence of state authority. Two questions on the nature of public power illustrate the incapacity of traditional criteria to fully address the distinction between public and private law: one, “whether action taken by a public entity in a contractual or other seemingly private-law setting is an exercise of private or public power” and, two, “whether and when private entities are capable of exercising public powers or performing public functions.”<sup>365</sup> Therefore, “it is more accurate to regard administrative law as regulating the activities of bodies that *exercise public powers or perform public functions*, irrespective of whether those bodies are public authorities in a strict sense.”<sup>366</sup> Thus, the emphasis is on the *nature of the power* that is exercised or the *nature of the function* that is performed, rather than on the actor.<sup>367</sup>

This criterion encompasses the implications for the public/private-law distinction that were brought about by the expansion of the welfare state, privatisation and

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<sup>361</sup> 116-117 (footnotes omitted).

<sup>362</sup> Wiechers M *Administratiefreg* (1973) 3.

<sup>363</sup> Wiechers M *Administratiefreg* (1973) 3 (“[D]ie aanwesigheid van *owerheidsgesag*”).

<sup>364</sup> Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) 117.

<sup>365</sup> Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 185.

<sup>366</sup> 2.

<sup>367</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) paras 141, 143. See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 185-193.



outsourcing. Nevertheless, the more modern criterion merely poses a better question by focusing on the relevant issues, namely public power and public function. The inquiries “what characterises public law and private law” and “how does one determine which branch applies in a particular case” remain unresolved. But, from the administrative-law perspective, unlike under the traditional criteria, the answer is now the product of the question “what makes a power or function public”.<sup>368</sup>

In *Cape Metropolitan Council v Metro Inspection Services Western Cape CC*<sup>369</sup> the Supreme Court of Appeal had to determine the nature of a power exercised in a contractual context, which has traditionally been regarded as a strictly private-law issue. The legal question was whether the cancellation of a contract by the appellant, an “organ of state” in terms of section 239 of the Constitution, amounted to administrative action.<sup>370</sup> This question hinged on the inquiry of what the nature of that power was.<sup>371</sup> Streicher JA found that the cancellation of the contract was not administrative action and that, consequently, the respondents were not entitled to the benefits of natural justice.<sup>372</sup>

In determining whether the cancellation of the contract amounted to the exercise of public power, Streicher JA reasoned as follows.<sup>373</sup> With reference to *President of the Republic of South Africa v South African Rugby Football Union*,<sup>374</sup> he recognised that “[o]ther considerations which may be relevant” to the determination of whether conduct is administrative action “are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation”.<sup>375</sup> Streicher JA found that the appellant obtained the power to cancel the contract from the terms of the contract and from common law, even though the appellant is a statutory public authority that was enabled by statute to

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<sup>368</sup> See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 3-5.

<sup>369</sup> 2001 3 SA 1013 (SCA).

<sup>370</sup> *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) paras 1-2.

<sup>371</sup> Para 17.

<sup>372</sup> Para 22.

<sup>373</sup> See *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) paras 17-22.

<sup>374</sup> 2000 1 SA 1 (CC).

<sup>375</sup> *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) para 17. See the minority judgment of Langa CJ in *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 186.

enter into the contract.<sup>376</sup> Thus the identity of the contracting party and the original source of the power are not decisive in determining whether administrative or private law applies. Streicher JA indicates that the terms of the contract were determined by the parties and not dictated by statute and that these terms were negotiated and agreed to on a platform of equality between the contracting parties.<sup>377</sup> The appellant did not act, in deciding the terms of the contract or in cancelling the contract, from a position of superiority as a result of its status as a public authority.<sup>378</sup> Furthermore, “[w]hen [the appellant] purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract.”<sup>379</sup> Streicher JA then concludes that “[i]n all these circumstances it cannot be said that the appellant was exercising a public power.”<sup>380</sup> Thus, Streicher JA considers the identity of the actor, the source of the power, the relationship between the contracting parties, whether the public authority acts from a position of superiority and what the public authority purported to do in determining whether the appellant exercised public or private power.

Streicher JA emphasises the fact that the appellant “purported” to cancel the contract on the ground of material breach in terms of contract law.<sup>381</sup> The relevance of what the appellant professes to have done, as a factor in determining whether administrative law or private law applies, is questionable. Why should the appellant’s possible misunderstanding of the nature of the power he is exercising influence the branch of law that applies?

In the minority judgment of *Chirwa v Transnet Ltd*,<sup>382</sup> Langa CJ states that the main issue at stake “is whether the applicant’s dismissal constitutes administrative action in terms of the Promotion of Administrative Justice Act”.<sup>383</sup> To this end Langa

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<sup>376</sup> *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) para 18.

<sup>377</sup> Para 18.

<sup>378</sup> Para 18.

<sup>379</sup> Para 18.

<sup>380</sup> Para 18.

<sup>381</sup> See *Cape Metropolitan Council v Metro Inspection Services Western Cape CC* 2001 3 SA 1013 (SCA) paras 18, 20.

<sup>382</sup> 2008 4 SA 367 (CC) paras 154-196.

<sup>383</sup> *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 154.

CJ considers whether the decision to dismiss “amounted to an exercise of public power or the performance of a public function.”<sup>384</sup> Concerning the characterisation of a power or function as public, Langa CJ says the following:

“Determining whether a power or function is “public” is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.”<sup>385</sup>

In *Logbro Properties CC v Bedderson NO*<sup>386</sup> the Supreme Court of Appeal subsequently qualified the import of *Cape Metropolitan Council v Metro Inspection Services Western Cape CC*,<sup>387</sup> the court also overruled the majority finding of *Mustapha v Receiver, Lichtenburgh*.<sup>388</sup>

In *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd*,<sup>389</sup> the respondent (“Thabiso”) claimed damages from the appellant (“the Government”) for the alleged wrongful cancellation of a contract between them.<sup>390</sup> The case was decided in favour of the Government on the basis of the terms of the contract only: the *audi alteram partem* rule and other administrative law principles were found not to be applicable to the dispute.<sup>391</sup> As authority for this contention Brand JA cites<sup>392</sup> *Cape Metropolitan Council v Metro Inspection Services CC*<sup>393</sup> and *Steenkamp NO v*

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<sup>384</sup> Para 181.

<sup>385</sup> *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 186. See Quinot G *State Commercial Activity: A Legal Framework* (2009) chapter 3 where all the determinative factors of the public/private-law distinction are analysed.

<sup>386</sup> 2003 2 SA 460 (SCA) paras 9-10.

<sup>387</sup> 2001 3 SA 1013 (SCA).

<sup>388</sup> 1958 3 SA 343 (A). See Quinot G *State Commercial Activity: A Legal Framework* (2009) 68-71.

<sup>389</sup> 2009 1 SA 163 (SCA).

<sup>390</sup> *Government of the Republic of South Africa v Thabiso Chemicals* 2009 1 SA 163 (SCA) para 1.

<sup>391</sup> Para 18.

<sup>392</sup> Para 18.

<sup>393</sup> 2001 3 SA 1013 (SCA) para 18.

*Provincial Tender Board, Eastern Cape*.<sup>394</sup> Brand JA explains that the statutory source of the cancellation was merely a term of the contract:

“The fact that the Tender Board relied on authority derived from a statutory provision (ie s 4(1) (eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations – like the provisions of ST36 – became part of the contract through incorporation by reference.”<sup>395</sup>

Quinot points out, however, that despite Brand JA’s reliance on *Cape Metropolitan Council v Metro Inspection Services CC*<sup>396</sup> as authority for the application of private law, Streicher JA’s comment that had the appellant cancelled the contract in terms of the regulations it would have been exercising a public power is inconsistent with Brand JA’s finding.<sup>397</sup>

This brief survey of South African case law illustrates the significance of the public/private-law divide and the far-reaching implications the choice of either public law or private law has. Thus, the public/private-law divide informs the administrative-law relationship: the divide determines which branch of law applies; the administration might prefer one legal route over another in relation to the same decision simply to avoid public-law scrutiny; and legal argument focuses on whether public or private law applies rather than on the nature and substance of the dispute itself.

Finally, although the South African courts have identified guiding factors, a complete definition of public power or public function remains elusive. This is not surprising as the scope and nature of the adjective “public” is dynamic; there are also theoretical short-comings in the current “classification approach” to state commercial

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<sup>394</sup> 2006 3 SA 151 (SCA) paras 11, 12.

<sup>395</sup> *Government of the Republic of South Africa v Thabiso Chemicals* 2009 1 SA 163 (SCA) para 18. Quinot contends that Brand JA “diminished the role of source as classification criterion” (see Quinot G *State Commercial Activity: A Legal Framework* (2009) 77).

<sup>396</sup> 2001 3 SA 1013 (SCA) para 18.

<sup>397</sup> Quinot G “Public Procurement” (2008) 3 *Juta’s Quarterly Review of South African Law* para 2.1.

activity:<sup>398</sup> the approach is indeterminate and inconsistent with the project of transformative constitutionalism.

### 3 3 5 Democracy and the Counter-majoritarian Dilemma

The *Oxford Dictionary of Current English* defines “democracy”, firstly, as “government by the whole population, [usually] through elected representatives” and, secondly, as a “classless and tolerant society”.<sup>399</sup> One of the functions of the Constitution is to “[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law”.<sup>400</sup> This suggests that democracy is not limited to majoritarianism. Due to the enormous populations of most nations direct democracy is no longer viable and, therefore, the election of representatives embodies the idea of government by the people. Alan Bullock identifies the following criteria of representative democracy: one, “whether ... elections are free”; two, “whether such elections provide an effective choice”; and, three, “whether the elected body of representatives ... has the right of legislation, the right to vote taxes and control the budget ... and the right to publicly question, discuss, criticize and oppose government measures without being subject to threats of interference or arrest.”<sup>401</sup>

Judicial review of administrative action is sometimes accused of infringing upon democratic principles, especially in the context of socio-economic rights litigation.<sup>402</sup> The charge is that judges are not appointed democratically and that the judiciary is elitist, i.e. that judicial review undermines the core elements of representative democracy.<sup>403</sup> Where the judiciary is required to adjudicate upon politically loaded issues, which typically fall within the competence of the executive, these

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<sup>398</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 128-132.

<sup>399</sup> Thompson DF (ed) *The Oxford Dictionary of Current English* (1992) 227.

<sup>400</sup> Preamble to the Constitution of the Republic of South Africa, 1996.

<sup>401</sup> Bullock A & Trombley S (eds) *The New Fontana Dictionary of Modern Thought* (2000, 3<sup>rd</sup> ed) 208-209.

<sup>402</sup> See Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 63.

<sup>403</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 30.

characteristics give rise to the so-called “counter-majoritarian dilemma”.<sup>404</sup> When reviewing administrative action relating to socio-economic rights courts can potentially direct the implementation of policy or legislation by the public administration, which, it is argued, is beyond judicial competence.<sup>405</sup> In such a case, the courts are said to lack democratic legitimacy.<sup>406</sup>

However, Bullock points out that “[d]emocracy is based on a belief in the value of the individual human being, and a further criterion is therefore the extent to which certain basic rights are guaranteed ... to every citizen.”<sup>407</sup> The Constitution reinforces a balance between “the rule of the many” and the protection of every citizen’s human rights. The founding provision of the Constitution, section 1, puts this forcefully:

“The Republic of South Africa is one sovereign democratic state *founded* on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms ...
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”<sup>408</sup>

Clearly, human dignity and representative democracy have been placed on an equal footing as foundational to the sovereign democratic state of the Republic of South Africa. The acknowledgement of the co-ordinate status of human dignity and democracy clarifies the counter-majoritarian dilemma and the lack of democratic legitimacy: in terms of the South African democratic standard, the protection of human rights, including the right to administrative justice,<sup>409</sup> by the courts, cannot be illegitimate in itself, unless the courts act beyond their competence. As a corollary to the criterion of human rights protection, “democracy is held to require the

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<sup>404</sup> 30, 30 n 70.

<sup>405</sup> 30.

<sup>406</sup> 30.

<sup>407</sup> Bullock A & Trombley S (eds) *The New Fontana Dictionary of Modern Thought* (2000, 3<sup>rd</sup> ed) 209.

<sup>408</sup> Emphasis added.

<sup>409</sup> S 33 of the Constitution of the Republic of South Africa, 1996.

establishment of an independent judiciary and courts to which everyone can have access.”<sup>410</sup> Under the Constitution, there may be no absolute majority rule.<sup>411</sup>

“South Africa’s Constitution embodies a conception of democracy that goes well beyond representation, elections, and majority.”<sup>412</sup>

Such an understanding of democracy has far-reaching implications for the roles of the judiciary and the public administration and their interaction. It also has implications for arguments based on the principle of democracy. All branches of the state have a democratic role to play and are legitimised by democratic principles.<sup>413</sup> Democracy affects constitutional mandates, the content of the separation of powers and checks and balances, deference, the public/private distinction and co-operative government.

### 3 3 6 Co-operative Government

Chapter 3 of the Constitution sets out the principles of co-operative government and intergovernmental relations. These principles apply to all spheres of government and the organs of state within each sphere.<sup>414</sup> Co-operative government is relevant to the analysis of the legal relationship between the public administration and the judiciary because it “must influence the interpretation of the constitutional provisions conferring power on the various spheres of government.”<sup>415</sup> This has implications for

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<sup>410</sup> Bullock A & Trombley S (eds) *The New Fontana Dictionary of Modern Thought* (2000, 3<sup>rd</sup> ed) 209.

<sup>411</sup> See Lenta P “Judicial Deference and Rights” (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 456-467 at 459.

<sup>412</sup> Klare K “Legal Subsidiarity & Constitutional Rights: A Reply to André van der Walt” (2008) 1 *Constitutional Court Review* 129-154.

<sup>413</sup> On the role of the separation of powers in protecting human rights without compromising democratic values, see Neuborne B “Judicial Review and Separation of Powers in France and the United States” (1982) 57 *New York University Law Review* 363-442.

<sup>414</sup> S 41(1) of the Constitution of the Republic of South Africa, 1996.

<sup>415</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 121.

understanding the doctrine of separation of powers,<sup>416</sup> checks and balances, the counter-majoritarian dilemma and deference.

Chapter 3 of the Constitution establishes a co-operative form of federalism, instead of competitive federalism.<sup>417</sup> Co-operative government implies that, as opposed to the allocation of exclusive legislative and executive responsibilities, spheres of government share responsibilities.<sup>418</sup>

“All spheres of government, be they national, provincial or local, must co-operate vertically and horizontally.”<sup>419</sup>

Without the proper and harmonious functioning of the organs of state within each sphere it will be virtually impossible for different spheres to co-operate. The Bill of Rights applies to all organs of state,<sup>420</sup> the Constitution is the supreme law of the land<sup>421</sup> and the supremacy of the Constitution is upheld by the courts.<sup>422</sup> Therefore courts play a pivotal role in co-operative government, even though the courts are not “generally thought to be engaged by [the] principles of co-operative government.”<sup>423</sup> So,

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<sup>416</sup> See *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 2 193 (T); Woolman S & Roux T “Co-operative Government and Intergovernmental Relations” in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, RS, July 2009) 14-15.

<sup>417</sup> Woolman S & Roux T “Co-operative Government and Intergovernmental Relations” in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, RS, July 2009) 14-1; Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 119.

<sup>418</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 119.

<sup>419</sup> Woolman S & Roux T “Co-operative Government and Intergovernmental Relations” in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, RS, July 2009) 14-7.

<sup>420</sup> S 8(1) of the Constitution of the Republic of South Africa, 1996.

<sup>421</sup> S 2.

<sup>422</sup> S 165(2).

<sup>423</sup> Woolman S & Roux T “Co-operative Government and Intergovernmental Relations” in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, RS, July 2009) 14-15.



“[w]hile the different spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfill its constitutional mandate.”<sup>424</sup>

Thus, in order for co-operative federalism to function the spheres of government and the organs of state within each sphere must work together and co-operate.<sup>425</sup> Co-operative government reinforces the idea that all the branches of state have a common agenda, even though they have different functions and keep each other in check.<sup>426</sup> This influences the interpretation and adjudication of disputes involving the public administration.<sup>427</sup> It should also influence the administration’s interpretation of its mandates. The thought of the fulfilment of the South African constitutional mandate without the participation of the courts, in terms of co-operative government, cannot be entertained.

### 3 4 Conclusion

The development and origins of South African administrative law illustrate the significant and lasting impact of the English doctrines of parliamentary sovereignty and rule of law. The force of the Diceyan influence meant that administrative law had a late start and developed slowly in South Africa. Administrative law was also

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<sup>424</sup> Woolman S & Roux T “Co-operative Government and Intergovernmental Relations” in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, RS, July 2009) 14-9.

<sup>425</sup> Currie I & De Waal J (eds) *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2002) 123.

<sup>426</sup> See s 41 of the Constitution of the Republic of South Africa, 1996.

<sup>427</sup> S 41(3) of the Constitution of the Republic of South Africa, 1996 reads,

“[a]n organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.”

From the judiciary’s perspective this provision can be likened to s 7(2) of the Promotion of Administrative Justice Act 3 of 2000, which provides that internal procedures must be exhausted before the courts may hear an application for judicial review. Thus, in both instances the courts remain uninvolved, at least initially, until other processes have been followed. This affects the way in which courts approach disputes related to the administration.

virtually synonymous with judicial review, and to a significant extent still is. Consequently, administrative law has laboured under negative associations of judicial control of and interference with the public administration, lack of democratic legitimacy and a mistrust of the public administration. This was exacerbated by the over-exuberant delineation of administrative action and employment of review during apartheid to compensate for the absence of a bill of rights. Therefore, the present administrative-law system in South Africa, which is characterised by red-light theory, should not be seen as an automatic response to the challenges raised by the rise of the welfare state, privatisation, outsourcing and socio-economic rights litigation, but as the product of the superimposition of the Diceyan ideology on a unique context and history. Thus, in the final analysis, the South African administrative-law system can be characterised by the prominence of judicial review, as illustrated by PAJA,<sup>428</sup> and by the emphasis on the rule of law.

The legal relationship between the judiciary and the public administration was discussed by means of six elements in order to identify the factors that inform and define this relationship. Firstly, the courts and public administration are subject to specific constitutional mandates. The courts play an integral role in South Africa's constitutional democracy as guardians of the Constitution while the public administration is given the primary responsibility of realising the Constitution's promise of socio-economic transformation. Secondly, the separation of powers and checks and balances are entrenched in the Constitution, defining the allocation of functions and the manner in terms of which the public administration and the judiciary may interact. Furthermore, the separation of powers is justiciable. Nevertheless, it has not been defined in the Constitution and there is potential for the development of this doctrine and the expansion of its application. Thirdly, the idea of deference has become an important topic of debate since Hoexter's article, "The Future of Judicial Review in South African Administrative Law",<sup>429</sup> which established the concept as a guiding principle for judicial intervention and non-intervention. Although the meaning of deference and its role are unclear, it has been endorsed and applied by the Constitutional Court. The relationship between deference and the doctrine of

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<sup>428</sup> See Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519.

<sup>429</sup> Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519.

separation of powers and checks and balances is also unclear. The South African courts seem to have equated the pure separation of powers and deference. In addition, whether three or four branches of government are recognized for the purposes of separation-of-powers analysis will have implications for the role deference plays. Importantly, at present deference enjoys a very wide application in judicial review. Deference has been employed to determine whether judicial review is appropriate, what the standard of scrutiny to be applied by courts should be and how to intervene with the public administration's decisions. This is in line with the elements of deference Hoexter identified: variability, the scope of "administrative action", and reasonableness review. However, deference is challenged from many angles. Even the existence of the enterprise itself is criticised. Therefore, a comprehensive and critical evaluation of the origins and development of deference, both in South Africa and abroad, is required in the light of the constitutional principles and context of South Africa. Also, a theory of deference can only proceed from a choice in political theory that identifies, *inter alia*, the constitutional role of the administration and the judiciary. This exercise is necessary before deference is accepted and incorporated further into South African law at face value.

Fourthly, the expansion of the welfare or administrative state, of outsourcing and of privatization has undermined the traditional criteria for distinguishing public law and private law. The distinction between public and private law is now best understood as hinging on the *nature of the power* that is exercised or the *nature of the function* that is performed. This development has important implications for analysing state administration and particular administrative practices such as public contracting because the identity of the actors is no longer decisive. Also, the law of contract, which is traditionally situated in the private-law domain, has to be reconceptualised to accommodate its changing role as a method of public administration. The distinction between public and private law is essential in this regard.

Fifthly, democracy is a founding value of the Constitution. Therefore, judicial review has been criticised as undemocratic where the courts adjudicate over socio-economic rights cases and "direct" the allocation of state resources. However, even if it is assumed that democracy is not also based on the value of the individual citizen, another founding value, human dignity, balances the lack of democratic legitimacy that may arise in such cases.

Finally, chapter 3 of the Constitution sets out the principles of co-operative government and intergovernmental relations. These principles aim to co-ordinate the spheres of government and the organs of state within each sphere in order to achieve the mandates imposed by the Constitution. These principles also oblige the courts to allow organs of state to resolve inter-governmental disputes internally before hearing these disputes. The courts must take the principles of co-operative government into consideration for the purposes of interpretation, they must allow for political solutions and they can play a valuable role in promoting the principles of co-operative government by clarifying constitutional mandates and constitutionally appropriate avenues for pursuing them.

In chapter two the nature of the separation of powers was discussed. Arguments in favour of incorporating the administration and administrative function into separation-of-powers analysis were also presented. In this chapter the characteristics of the South African administrative-law system were identified on the foundation of the concepts formulated in the previous chapter. The elements that characterise the legal relationship between the administration and the judiciary were discussed, with particular emphasis on the deference debate. On the whole the South African administrative-law system is characterised by red-light theory, with judicial review the central topic. Calls for an integrated administrative law and a suitable role for judicial review have been made by, for instance, Hoexter. This has been adopted by the courts and applied as a settled matter in the form of a rhetoric of deference. However, the content of the rhetoric of deference amounts to the pure separation of powers. This leaves various questions concerning the content of administrative justice, the content and nature of deference, the appropriate role of administrative law and judicial review within the administrative-law system, and the nature of the relationship between the administration and the judiciary unaddressed.

In chapter four a different approach to the legal relationship between the administration and the judiciary is explored, namely, the French administrative-law system. Can the debate be conducted in terms beyond the pure separation of powers, judicial review or deference? The French system is renowned for its alternative interpretation of the separation of powers<sup>430</sup> and its administrative courts as well as

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<sup>430</sup> See, for instance, in the English legal literature, Schwartz B “A Common Lawyer looks at the Droit Administratif” (1951) 29 *The Canadian Bar Review* 121-138 at 126; Bermann GA “The

the recognition of administrative law as a distinct branch.<sup>431</sup> How is the existence of this alternative system explained and justified? This is the central question of the following chapter, chapter four. The response to this question can be described as a variety of constitutional principles and explanations. In chapter five, however, the French system is assessed on the doctrinal level by considering the French administrative contract.

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Scope of Judicial Review in French Administrative Law” (1977) 16 *Columbia Journal of Transnational Law* 195-254 at 197; Cummins RJ “The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France” (1986) 35 *International and Comparative Law Quarterly* 594-628 at 598; Merryman JH “The French Deviation” (1996) 44 *The American Journal of Comparative Law* 109-119 at 118; and in the French literature, Bénéoit F-P “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 283; Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 770; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712. See also Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 12.

<sup>431</sup> See *Blanco*, TC 8 February 1873.

## CHAPTER 4

### The French Administrative-Law System

#### 4 1 Introduction

French administrative law has been referred to for comparative purposes since the first academic publications dedicated to administrative law in South Africa.<sup>1</sup> More recent contributions also mention the French example as a classic alternative, but, along with the earlier works, are limited to cursory discussions.<sup>2</sup> These discussions are regarded as the point of departure for this chapter and they are not revisited. Instead, the explanations and principles that describe and justify the legal relationship between the administration and the administrative jurisdiction in France are identified. For the purposes of this dissertation those elements that have led to the existence and maintenance of an independent administrative jurisdiction, within the administration itself, are pertinent. Therefore, the discussion is largely historical,<sup>3</sup> more so than the chapter on the South African administrative-law system.

Four characteristics of the French administrative-law system are particularly significant in relation to common-law jurisdictions. Firstly, the French administrative jurisdiction is a court separate from the judiciary and not merely a specialised court within the judicial branch. This is the so-called French “duality of jurisdiction”. Secondly, the administrative jurisdiction is part of the administration and not of the judiciary. Thirdly, the *Conseil d’État*, the supreme administrative jurisdiction, has a dual function as both adviser and judge of the administration. Finally, the administrative jurisdiction is independent, despite falling within the administration. These characteristics define the relationship between the administration and the administrative jurisdiction in France and distinguish the French administrative-law system from the South African system. Therefore, the questions “how did the French

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<sup>1</sup> See, for instance, Wiechers M *Administratiefreg* (1973) 21-25.

<sup>2</sup> See, for instance, Bolton P *The Law of Government Procurement in South Africa* (2007) 16 n 16; Quinot G *State Commercial Activity: A Legal Framework* (2009) 259-261.

<sup>3</sup> Although there is some debate, set out below, on which principles justify the French administrative-law system, they were all formulated before the twentieth century and have remained since.

administrative-law system develop as it did, culminating in these particular characteristics”, and “why did this system endure” are explored in the historical discussion that follows. The inquiry can be reduced to one theme, namely, the explanation for the development and existence of an independent administrative jurisdiction within the administration.

The development of the French administrative-law system dates from the Middle Ages. The long historical period under discussion warrants an overview of the main events. The significance of these events varies according to the different principles or explanations that rationalise the administrative-law system in question.

The “traditional explanation” relies on the so-called “French interpretation” of the separation of powers. In terms of the French interpretation the 1789 Revolution is the foundation of the French system. In particular, the Law of 16-24 August 1790, which declared the principle of the separation of authorities, is the founding act of the administrative jurisdiction, thereby separating administrative and ordinary courts. This interpretation has received constitutional recognition in France and is the explanation most often proffered for the existence of the French system. The influence of this interpretation is illustrated by the prevalence of this explanation in English literature on French administrative law.

However, leading administrative law theorists, such as Sandevor, Troper, Chevallier and Velly challenge the accuracy of the French interpretation on numerous grounds. These critiques are discussed in some detail in order to give an overview of the different views on the significance of the 1789 Revolution and the Law of 16-24 August 1790.

Other explanations for the French administrative-law system, though less well known than the French interpretation, are also authoritative in French academic literature. These explanations are the early origins of a duality of jurisdiction due to a simple division of labour; the principle “to judge the administration is also administering”; and the principle of the separation of the administrative jurisdiction and the active administration. Each explanation is discussed towards providing an overview of the theories that rationalises the existence of an independent administrative-law system. The purpose of this chapter is not to identify the correct or more persuasive explanation, in the event that this is possible. Rather, the explanations and principles that characterise and rationalise the legal relationship between the administration and the administrative jurisdiction, along with any critique

of these, are simply identified. It is beyond the scope of this dissertation to assess the value of each explanation and principle within the French context. Finally, the institutional product of the various explanations and principles, the *Conseil d'État*, is discussed in order to illustrate the French administrative-law system itself.

## 4 2 The Origins and Development of the French Administrative-Law System

### 4 2 1 The Origins of the French Administrative-Law System

The precise origins of the French administrative-law system are uncertain. One school of thought argues that French administrative law dates from the Middle Ages, that early traces of modern principles can be identified in the laws and customs of that period.<sup>4</sup> Another school regards administrative law as a product of the French Revolution of 1789 and, specifically, of the *Conseil d'État*.<sup>5</sup> These schools are not necessarily in direct opposition as much depends on the definitions attributed to concepts such as “administration”, “administer”, “administrative jurisdiction” and “administrative law”.

Nevertheless, leading academics such as Jean-Louis Mestre and Francis-Paul Bénéoit have convincingly demonstrated the pre-Revolutionary origins of French administrative law.<sup>6</sup> Mestre explains, in his *Introduction Historique au Droit Administratif Français*, how a vast body of administrative law rules developed

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<sup>4</sup> Mestre JL *Un Droit Administratif à la fin de l'Ancien Régime: Le Contentieux des Communautés de Provence* (1976); “Les Racines Seigneuriales du Droit Administratif Français” (1981) IV *Annuaire Européen d'Administration Publique* 783-799; “La Contribution des Droit Romain et Canonique à l'Élaboration du Droit Administratif” (1982) V *Annuaire Européen d'Administration Publique* 925-943; “Les Fondements Historique du Droit Administratif Français” (1982-1983) n° 34 *Études et Documents publiés par Le Conseil d'État* 63-80; *Introduction Historique au Droit Administratif Français* (1985); Bénéoit F-P *Le Droit Administratif Français* (1968); “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295. See also Weidenfeld K *Les Origins Médiévales du Contentieux Administratif (XIVe – XV Siècles)* (2001).

<sup>5</sup> Auby JB & Cluzel-Métayer L “Administrative Law in France” in Seerden R (ed) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2007) 61-92 at 61.

<sup>6</sup> See n 4 above.



between the eleventh century and the end of the *Ancien Régime*,<sup>7</sup> based on two elements: one, the seigniorial regime and, two, the contribution of learned law, specifically, Roman Law and canon law.<sup>8</sup>

The feudal lords developed prerogatives based on the privileges of the royalty that preceded them. These prerogatives were refined by the revival of Roman law and the development of canon law. The refinement of ancient law culminated in a complete body of administrative-law rules by the end of the *Ancien Régime*. Mestre argues that after the 1789 Revolution the French government did not completely break away from these rules but, rather, formalised many of them and institutionalised the fundamental aspects of French administrative law and review.

#### **4 2 2 An Overview of the Historical Development of the French Administrative-Law System**

On the basis of these early origins, the historical development of the French administrative-law system can broadly be divided into two broad periods: one, the period of the *Ancien Régime*, dating from the Middle Ages to the 1789 Revolution and, two, the period from the Revolution to the twentieth century. The following section provides an overview of the historical development of the French administrative-law system over these two periods. In this overview the main events and developments in the creation of the French administrative-law system are identified.

According to Gaudemet the existence of administrative litigation in France dates back to the twelfth century, during the *Ancien Régime*.<sup>9</sup> The allocation of the function of deciding administrative litigation was a complex matter, though. The conflicts between the monarchy and the courts for the right to preside over administrative

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<sup>7</sup> The *Ancien Régime* refers to the French socio-political system in place before the 1789 Revolution.

<sup>8</sup> Mestre J-L *Introduction Historique au Droit Administratif Français* (1985) 16.

<sup>9</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 327-328.

litigation are characteristic of the *Ancien Régime*.<sup>10</sup> During this period the institution presiding over administrative litigation changed regularly.<sup>11</sup>

With the Edict of Saint-Germain in 1641 the monarchy took a decisive step towards reserving administrative litigation for the administration itself.<sup>12</sup> It addressed the conflict by declaring that the *Parlements* and other ordinary courts were established solely to secure justice for French citizens, in other words, to hear disputes between private persons and criminal law cases. The ordinary courts were expressly prohibited from taking cognizance of affairs concerning the state, the administration or the government, a function reserved for the king. Two decisions of the *Conseil* on 19 October 1656 and 8 July 1661 reaffirmed that the cognizance of administrative affairs is reserved for organs closely associated to royal power.<sup>13</sup> This prohibition met with much resistance from the *Parlements*.

A milestone in the development of the French administrative-law system is the French Revolution of 1789. On 26 August 1789 the *Assemblée Nationale Constituante* adopted the Declaration of the Rights of Man and of the Citizen that instituted the separation of powers, which declared in article 16:

“Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.”<sup>14</sup>

The reforms brought about during the Revolution professed to institute a decisive break with the absolutist past of the *Ancien Régime*. However, the Revolution also drew on the heritage from the *Ancien Régime* by systematising it and subjecting it to new concepts,<sup>15</sup> such as the separation of powers.<sup>16</sup> A particular concern was that the *Parlements* had been hostile towards the administration and had constantly interfered

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<sup>10</sup> See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328.

<sup>11</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 49-63.

<sup>12</sup> 48.

<sup>13</sup> 48.

<sup>14</sup> “Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution.” The English translation is from Barendt E “The Rule of Law and the Separation of Powers” (1995) *Public Law* 599-619 at 599.

<sup>15</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328.

<sup>16</sup> *De l'Esprit des Lois* was published in 1748.

with their activities. The revolutionaries therefore passed the Law of 16-24 August 1789, article 13 of which prohibited the courts from interfering with the activities of the administration; in doing so the principle of the separation of administrative and judicial authorities was promulgated.<sup>17</sup> Shortly thereafter the Law of 6, 7-11 September 1790 and the Law of 7-14 October 1790 allocated administrative litigation to the active administration itself.

The revolutionary reforms resulted in the system of the *administrateur-juge* or *administration-juge* in terms of which the administration was its own judge.<sup>18</sup> This system would eventually develop into the modern administrative jurisdiction.

The creation of an advisory administration, the *Conseil d'État*, in close proximity to the active administration, was the next significant development.<sup>19</sup> Established in 1799, the advisory administration consisted of administrative advisors whose function it was to give advice to active administrative authorities. In practice, administrative litigation gradually came to be deferred to the advisors. Nevertheless, the *Conseil d'État* was performing its advisory and litigious functions on the basis of *justice retenue*<sup>20</sup> which meant that formally the *Conseil d'État* was advising the sovereign and therefore decisions still emanated from the sovereign. Thus, the administration was still overseeing itself, albeit with the intermediary of the advisory administration.

Subsequently the Law of 24 May 1872 enacted that the *Conseil d'État* decides administrative litigation by means of *justice déléguée* instead of *justice retenue*;<sup>21</sup> thus its decisions were made in its own capacity and not formally on behalf of the sovereign. From then on the *Conseil d'État* presiding as a court could dispense with

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<sup>17</sup> See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328.

<sup>18</sup> See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 329. *Administrateur-juge* or *administration-juge* means administrator-judge or administration-judge, respectively, which refers to the administrator or administration presiding over administrative litigation instead of a judge within the judiciary.

<sup>19</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 329-330.

<sup>20</sup> The system of *justice retenue* means that legally it is always the king or the emperor which judges (Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722).

<sup>21</sup> The *Conseil d'État's* capacity to pronounce judgments in the name of French citizens, instead of in the name of the head of state, is known as the *justice déléguée* (Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 48).

litigation without interference from the head of state. At the same time a *Tribunal des Conflits* was established to identify the competent institution where there was a jurisdictional conflict between the administrative and judicial jurisdictions.

However, the doctrine of the *ministre-juge*<sup>22</sup> would impede these positive developments. Until the end of the nineteenth century the legislation of 1799 did not eradicate the system of the *administrateur-juge*. This implied that ministers remained the administrative judges of the common law within their sphere of responsibility. The jurisdiction of the *Conseil d'État* was merely additional to the jurisdiction of the ministers, but did not substitute the former's jurisdiction for the latter's. Therefore, private individuals were still obliged to bring their cases before the relevant minister in the first instance and only then, on appeal, could these case be brought before the *Conseil d'État*. This situation diluted the reforms granting the *Conseil d'État* the capacity of *justice déléguée*. Thus, the active administration remained an administrative jurisdiction, as was the case before 1872.

However, in the case of *Cadot*, CE 13 December 1889 the *Conseil d'État* formally abandoned the theory of the *ministre-juge* by allowing direct recourse to the *Conseil d'État* as a court of first instance, without having to appear before the ministerial jurisdiction. From then on it was the administrative judge of the common law and this development completed the separation of the active administration from the administrative jurisdiction, as expressed by the principle of the separation of the administrative jurisdiction and the active administration.<sup>23</sup>

### 4 2 3 Introducing the *Parlements*

The *Parlements* played a pivotal role in the development of the French administrative-law system. Therefore an overview of the historical function and nature of the institutions named *Parlements* is required. In this section I discuss the meaning of the word *Parlement*, the origins, development and status of the *Parlements*, their characteristics and the problems associated with the *Parlements*.

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<sup>22</sup> Under the system of the *administrateur-juge* the *ministre-juge*, literally “minister-judge”, implies that the minister of a particular state department was the common-law judge of matters within his department.

<sup>23</sup> See, generally, Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970).

Although the French word for parliament is *parlement*, before the 1789 Revolution *parlement* designated an altogether different institution: historically, the word *parlement* referred to a French high court.<sup>24</sup> Therefore, where I employ the word *Parlement* it is in its historical sense, designating the judicial institution; and I prefer it to the English word parliament to avoid any association with a representative legislative body.

Initially there was only one *Parlement*, the *Parlement* of Paris, which originated in the *Curia Regis*.<sup>25</sup> The *Curia Regis* “was at the same time a feudal court and a royal court”<sup>26</sup> as well as “a council of the government”.<sup>27</sup> Gradually the *Curia Regis* divided into three sections, namely, the Council of the King, the Chamber of Accounts, and the *Parlement*.<sup>28</sup> The *Parlement* was the judicial section that later became independent of the Court of the King.<sup>29</sup> Thus, the *Parlement* of Paris was a court of first instance and of appeal.<sup>30</sup>

Despite the *Parlement*'s independence,

“[t]he judgments of the king's court were the work of both the judges who composed it and of the king who presided over it. Once the Parliament became detached from the king's court, it acquired by that very fact a power of its own and an independent jurisdiction. Its judgments were its exclusive work. Nevertheless, the king was always in theory the chief of the Parliament, and it rested with him to come and sit in it as well as to revise its judgments.”<sup>31</sup>

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<sup>24</sup> Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9 n 21. See Brissaud *J A History of French Public Law* tr Garner JW (1969) 432 n 4 (“[I]n the 1200s, the word [*Parlement*] was understood to mean a judicial body in France”).

<sup>25</sup> Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9; Brissaud *J A History of French Public Law* tr Garner JW (1969) 432, 443.

<sup>26</sup> Brissaud *J A History of French Public Law* tr Garner JW (1969) 432 (footnote omitted).

<sup>27</sup> 435.

<sup>28</sup> Brissaud *J A History of French Public Law* tr Garner JW (1969) 379, 435. See, generally, Saint-Bonnet F & Sassier Y *Histoires des Institutions avant 1789* (2008) 320-332. In Brissaud's *A History of French Public Law* James W Garner has translated *Parlement* by Parliament; therefore I retain the word Parliament where it appears in quotations.

<sup>29</sup> Brissaud *J A History of French Public Law* tr Garner JW (1969) 435-437.

<sup>30</sup> 441-442.

<sup>31</sup> 440-441 (footnotes omitted).

Initially, the *Parlement* of Paris had jurisdiction over the whole kingdom of France, but as the territory of France expanded the creation of provincial *Parlements* became necessary.<sup>32</sup> Nevertheless, despite its judicial character, a critical characteristic of the *Parlements* was their contested political role.<sup>33</sup> The political role played by the *Parlements* had a legislative and executive<sup>34</sup> form: the *Parlements* exercised legislative power by making general orders or regulations and by refusing to register royal ordinances. The *Parlements* had come to inscribe royal acts and ordinances on their registers, as a formality, in order to, *inter alia*, satisfy publicity requirements and to have a copy in its possession.<sup>35</sup> In the hands of the *Parlements*, the registration of royal acts gradually became a validity requirement.<sup>36</sup> However, from the king's perspective the validity of his acts did not depend on their registration,<sup>37</sup> France being an absolute monarchy. On the whole, at the onset of the 1789 Revolution, the *Parlements* were able to control nearly every political and administrative matter by

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<sup>32</sup> Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9; Brissaud *J A History of French Public Law* tr Garner JW (1969) 443.

<sup>33</sup> See Brissaud *J A History of French Public Law* tr Garner JW (1969) 445-451. Brissaud explains that

“[a]lthough the [*Parlement* of Paris] was above all a judicial body, its powers were far from being confined to the administration of justice. We see it, without there being any precise text to determine its functions, behaving like a high administrative authority, watching over the administration and the victualing of Paris, controlling the administration of the communes, reforming the universities, and occupying itself with highway administration, with public monuments, with hospitals, and with the police; it sent its members to visit prisons; it assured the execution of the regulations of the craft guilds; it prohibited fairs and markets in times of epidemics; it forbade certain plays at the theatre, suppressed books, and, in 1606, established a tax for the benefit of the poor. Whether we see here a survival of the primitive functions of the Council of the King or an extension of its judicial authority, the Parliament of Paris had, in the 1400s and 1500s, a large share in the administration of public affairs. Specialization of services caused it to return little by little (but never completely) to its true sphere.” (442-443, footnotes omitted).

<sup>34</sup> Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9-11; Brissaud *J A History of French Public Law* tr Garner JW (1969) 358, 445-447.

<sup>35</sup> Brissaud *J A History of French Public Law* tr Garner JW (1969) 446.

<sup>36</sup> 446 (footnote omitted).

<sup>37</sup> Brissaud *J A History of French Public Law* tr Garner JW (1969) 446-447; “All justice Emanated from the King was an undisputed axiom in the 1500s.” (427, footnote omitted).

means of a veto.<sup>38</sup> The increasing specialisation of functions resulted in the *Parlements* being limited to their judicial role and deprived of political functions, at least formally.<sup>39</sup>

The perceived political interference of the *Parlements* was problematic before the 1789 Revolution precisely because France was an absolute monarchy. The conflicts between the royal authority and the *Parlements* “derived from the very fact that whatever powers the *parlements* possessed were delegated ones” and “[i]n theory these courts continued to owe their authority to the Crown, which might revoke and exercise it personally at will.”<sup>40</sup>

This political role was exacerbated by other characteristics of the *Parlements*, namely, the venality<sup>41</sup> and heredity of the judicial office.<sup>42</sup>

“After the 1300s and 1400s it was not rare to see the incumbent of a public office ... disposing of it for the benefit of a third party by the indirect method of a resignation in his favor ... Public office was already in many respects purchasable; there was a regular trade in offices. *The needs of the treasury led to the regularization and the legalization of the practice.*”<sup>43</sup>

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<sup>38</sup> Brissaud J *A History of French Public Law* tr Garner JW (1969) 448.

<sup>39</sup> 449.

<sup>40</sup> Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9.

<sup>41</sup> Saleability or purchasability.

<sup>42</sup> Brissaud J *A History of French Public Law* tr Garner JW (1969) 447.

<sup>43</sup> Brissaud J *A History of French Public Law* tr Garner JW (1969) 458-459. The consequences of the *Parlement's* interference were significant, Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 10:

“to obstruct the central administration, it had now become impossible to divest them their powers. The judicial offices – *parlements* and inferior tribunals alike – in the course of time had become venal and hereditary. With the constantly increasing needs of the royal treasury, the sale of these offices had become a substantial source of revenue, to the obvious detriment of royal sovereignty. In turn, the judicial officers found themselves compelled to ‘sell justice’ in order to reimburse themselves and to get a return on their investment. When, under Louis XIV, reforms were proposed, it was found that the evil was too firmly rooted to be eradicated. A class of public officials had come into existence whose tenure would no longer yield to *ex parte* revocation. Crown and judiciary alike depended on the established system for income.” (footnotes omitted).

The combination of the *Parlements*' political role and the venality and heredity of office created

“in an absolute monarchy, by the simple fact of the separation of powers, an organ of resistance and of control. The Parliament, recruited from the higher middle class, claimed to be the guardian of the fundamental laws of the kingdom and considered itself as a moderating power designed to curb the excesses of royal absolutism.”<sup>44</sup>

The significance of the *Parlements*' political power role lies in the reaction of the royal authority against the *Parlements* during the *Ancien Régime* and the 1789 Revolution. The *Parlements*' political role<sup>45</sup> was perceived as abuse and therefore strong measures would be adopted to prevent its recurrence; ultimately, on 4 October 1790 the Constitutional Assembly abolished the *Parlements* themselves.<sup>46</sup> This constituted a decisive step in the development of the French administrative-law system.

### **4 3 The Traditional Explanation for the Existence of the Administrative Jurisdiction**

According to the so-called “traditional explanation” for the existence of the administrative jurisdiction, the Law of 16-24 August 1790 constitutes the foundation of modern French administrative law and the duality of jurisdiction.<sup>47</sup> The principle of the separation of administrative and judicial authorities, proclaimed in article 13 of

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<sup>44</sup> Brissaud J *A History of French Public Law* tr Garner JW (1969) 447 (footnote omitted). Although this quotation refers to the separation of powers, from Brissaud's discussion as a whole of the development of the *Parlements*, it seems that he means the separation or specialisation of functions as a result of an increase in governmental activities rather than the doctrine of the separation of powers, strictly speaking.

<sup>45</sup> See 4 6 2 1 1 below.

<sup>46</sup> Brissaud J *A History of French Public Law* tr Garner JW (1969) 451.

<sup>47</sup> Bénéoit F-P “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 283; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 723; Velley S “La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 770. See also Sandevor P *Études sur le Recours de Pleine Jurisdiction* (1964) 45.



this law, implies that the judiciary may not interfere with the active administration and, accordingly and consequently, may not preside over administrative litigation.<sup>48</sup> In prohibiting ordinary judges from interfering with the activities of administrative bodies in any way the law intended to exclude administrative litigation from the competence of the judicial tribunals in the name of the independence of the administration.<sup>49</sup> The establishment of a distinct administrative jurisdiction is the result of the principle of the separation of authorities understood thus.<sup>50</sup> The principle of the separation of authorities itself constitutes the French expression or interpretation of the separation of powers, the principle also emanating from the particular interpretation of the separation of powers.<sup>51</sup> Therefore, the administrative jurisdiction is the outcome of a particular interpretation of the separation of powers in 1789.<sup>52</sup>

Thus, firstly, the traditional explanation holds that article 13 of the Law of 16-24 August 1790, in proclaiming the principle of the separation of authorities, constitutes the foundation of administrative law and the duality of jurisdiction; secondly, the prohibition that courts may not interfere with administrative activities implies that courts may not preside over administrative litigation which necessitated the establishment of a distinct administrative jurisdiction; and, finally, the principle of the separation of authorities is itself the product and content of a particular interpretation of the separation of powers: the French interpretation of the separation of powers. Thus, the primacy of the principle of the separation of authorities in relation to the administrative jurisdiction is evident.

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<sup>48</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712.

<sup>49</sup> 712.

<sup>50</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712. See Bénéoit F-P “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 283.

<sup>51</sup> Bénéoit F-P “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 283.

<sup>52</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712.

This view of the development of the administrative jurisdiction has been endorsed by the majority<sup>53</sup> of French public-law specialists. For example, both René Chapus and Yves Gaudemet<sup>54</sup> maintain that administrative law originated in the principle of the separation of authorities, instituted by the Law of 16-24 August 1790 and reiterated by the Law of 16 fructidor An III, and that the separation of authorities withdrew administrative litigation from the competence of the ordinary courts,<sup>55</sup> also, in their view, the revolutionary interpretation of the separation of powers is expressed in the principle of the separation of authorities.<sup>56</sup> English writing on French administrative law has also widely adopted the traditional explanation.<sup>57</sup> In 1987, the *Conseil Constitutionnel* endorsed the traditional explanation.<sup>58</sup>

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<sup>53</sup> Bénédict F-P “Les Fondements de la Justice Administrative” in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 283 (“La justice administrative en France est très généralement présentée comme ayant pour base initiale le principe de la séparation des autorités”); Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 770 (“[U]ne opinion très généralement admise”); Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712 (“[L]a présentation doctrinale classique”).

<sup>54</sup> Gaudemet and Chapus have each authored an established contemporary treatise on French administrative law.

<sup>55</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 2-3; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328-329.

<sup>56</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 2; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328.

<sup>57</sup> See, for instance, Schwartz B “A Common Lawyer looks at the Droit Administratif” (1951) 29 *The Canadian Bar Review* 121-138 at 126 (“In France, as in the common-law world, the separation of powers forms a cornerstone of constitutionalism. The doctrine there has, however, received an interpretation wholly unlike that to which the common lawyer is accustomed.”) (footnote omitted); Bermann GA “The Scope of Judicial Review in French Administrative Law” (1977) 16 *Columbia Journal of Transnational Law* 195-254 at 197 (“[T]he principle of separation of powers has been interpreted in France to forbid the *tribunaux judiciaires* to ‘interfere in any way whatsoever with the performance of administrative functions.’”) (footnote omitted); Cummins RJ “The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France” (1986) 35 *International and Comparative Law Quarterly* 594-628 at 598 (“The fundamental distinguishing feature of this legal structure is a special application of the principle of separation of powers.”), (“[T]he special separation of powers established by the law of 16-24 August 1790 remains a fundamental principle of the constitutional tradition.”) (601); Merryman JH “The French Deviation” (1996) 44 *The American Journal of Comparative Law* 109-119 at 118 (During the 1789 Revolution “a peculiar doctrine of separation of powers, born of

#### 4 4 The Constitutional Status of the French Administrative Jurisdiction

In the decision of 23 January 1987,<sup>59</sup> the *Conseil Constitutionnel* pronounced on the constitutional foundation and the scope of the competence of the French administrative jurisdiction.<sup>60</sup> The *Conseil Constitutionnel* held that the measures contained in articles 10 and 13 of the Law of 16-24 August 1790 and in the decree of 16 fructidor An III which established the principle of the separation of administrative and judicial authorities do not in themselves have constitutional status; thus the principle itself cannot have constitutional status.<sup>61</sup> This implies that the principle is not a necessary corollary of the doctrine of the separation of powers that was proclaimed in article 16 of the Declaration of the Rights of Man and the Citizen, which was subsequently granted constitutional status by the *Conseil Constitutionnel*.<sup>62</sup>

Consequently, the *Conseil Constitutionnel* stated that in accordance with the “French conception” of the separation of powers, there appears among the “fundamental principles recognised by the laws of the Republic”, one in terms of which, except for matters reserved by their nature to the judicial authority, the annulment or amendment of decisions taken, in the exercise of public power prerogatives, by authorities exercising executive power, falls in the last instance under

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conditions specific to 17<sup>th</sup> and 18<sup>th</sup> century France and generalized and universalized in the works of Montesquieu and other Frenchmen, came to play an important role in the design of the new French legal system.”). See also Uhler *A Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 12.

<sup>58</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 770; Chevallier J “Séparation des Autorités Administratives et Judiciaires” in Duhamel O & Meny Y (eds) *Dictionnaire Constitutionnel* (1992) 970-971 at 971.

<sup>59</sup> CC decision n° 86-224 DC of 23 January 1987.

<sup>60</sup> Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed). See Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 767-770.

<sup>61</sup> Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed) 664-665, 667.

<sup>62</sup> 667.

the competence of the administrative jurisdiction.<sup>63</sup> This motivation constitutes, according to the *Conseil Constitutionnel*, the constitutional foundation of the competence of the administrative jurisdiction as well as the scope of that competence.<sup>64</sup>

This foundation of the administrative jurisdiction follows two linkages.<sup>65</sup> Firstly, the *Conseil Constitutionnel* drew on the French conception of the separation of powers: while the separation of authorities is not the necessary consequence of the separation of powers, there is nevertheless in the French juridical tradition a relation between the two ideas.<sup>66</sup> Secondly, the reference to this tradition enabled the *Conseil Constitutionnel* to link the competence of the administrative jurisdiction to the “fundamental principles recognised by the laws of the Republic”.<sup>67</sup>

The position of the *Conseil Constitutionnel* consecrates the traditional explanation for the existence of the administrative jurisdiction, to a significant extent. The traditional explanation is based on the primacy of the principle of the separation of administrative and judicial authorities which has a twofold meaning in terms of this explanation: firstly, the courts are prohibited from interfering with the active administration and, secondly, the institution of a special jurisdiction to preside over administrative litigation is required.<sup>68</sup>

#### 4 5 The Duality of Jurisdiction

The existence of an administrative jurisdiction during the *Ancien Régime* is a controversial question that, according to Chevallier, depends on the criterion employed to define such a jurisdiction.<sup>69</sup> In terms of one view a true administrative jurisdiction, independent of the judiciary, existed throughout the *Ancien Régime*. During the Revolution this jurisdiction was merely re-established and, thus, cannot be

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<sup>63</sup> 665, 667-668.

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<sup>65</sup> 668.

<sup>66</sup> 668.

<sup>67</sup> 668.

<sup>68</sup> Chevallier J “Séparation des Autorités Administratives et Judiciaires” in Duhamel O & Meny Y (eds) *Dictionnaire Constitutionnel* (1992) 970-971 at 970.

<sup>69</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 41-42.

a product of modern public law. Another view holds that during the *Ancien Régime* there were neither procedural guarantees nor an independent administrative jurisdiction. Therefore an administrative jurisdiction cannot be said to have existed.

Chevallier contends that these two criteria both define jurisdiction, but that the latter criterion is a relatively recent development.<sup>70</sup> Firstly, the “material criterion” simply defines administrative jurisdiction as the organ tasked with resolving administrative litigation.<sup>71</sup> The second criterion defines jurisdiction according to the formal and organic requirements of a jurisdictional organ. The latter did not apply before the late nineteenth century and therefore the concept of jurisdiction was based on the material criterion; thus, the status of judge depended on the function performed, not the nature of the institution and decision. As unsatisfactory as the material criterion may be, it was applied before the nineteenth century and, therefore, it is possible to refer to an administrative jurisdiction during the *Ancien Régime* and before 1872.<sup>72</sup>

#### **4 5 1 The Early Origins of an Administrative Jurisdiction**

Bénoit’s contention<sup>73</sup> that the duality of jurisdiction is an historical occurrence, dating from the very origin of French public institutions during the late Middle Ages, is congruent with the material criterion. Initially, during the seigniorial period, all state functions were merged in the person of the royal authority and there was no separation of functions. This was a logical situation because the sovereign held all state power: there was no administration, judicial jurisdiction or administrative jurisdiction as there was only one authority, the feudal lord, which exercised all of

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<sup>70</sup> 42.

<sup>71</sup> In order to define administrative litigation one must be able to distinguish between the administrative and jurisdictional functions. Therefore, while the particular character of administrative litigation may have been recognised at an early stage, the concept was by no means certain or developed since the administrative and judicial functions were merged after the Middle Ages.

<sup>72</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 42.

<sup>73</sup> Bénoit F-P *Le Droit Administratif Français* (1968) 273, 275. Cf. Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 327.

these powers.<sup>74</sup> A maxim of the time, “all justice emanates from the king”,<sup>75</sup> indicates that the king dispensed all justice and any delegation of power could be revoked; thus the autonomy of any judicial function was theoretically impossible.<sup>76</sup> The feudal lord would give his officers tasks to complete in his name, but there was no distinction between administrative or jurisdictional functions.<sup>77</sup> Similarly, with the rise of the monarchy, royal functionaries were at the same time, in effect, administrators and judicial and administrative judges.<sup>78</sup>

With the rapid increase in the number of state activities, and the consequent division of labour, Benoît explains how two trends gradually progressed until the end of the monarchical period: one, distinguishing between administrative and jurisdictional functions and, two, specialisation within the jurisdictional function.<sup>79</sup> Regarding the first trend, in a slow process, some royal representatives specialised in either the administrative or the jurisdictional function. This split was necessitated by the need to apportion labour; it was not the result of a preconceived principle distinguishing functions. Only at the start of the eighteenth century did a conceptual distinction evolve between the administrative and jurisdictional functions as “administration” and “jurisdiction” gained their modern meanings.

In terms of the second trend judges tasked with criminal cases and cases between individuals were limited to hearing only these cases. Administrative affairs and affairs concerning the state fell outside of their competence and they were prohibited from hearing cases related to these matters. Requests or petitions to the king on administrative matters were addressed to his administrative representatives. This arrangement was apparently in conflict with the first trend, which distinguished between administrative and jurisdictional functions, because these representatives had

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<sup>74</sup> Benoît F-P *Le Droit Administratif Français* (1968) 275; Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 43.

<sup>75</sup> Own translation from “Toute justice émane du roi”.

<sup>76</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 43.

<sup>77</sup> Benoît F-P *Le Droit Administratif Français* (1968) 275.

<sup>78</sup> 275.

<sup>79</sup> Benoît F-P *Le Droit Administratif Français* (1968) 275-277. See Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 43-44.

a distinctly administrative character but were nevertheless tasked with presiding over administrative litigation.<sup>80</sup> At the time, the *intendants* and the *Conseil du Roi* were more administrative organs specialised in administrative litigation than true jurisdictions in the modern sense of the word.<sup>81</sup> They were at least as independent as the *Parlements*, although politicised.<sup>82</sup>

Thus, on the whole, the specialisation within the jurisdictional function was characterised by a duality of jurisdiction during the *Ancien Régime*.<sup>83</sup> The Monarchy recognised the distinction between administrative and jurisdictional functions, but never granted a monopoly over the whole jurisdictional function to the judiciary.<sup>84</sup> From the onset the same judge did not hear matters concerning both individuals and administrative matters; administrative litigation was reserved for “judges” close to the administration.<sup>85</sup>

The preceding historical account demonstrates that even before the Revolution France had never had a single jurisdictional *function*, but, rather, jurisdictional *functions*: the administrative jurisdiction originated under the Monarchy at the same time as the judicial jurisdiction.<sup>86</sup> This development has also been confirmed by other leading administrative-law experts such as Alexis de Tocqueville and Edouard Laferrière.<sup>87</sup> Therefore the duality of jurisdiction emerged historically as an institution of the *Ancien Régime*.<sup>88</sup>

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<sup>80</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 276.

<sup>81</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277. See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 47. See also Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9.

<sup>82</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277.

<sup>83</sup> 277.

<sup>84</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277. In addition, any function the *Parlements* exercised was delegated to them by the monarchy and could be revoked, Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9.

<sup>85</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277.

<sup>86</sup> 277.

<sup>87</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277. See Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 14; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 129 n 6.

<sup>88</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 277.

Thus Benoît demonstrates that due to the increase in state functions during the late Middle Ages a division of labour was required. As a result of this division of labour distinct administrative and judicial jurisdictions were established for practical reasons. Therefore, at an early stage during the *Ancien Régime*, an administrative jurisdiction existed, independently of the 1789 revolution and article 13 of the Law of 16-24 August 1790.

#### 4 5 2 The Distinct Concept of Administrative Litigation

Chevallier argues that the development of an administrative jurisdiction during the *Ancien Régime* was closely associated with an additional process, beyond the division of labour: the recognition of the specificity of administrative litigation and the difficulties associated with allocating the competence to preside over administrative litigation.<sup>89</sup> The specificity of administrative litigation became apparent when the judicial and administrative functions were distinguished and the problem of the allocation of administrative litigation arose. Subsequently, exceptional jurisdictions were created to preside over administrative litigation, but they gradually aligned with the autonomous *Parlements*; as a result administrative litigation was allocated to the active administration, and this was the position until the 1789 revolution.

During the thirteenth century the *Curia Regis*, adviser to the state, legislator and supreme court, divided into the *Grand Conseil*, concerned with governmental and legislative matters, the *Chambre des Comptes*, concerned with state finance, and the *Parlement*,<sup>90</sup> competent to decide private disputes. The distribution of functions was a practical concern and the division of labour was not based on principle.<sup>91</sup> Since the various functions were conceptually vague there was much intrusion between all of the branches.

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<sup>89</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 44-49. See Braibant G & Stirn B *Le Droit Administratif Français* (2005, 7<sup>th</sup> ed) 31.

<sup>90</sup> Initially, there was only the *Parlement* of Paris and later numerous provincial *Parlements* were established to address the proliferation of cases.

<sup>91</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 46-47.



The king, as absolute sovereign, remained the supreme judge until the end of the *Ancien Régime* and the *Parlement*, stemming from the *Curia Regis*, was merely the recipient of delegated power.<sup>92</sup> The king could legitimately substitute his decision for any decision taken by the *Parlement* and withdraw any case from the *Parlement's* jurisdiction.<sup>93</sup> Gradually, however, the *Parlement* became independent and this led to conflicts with the monarchy for control of certain functions that would last for centuries.

The opposing claims revealed a seemingly hybrid matter, administrative litigation, which both organs claimed as rightfully theirs:<sup>94</sup> on the one hand, the judiciary claimed authority over administrative disputes on the basis of the cases' nature as a legal dispute; on the other hand, the administration felt that its own authority was implicated and therefore prohibited the *Parlements* from performing this function. Consequently, whenever a matter arose affecting the general interest, administrative action or state finance, the judiciary were not authorised to hear the matter.<sup>95</sup>

The administration justified their position with reference to the necessity of centralising administrative decision-making, the need for special procedures for administrative litigation and the protection of the administration from efforts by judges to control administrative action by means of the *contentieux administratif*, in other words, "administration in the form of the judiciary".<sup>96</sup> Thus at an early stage judicial courts were prohibited from presiding over litigation originating in the activity of royal agents.<sup>97</sup>

From the time of Louis XIII the principle of "juger l'administration, c'est encore administrer" emerged.<sup>98</sup> The Edict of Saint-Germain of 1641 recognised the specificity of the *contentieux administratif* in relation to judicial litigation; it

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<sup>92</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 45; Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 11.

<sup>93</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 45.

<sup>94</sup> 47.

<sup>95</sup> 47.

<sup>96</sup> 47. Own translation from "L'administration en la forme judiciaire".

<sup>97</sup> 48.

<sup>98</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 48. See 4 9 below.

prohibited *Parlements* from taking cognizance of any matter that could concern the state, the administration or the government.<sup>99</sup> This principle was reaffirmed by two decisions of the *Conseil* on 19 October 1656 and 8 July 1661 reserving administrative affairs to organs closely associated to royal power.<sup>100</sup> From then on edicts and ordinances of the king stated that all disputes originating in administrative action are to be brought before the *intendants*.<sup>101</sup>

By the end of the *Ancien Régime*, royal authority had prevailed and most administrative cases were not resolved by the courts.<sup>102</sup> However, the prohibition was not absolute since the *Parlements* remained competent in respect of some administrative litigation.<sup>103</sup> These conflicts allowed a clear idea of the *contentieux administratif* to emerge and after the fourteenth century its existence was established.<sup>104</sup>

## **4 6 The Principle of the Separation of the Administrative and Judicial Authorities<sup>105</sup>**

### **4 6 1 The Separation of Authorities during the *Ancien Régime***

According to the traditional explanation the principle of the separation of authorities was first proclaimed in article 13 of the Law of 16-24 August 1790. Given this law's central, founding role in the development of the duality of jurisdiction,<sup>106</sup> Bénéoit's critique<sup>107</sup> of the originality of article 13 is set out below.

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<sup>99</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 48; Bénéoit F-P *Le Droit Administratif Français* (1968) 278.

<sup>100</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 48.

<sup>101</sup> 48.

<sup>102</sup> 49.

<sup>103</sup> 49.

<sup>104</sup> 49.

<sup>105</sup> Uhler refers to the "differentiation of agencies", *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 12.

<sup>106</sup> At least in terms of the traditional explanation.

<sup>107</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 278-279.

As state functions became more defined and as competences were distributed among various royal agents, the courts reacted against this process of specialisation due to the strict limitation of their functions. The courts, in particular the *Parlements*, not only rejected the distinction between administrative and jurisdictional functions and the limitation of their jurisdiction, but declared themselves competent to preside over administrative matters originating in the activities of the active administration and over litigation between the administration and private individuals. Thus, the courts encroached upon administrative litigation and the functional sphere of the administration, thereby impeding the completion of the administrative and jurisdictional structure set in motion during the Monarchy. This state of affairs resulted in continuous conflict between the administration and the courts.

The Monarchy immediately responded to the courts' opposition. The Monarchy had created judicial judges to hear cases between individuals and not to interfere with administrative matters under the pretence of judging the administration. Therefore, in 1641 the Monarchy prohibited judicial judges from presiding over any administrative matter in the Edict of Saint-Germain.<sup>108</sup> The purpose was to safeguard the progress that had been made and thus, according to Bénéoit, Richelieu formally laid down a principle which has been maintained ever since and which would come to be known as the principle of the separation of authorities. This principle prohibits judicial judges from taking cognizance of administrative matters and administrative litigation.<sup>109</sup> The Edict of Saint-Germain declared unequivocally that judicial courts were only created to render justice to French subjects and that they were expressly forbidden from

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<sup>108</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 278; Bénéoit F-P "Les Fondements de la Justice Administrative" in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 284. See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 328.

<sup>109</sup> Bénéoit F-P *Le Droit Administratif Français* (1968) 278. Bénéoit contends that the provisions which prohibited the judiciary from interfering with the administration and from presiding over administrative litigation later became known as the principle of the separation of authorities. In contrast, Chevallier, Sandevour and Troper argue that there is no link between the separation of authorities, as declared in the Law of 16-24 August 1790, and the decision to prohibit the judiciary from presiding over administrative litigation. Therefore, a distinction should be maintained between the judiciary's interference with the administration through litigation and other forms of interference. In addition, here Bénéoit is referring to the import of the principle during the *Ancien Régime*, as opposed to the those authors who discuss the principle's meaning in the light of the Revolution and the revolutionary debates, in particular.

deciding any matter concerning the State, the administration or the government. Thus, 150 years before the Revolution the principle of the separation of authorities was formally proclaimed; in other words, this proclamation followed the installation of a jurisdictional duality and was the consequence, not the cause, of this factual duality.<sup>110</sup>

However, the Edict of Saint-Germain did not finally resolve the conflict: as the Monarchy weakened during the second half of the eighteenth century the *Parlements* again flouted the prohibitions. They refused to register royal ordinances for reform, interfered with the functioning of the administration, gave orders to administrative authorities and summoned the king's agents under the pretext of judging them.<sup>111</sup> At the time the *Parlements'* conduct was considered abuse and a contributing factor to the outbreak of the 1789 Revolution. This shows that the idea of the separation of authorities had become accepted and political attacks upon it were regarded as inadmissible.

The Edict of Saint-Germain and article 13 of the Law of 16-24 August 1790 have very similar wording. Therefore, the Edict of Saint-Germain questions the professed originality of article 13 as a formulation of the Revolution. Furthermore, the Edict of Saint-Germain precedes the separation-of-powers doctrine by over 100 years,<sup>112</sup> which undermines the argument that the separation of authorities flows from the separation of powers and is the French interpretation of the separation of powers. Nevertheless, the Edict of Saint-Germain and article 13 cannot necessarily be equated.

#### 4 6 2 The French Revolution of 1789 and the Separation of Authorities

The principle of the separation of administrative and judicial authorities, as the innovative concept of the traditional explanation, is critiqued, not only by B enoit on the basis of the preceding argument, but also by Sandevour, Troper, Velly, Mestre and, in particular, Chevallier. In surveying their critiques, the role of article 13 of the

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<sup>110</sup> B enoit F-P "Les Fondements de la Justice Administrative" in *M langes offerts   Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295 at 284.

<sup>111</sup> B enoit F-P *Le Droit Administratif Fran ais* (1968) 279; Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 10.

<sup>112</sup> As mentioned, Montesquieu's *De l'Esprit des Lois* was published in 1748.

Law of 16-24 August 1790 is set out in two parts.<sup>113</sup> The first part explains what the *constituants* and the Assembly sought to achieve with the promulgation of the Law of 16-24 August 1790 and particularly article 13, expressing the principle of the separation of authorities. The second part indicates what the Law of 16-24 August 1790 did not attempt to address whatsoever and what was left unresolved at the time the statute was promulgated.

## 4 6 2 1 The Positive Role of the Separation of Authorities

### 4 6 2 1 1 The Mischief

A useful starting point in determining the actual role of the Law of 16-24 August 1790 on the organisation of the judicial branch is to identify the mischief that the statute sought to remedy. Certainly, in proclaiming this law, the *constituants*' principal priority was to react against the abuses perpetrated by the courts of the

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<sup>113</sup> Sandevior provides a timeline of the stages constituting the determination of the authorities competent to preside over administrative litigation during the revolutionary period, Sandevior P *Études sur le Recours de Pleine Jurisdiction* (1964) 52. This timeline is reproduced below in order to facilitate the subsequent discussion:

22 December 1789: The first draft on judicial organisation is presented to the Assembly in terms of which administrative litigation is allocated to an exceptional jurisdiction named *tribunal d'administration* ("tribunal of the administration").

24 March 1790: Thouret opens the general discussion.

30 March 1790: Chabroud argues for the full jurisdictional competence of the judiciary.

31 March 1790: A programme for discussion is tabled by Barrère de Vieuzac. It consists of ten questions on principles and the ninth addresses exceptional tribunals.

27 May 1790: The ninth question is tabled for discussion, but the discussion is postponed.

5 July 1790: The second draft on judicial organisation is presented to the Assembly, also suggesting the allocation of the *contentieux administratif* to a tribunal of the administration. The provision that will later become article 13 of the Law of 16-24 August 1790 is adopted.

July 1790: Pezous proposes the idea of the *administrateur-juge*.

12 August 1790: The question of a tribunal of the administration is adjourned again.

16 August 1790: The Law of 16-24 August 1790 is adopted without any mention of administrative litigation.

6 September 1790: The Law of 6, 7-11 September 1790 is adopted, enacting the system of the *administrateur-juge*.

*Ancien Régime*;<sup>114</sup> specifically, article 13 prohibited the courts from interfering with the activities of the administration. Therefore, it is also important to characterise the perceived nature of these abuses, from the perspective of the *constituants*, in order to appreciate the mischief and the intended role of the statute.

Chevallier argues that the *constituants* were targeting a particular mischief: during the *Ancien Régime* the *Parlements* had exercised both legislative and regulatory powers, in addition to their jurisdictional competences.<sup>115</sup> The *constituants* regarded such a merging of powers, which rendered the *Parlements* both administrators and legislators, as one of the abuses distorting the exercise of judicial power. Such an encroachment was intolerable in a good constitution. Significantly the distrust of the *Parlements* did not result from their deciding administrative litigation, but from the political role these courts had played during the *Ancien Régime* and this alone.<sup>116</sup> Thus, it is the political competences exercised by the *Parlements* during the *Ancien Régime* which constituted the mischief.

#### 4 6 2 1 2      **The Primacy of the “Ordinary” Separation of Powers**

Sandevour demonstrates that, as far as the *Assemblée Constituante* of 1789 was concerned, the separation of powers was a vital principle that the *constituants* considered dogma.<sup>117</sup> Significantly, especially for the purposes of this discussion, Montesquieu’s theory was central in all matters; even the idea of a *justice*

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<sup>114</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 66-67; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714.

<sup>115</sup> On the one hand, they participated in the exercise of the legislative function by means of the power of registering ordinances (*ordonnances*); this, gradually led to the *Parlements* controlling the regularity of ordinances through *vérification* and to examination of their legitimacy/cogency (“bien-fondé”) in leading to the submission to the king of “remonstrances”. On the other hand, they assumed the right to make regulations, not only for judicial matters, but also for all matters concerning public order, in exercising police competences; in addition the *Parlements* did not hesitate to summon royal agents to appear before them and to give them instructions (Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714).

<sup>116</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 53; Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 52.

<sup>117</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 46-49.

*administrative* was strongly influenced by the separation of powers. Therefore, the important question is what the separation of powers entailed for the *constituants*.

Specifically, from 22 December 1789 onwards, the guiding role of the separation of powers in relation to the *justice administrative* is evident. The debates concerning the judicial branch reveal numerous references to the separation of powers.<sup>118</sup> However, contrary to what may be expected given the traditional explanation, Sandevour explains that the separation of powers was restrictive:<sup>119</sup> it impeded the development of a *justice administrative*. The reason for this obstructive effect was the following: for the *constituants* the application of the separation of powers as such superseded their distrust of the *Parlements*. Nevertheless, the question remains: how did the *constituants* understand the separation of powers to allow for this effect?

A corollary of the separation of powers was the idea of jurisdictional unity which implies that deciding cases naturally falls within the judicial branch and that the notion of judges outside this branch is impossible.<sup>120</sup> Therefore, having judges within the executive was simply impermissible.<sup>121</sup> This explains how the separation of powers impeded the development of the *justice administrative*, rather than serving as a catalyst, despite the distrust of the *Parlements*.<sup>122</sup>

#### 4 6 2 1 3      **The Intended Purpose of the Law of 16-24 August 1790**

In the light of the mischief which the Law sought to remedy and the primacy of the separation of powers in its ordinary sense, as opposed to the so-called French conception, the question “what was the original meaning attributed to article 13<sup>123</sup> by the *constituants* and the *Assemblée*” is discussed. In other words, what was the content of the principle of the separation of authorities in the Law of 16-24 August 1790?

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<sup>118</sup> 47.

<sup>119</sup> See Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 47.

<sup>120</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 48-49; see Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 66-67 (the revolutionaries' narrow understanding of the separation of powers implied that each organ of state is entrusted through delegation with a portion of sovereignty in order to exercise their function, and their function alone).

<sup>121</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 49.

<sup>122</sup> 48.

<sup>123</sup> See Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 53.

Sandevour shows why, in his view, the separation of authorities itself was concerned with the application of the separation of powers, as defined in the preceding section, to the relationship between the judiciary and the administration.<sup>124</sup> In terms of this analysis, the separation of authorities was simply an expression of the separation of powers, understood conventionally, in a specific context. In particular, Sandevour demonstrates on two grounds that the meaning of article 13 is less original than has been thought since the nineteenth century: one, in proclaiming the principle of the separation of authorities, the *constituants* were not referring to the separation of jurisdictions, but exclusively to the separation of powers and, two, in proclaiming the separation of powers the *constituants* were not referring to a so-called French conception, but exclusively to the “rational”, or ordinary, conception of the separation of powers.<sup>125</sup>

The fundamental principles having been proclaimed in article 16 of the Declaration of the Rights of Man and of the Citizen on 26 August 1789, the next step was to apply them. The dominant principle in relation to the judiciary was the separation of powers; therefore the purpose of the Law of 16-24 August 1790 was simply to apply the separation of powers to the structure of the judiciary.<sup>126</sup> The primacy of the separation of powers was pertinent to the distrust of the *Parlements*. Significantly, as mentioned, this distrust was the result of the political role played by the *Parlements* during the *Ancien Régime* and not of their competence in matters of administrative litigation. The application of the separation of powers was expected to remedy these abuses perpetrated by the *Parlements*. As such article 13 merely restated the prohibition already promulgated in the earlier Law of 22 December 1789 on administrative assemblies, which declared that judges may not interfere with the activities of administrative organs in any way;<sup>127</sup> judicial interpretation of the Law of

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<sup>124</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 52-56.

<sup>125</sup> 52-53.

<sup>126</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 53; see Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716.

<sup>127</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 54-55, 56; Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 772. Velley refers to the Law of 22 December 1789-January 1790 (772).



22 December 1789 makes it clear that the law only prohibited infringements of the separation of powers.<sup>128</sup>

Thus one can identify three important characteristics of the separation of authorities, indicative of its content in terms of Sandevor's analysis: one, the separation of authorities did not imply a duality of jurisdiction; two, the separation of authorities implied and restated an application of the ordinary separation of powers; and, finally, the separation of authorities was a response to the political infringements of the courts during the *Ancien Régime*, which did not include administrative litigation. Therefore the purpose of the Law was to apply the separation of powers as a response to the abuses of the *Ancien Régime*. These observations reveal the nature of the principles, but introduce another question: how did the Law of 16-24 August 1790 structure and regulate the judiciary in order to realise the fundamental principles which this statute sought to apply?

#### **4 6 2 1 4      The New Position and Role of the Judiciary**

The Law of 16-24 August 1790 was a response to the political role exercised by the *Parlements* and an expression of the separation of powers. In particular, article 13 affirmed the principle of the separation of authorities, which applied the separation of powers to the relationship between the judiciary and the administration. In addition, the Law regulated the position of the judiciary in relation to all the branches of government and this requires elaboration. Therefore the following discussion considers the position of the judiciary in government generally as well as in relation to the administration. This clarifies the meaning of the principle of the separation of authorities.

Chevallier argues that the *constituants* intended to react against the abuses of the *Parlements* through two strategies.<sup>129</sup> Firstly, the integrity of the judicial function had to be established since the earlier merging of functions had compromised this function,<sup>130</sup> and, secondly, strict limitations had to be set for the judicial branch by

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<sup>128</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 55.

<sup>129</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714.

<sup>130</sup> That is, the judicial branch's exercise of legislative and administrative functions in addition to its jurisdictional functions amounted to a non-separation of powers.

subordinating the judiciary to the legislative branch and separating the judiciary from the administrative branch.

Chevallier relies on the *constituants*' position for the judiciary within the institutional structure of the state and their definition of the judicial function to justify his argument.<sup>131</sup> On the whole, the judiciary was placed in a subordinate position to the legislature. This was the case since legislating was regarded as the supreme function and therefore all other state functions were subordinate to it. Notably, authors such as Montesquieu and Rousseau, with his idea of law as the expression of the general will, supported this view. As far as the *Assemblée* was concerned the legislature, executive and judiciary were not three equal powers in terms of the separation of powers: the judicial and the administrative functions were both subordinate to the legislative function.<sup>132</sup> Consequently, the judicial function could only be strictly subject to the law.<sup>133</sup>

The judicial function itself was defined as a mechanical application of the law to specific cases, i.e. performing the judicial function was simply the formulation and declaration of a syllogism.<sup>134</sup> The debates of the *Assemblée* and the position of the judiciary within the governmental structure reinforce the conception of the judicial function as the mechanical application of law.<sup>135</sup> This implied that judges were to keep to the letter of the law, remaining faithful to the will of the legislator.<sup>136</sup> In other words, judges determined whether the facts of a particular case came within the application of a law and, if so, applied the law.<sup>137</sup> The Law of 16-24 August 1790 was

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<sup>131</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714-715.

<sup>132</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 176-177; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714.

<sup>133</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 172; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714.

<sup>134</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 50; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714-715.

<sup>135</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 50.

<sup>136</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714-715.

<sup>137</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 50.

simply the legislative expression of these conceptions of the judiciary's position and function.<sup>138</sup>

#### 4 6 2 1 5 The Prevailing Conception of the Judiciary Applied

The mischief, the purpose, the prevailing principles and the status of the judiciary in terms of these principles have been established. It has also been shown that the separation of powers was applicable to the judiciary's relationship with both the administration and the legislature.<sup>139</sup> Nevertheless, the *constituants* went further by determining specific boundaries within which the courts were to operate.<sup>140</sup>

As mentioned, the organisation of the judiciary by means of this statute was essentially an exercise in applying the separation of powers for the specific purpose of preventing the judiciary from interfering with the legislature and the administration.<sup>141</sup> The separation of powers was not merely declared in the abstract to be applicable to the judiciary, though, but applied separately to the relationships between the judiciary and the legislative and administrative branches.<sup>142</sup> In other words, the statute gave specific content to the separation of powers in the context of these relationships.

The debates on the drafts for the Law of 16-24 August 1790 indicate how the separation of powers was applied to these relationships. Regarding the limitations of the judiciary in relation to the legislature,<sup>143</sup> the First Constitutional Committee<sup>144</sup> declared unanimously that the principles of judicial organisation require that the judiciary may not participate in the legislative function whatsoever. The prohibition

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<sup>138</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715.

<sup>139</sup> The separation of the judiciary and the legislature and the separation of the judiciary and the administration were both treated as separation-of-power matters, Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 54.

<sup>140</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 714, 715. Once again the *constituants* were motivated by the abuses perpetrated by the *Parlements* during the *Ancien Régime* (715).

<sup>141</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 53-54.

<sup>142</sup> 53-54.

<sup>143</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715.

<sup>144</sup> Through Bergasse (Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715).

extended to taking an active part in the law or influencing the making of law in any way. The law, as the expression of the general will, had to be placed beyond any judicial influence.<sup>145</sup> Therefore, in the Law of 16-24 August 1790, judges were expressly prohibited from participating in the making of law and from preventing or delaying the execution of law (article 10); judges were obliged to transcribe laws (article 11); they were prohibited from making regulatory decisions (article 12); and were obliged to refer any interpretation of the law to the legislature (article 12).<sup>146</sup> Thus, not only were judges unable to intervene with the legislative process, but also they were denied any power of interpretation.<sup>147</sup>

Article 9 of the Second Constitutional Committee's first draft addressed the relationship between the administration and judiciary as follows: the judicial power being distinct and having to be kept separated from the power of administering, the courts of justice cannot take any part in the administration's matters, nor disrupt, in whatsoever manner, the operations of the administration, nor summon before them administrators for reasons relating to their functions, on penalty of forfeiture.<sup>148</sup> This formulation, submitted by Thouret on 24 March 1790 as the expression of the intention to separate the judicial power from administrative functions, was approved by the Assembly, including proponents of the unity of jurisdiction.<sup>149</sup>

On 5 July 1790 the second draft was presented to the Assembly. This draft modified the wording of the provision which would become article 13 of the Law of 16-24 August 1790 by identifying two possible forms of encroachment on the administrative power, such as they had manifested themselves during the *Ancien Régime*, namely, the exercise of administrative functions through regulations and

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<sup>145</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715.

<sup>146</sup> 715.

<sup>147</sup> 715.

<sup>148</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715; see Sandevor P *Études sur le Recours de Pleine Jurisdiction* (1964) 54.

<sup>149</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 715; Velley S "La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs" (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 771-772.

administrative meddling by means of summonses and directives.<sup>150</sup> The text of 5 July was adopted without any debate<sup>151</sup> and on 16 August article 13, declaring the principle of the separation of authorities, became law.<sup>152</sup> Therefore, according to Chevallier, the meaning of the text is perfectly clear: the practices of the former *Parlements* were incompatible with the doctrine of the separation of powers and in order to prevent a return to these abuses the judiciary was made subject to explicit limitations.<sup>153</sup>

#### 4 6 2 1 6      **The *Constituants* had Faith in their Renovatory Work**

Due to these reforms there was no concern that the abuses of the *Ancien Régime* would continue.<sup>154</sup> The *constituants* were confident that the courts would respect the law and that the infringements of the former *Parlements* would be curbed by the reformed structure of the judiciary.<sup>155</sup> As far as the relationship between the judiciary and the legislature was concerned, the courts had a subordinate position which meant that the legislature had sufficient power to protect its position.<sup>156</sup> Furthermore, since judges were now merely applying the law, judges were incapable of controlling the administration; in other words, the administration was subject to the law and not the courts.<sup>157</sup> Thus, once the Law of 16-24 August 1790 prohibited the courts from interfering with the activities of the administration, administrative litigation could be allocated to the judiciary without contradicting the principles expressed in the Law.<sup>158</sup>

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<sup>150</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716.

<sup>151</sup> 716.

<sup>152</sup> Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>153</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716.

<sup>154</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 51; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>155</sup> Sandevor P *Études sur le Recours de Pleine Jurisdiction* (1964) 45-46.

<sup>156</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 53.

<sup>157</sup> 50.

<sup>158</sup> 53.

## 4 6 2 2 The Limits of the Law of 16-24 August 1790

### 4 6 2 2 1 Adherence to the Unity of Jurisdiction

The former *Parlement's* exercise of political functions was not the only *Ancien Régime* legacy requiring revision. Chevallier explains that the *constituants* also intended to modify the administrative-litigation system that had been operating under the *Ancien Régime*, a system characterised by complexity and unpopularity.<sup>159</sup> How this system originated and its nature is important.<sup>160</sup> The complexity of the system was due to the proliferation of jurisdictions competent to preside over administrative litigation; and the proliferation of jurisdictions resulted from the centuries-old conflicts between the monarchy and the *Parlements* for control over administrative litigation.

As courts became more independent during the *Ancien Régime*, the monarchy tried to prevent them from presiding over administrative litigation.<sup>161</sup> Initially, from the fourteenth century onwards, the monarchy allocated administrative litigation to various special administrative jurisdictions, which were closely associated with the monarchy. However, as these institutions grew more independent they became aligned with the *Parlements*. This brought the monarchy to transfer again the function of administrative litigation to organs linked more directly to the monarchy. Thus, from the sixteenth century onwards, the *intendant* gradually became the administrative judge and the *Conseil du Roi*, apart from its traditional functions, presided over administrative complaints and actions brought by private individuals against the king concerning the policing of the kingdom.<sup>162</sup> Subsequently, the Edict of Saint-Germain of 1641 formally recognised the specificity of administrative litigation by prohibiting the *Parlements* from presiding over matters which could concern the state, the administration or the government; nevertheless, despite this recognition one

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<sup>159</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716-717.

<sup>160</sup> See Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716-717.

<sup>161</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716.

<sup>162</sup> 716-717.

cannot deduce a true separation between administrative and private litigation during the *Ancien Régime*.<sup>163</sup> Administrative litigation was shared haphazardly between, on the one hand, the true jurisdictions, the courts and the special jurisdictions, and, on the other hand, active administrative organs, which held administrative and jurisdictional competences simultaneously.<sup>164</sup>

It is this confusion that was challenged during the Revolution and popular opinion demanded the elimination of the exceptional jurisdictions and the *intendant*.<sup>165</sup> How would the elimination of these offices be accommodated, though? Once again the separation of powers played a central role. The unity of jurisdiction, a corollary of the separation of powers, implied that the judicial function could only be performed by one branch and the function of deciding cases naturally fell to the judicial branch.<sup>166</sup> For the *Assemblée* the task of applying law to administrative action was no different to the application of law to private activities.<sup>167</sup> Furthermore, in 1789 the specificity of administrative *litigation* in relation to administrative *action* was recognised; during the Revolution no one supported the idea that “to judge the administration is still administering”.<sup>168</sup> The *constituants* and the members of the *Assemblée* were neither under the impression that judging the administration amounts to administering nor that administering includes judging the administration.<sup>169</sup> Therefore references to any type of dispute or litigation, administrative or otherwise, implied the function of judges within the judiciary.<sup>170</sup> Only one definition was possible in terms of the separation of powers and the revolutionary legislation: presiding over administrative

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<sup>163</sup> 717.

<sup>164</sup> 717.

<sup>165</sup> 717.

<sup>166</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 48-49; Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 68; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

<sup>167</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 58; Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 68.

<sup>168</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

<sup>169</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57.

<sup>170</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 49; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

litigation is simply judging, the natural function of the judiciary.<sup>171</sup> In presiding over administrative litigation, the courts would remain within the limits of their sphere of competence and they would not be encroaching upon the administrative function.<sup>172</sup> Thus, in 1789 the intention of the majority of the *Assemblée* was for administrative litigation to be assimilated under judicial litigation.<sup>173</sup> This was the solution to the unpopular system of administrative litigation that existed during the *Ancien Régime*. Nevertheless, although the definition of the judicial function was clear in this regard, its application was problematic.<sup>174</sup>

#### 4 6 2 2 2      **The Will to Eliminate All Exceptional Jurisdictions**

The intention of eliminating all exceptional jurisdictions was evident from the onset, but the recognition of the specificity of administrative litigation meant that their elimination would be problematic.<sup>175</sup> The First Constitutional Committee's draft, presented by Bergasse on 17 August 1789, eliminated all exceptional jurisdictions in line with democratic demand. When this draft failed the Second Constitutional Committee proposed a different solution, whilst professing to have followed the Bergasse draft.

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<sup>171</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57; Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 49.

<sup>172</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

<sup>173</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 68; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

<sup>174</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717. One argument holds that the *constituants* adopted a restrictive conception of the judicial function that implied the exclusion of administrative disputes from the onset: in considering that judges were appointed to protect only civil liberty, and not political liberty, or to apply civil law, and not political law, the *constituants* could have been expressing their intention to limit judicial competence to disputes between individuals; however, this interpretation advanced by Duguit has been criticised to the extent that the reference to political laws certainly includes constitutional laws (717).

<sup>175</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69-70; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717-718.



On 22 December 1789 Thouret presented the Second Constitutional Committee's draft which would also eliminate all exceptional jurisdictions. However, even though the report submitted that all litigation under the jurisdiction of the exceptional jurisdictions should be allocated to the ordinary courts, the complicated nature of a large kingdom meant that the courts would not be able to adjudicate matters of a certain nature without serious disadvantages.<sup>176</sup> Therefore the committee proposed to establish a *tribunal d'administration* ("tribunal of the administration") in each department, charged with presiding over litigation concerning the administration and taxation.<sup>177</sup> This tribunal, composed of five elected judges and presiding over simple issues at no cost, would be competent to hear matters of taxation, public works, elections, and policing.<sup>178</sup> Nevertheless, the proposed tribunal was a specialised tribunal within the judiciary.<sup>179</sup>

Predictably, when the proposal was presented on 24 March, *only* the tribunal's status as an exceptional jurisdiction was challenged in the *Assemblée* because this system would merely reinstate the multiplicity of tribunals which had prevailed during the *Ancien Régime* and which was rejected by the majority of the *constituants* and the public.<sup>180</sup> Nevertheless, while the deputies staunchly defended the unity of jurisdiction

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<sup>176</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>177</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL "Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents" (1996) *Revue Française de Droit Administratif* 289-300 at 290.

<sup>178</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL "Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents" (1996) *Revue Française de Droit Administratif* 289-300 at 290.

<sup>179</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69-70; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>180</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 70; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre

they were aware of the special character of administrative litigation.<sup>181</sup> Thus, the *constituants* faced a dilemma: on the one hand, instituting specialised judicial tribunals was contrary to democratic demand and, on the other, allocating administrative litigation to the judiciary disregarded the specificity of administrative litigation.<sup>182</sup>

The *constituants* subsequently agreed that the principles must be finalised before discussing the details of judicial organisation.<sup>183</sup> To this end Barrère de Vieuzac provided a programme for discussion consisting of ten questions on 31 March 1790.<sup>184</sup> The ninth question enquired whether the same judges would decide all matters or whether there would be different jurisdictions for cases concerning commerce, administration, taxation and policing.<sup>185</sup> Significantly, this question did not suggest the possibility of removing administrative litigation from the jurisdiction of the judiciary.<sup>186</sup> The alternatives were limited to courts competent to preside over all matters and exceptional courts for specific categories of litigation where technical expertise would be required.<sup>187</sup> When this question was submitted to the *Assemblée* on 27 May for discussion, hostility toward exceptional tribunals resulted in postponement of the matter.<sup>188</sup>

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JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 290-291.

<sup>181</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 70.

<sup>182</sup> 70.

<sup>183</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>184</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 51; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718, 718 n 43; Velly S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 773, 773 n 23.

<sup>185</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718, 718 n 43; Velly S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 773, 773 n 23.

<sup>186</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 51.

<sup>187</sup> 51-52.

<sup>188</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 61; Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration*

**4 6 2 2 3      5 July 1790: The Question of the Tribunal of the Administration**

The debates and voting that took place on 5 July 1790 are crucial in the analysis of authors who challenge the traditional explanation. On 5 July the Constitutional Committee presented a new draft on the structure of the judiciary to the *Assemblée*<sup>189</sup> which included provisions proposing both the creation of a *tribunal d'administration* and the entrenchment of the separation of authorities.<sup>190</sup> However, these proposals were treated independently and only the latter was voted upon and adopted in the Law of 16-24 August 1790. In particular, Heading 13 of the new draft, entitled “Judges for the litigation of administration and taxation”,<sup>191</sup> proposed the institution of a *tribunal d'administration*, now consisting of three members.<sup>192</sup> The suggestion of such a tribunal encountered the same opposition against the proliferation of jurisdictions as before, with concerns of high costs and conflicts of competence.<sup>193</sup>

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*Active* (1970) 70; Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52 (Troper refers to the discussion taking place on 27 March 1790, but this appears to be an error because Troper also indicates that the questions were first submitted on 31 March); Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718. Le Chapelier suggested an adjournment on the basis that the question of a tribunal of taxation could not be decided before the determination of the system of taxation (718).

<sup>189</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 70; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>190</sup> Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>191</sup> 291.

<sup>192</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 70; Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>193</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 70; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre

On the 5<sup>th</sup> of July, the day that the draft was debated, Heading 13 was not discussed and Barrère de Vieuzac's ninth question remained unaddressed and unresolved.<sup>194</sup> Also, only the provisions that were presented during the debates were voted on<sup>195</sup> and this included the measure that would later become Article 13.<sup>196</sup> Thus, on the day that the provision that would later become Article 13 was *adopted*, the Assemblée had not as yet resolved the question of the allocation of administrative litigation.<sup>197</sup> Later, on 12 August, the debate on the tribunal of the administration was adjourned again and on 16 August the law on judicial organisation was adopted, without Heading 13.<sup>198</sup> Nevertheless, the majority of the measures were promulgated as law, including article 13 declaring the principle of the separation of authorities.<sup>199</sup>

The implication of these events is that if a specialised administrative tribunal within the judiciary was so vehemently opposed, had the promulgation of the separation of authorities entailed a duality of jurisdictions, not merely specialisation within the judiciary, the supporters of the unity of jurisdiction would certainly have raised their concerns in the debates and would not have voted in favour of a system directly opposed to their foundational principles.

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JL "Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents" (1996) *Revue Française de Droit Administratif* 289-300 at 291. The memoir of Pezous, published in July, reveals the opposition to the the institution of tribunals of the administration and for taxation where he says that these tribunals would result in saturating France with judges, overburdening the people with expenses and questions of jurisdiction (Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718).

<sup>194</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52.

<sup>195</sup> 52.

<sup>196</sup> Velly S "La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs" (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 773.

<sup>197</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 56, 61. As far as the Constitutional Committee was concerned administrative litigation was still allocated to a tribunal of the administration (56).

<sup>198</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL "Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents" (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>199</sup> Mestre JL "Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents" (1996) *Revue Française de Droit Administratif* 289-300 at 291.

Some authors, such as Laferrière, Bonnard, Waline and Weil,<sup>200</sup> claim that Article 13, which prohibits judges from interfering with the activities of the administration, separated administrative and judicial litigation.<sup>201</sup> Chevallier asserts that the debates prove that this view is completely inaccurate: partisans of the unity of jurisdiction adopted this view without the least discussion for it merely reaffirmed the separation of powers and the prohibition of the judiciary from performing administrative acts.<sup>202</sup> The problem of the allocation of administrative litigation, which had been set aside for the moment, remained in its entirety.<sup>203</sup>

#### 4 6 2 2 4      **The Tribunal of the Administration: A Judicial Organ**

Chevallier points out that many notable authors on French administrative law<sup>204</sup> have wrongly believed that the *tribunal d'administration* was a true administrative jurisdiction, i.e. an independent jurisdiction competent to preside over administrative matters, and that its institution would have implemented the separation of the administrative jurisdiction and the active administration.<sup>205</sup> However, Sandevor, Chevallier and Mestre argue that the *tribunal d'administration* was merely a specialised judicial tribunal.<sup>206</sup> The fact that the provision recommending such a

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<sup>200</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71 n 103.

<sup>201</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71. See Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 172.

<sup>202</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71. See Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 172.

<sup>203</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71.

<sup>204</sup> Dareste, Laferrière, Duguit and Appleton.

<sup>205</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69.

<sup>206</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 56, 60; Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718; Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

tribunal was inserted in the draft for the organisation of the judiciary, that Thouret claimed that the principles in the Bergasse draft had been followed, and that the debates of the most fervent supporters of the unity of jurisdiction only opposed the proliferation of jurisdictions and did not mention the separation of powers are cited as evidence that this tribunal would merely amount to a specialisation within the judiciary.<sup>207</sup> As Sandevour and Chevallier point out, the distinction between the ordinary courts and the *tribunal d'administration* was simply functional, not political.<sup>208</sup> Thus, even if the *tribunal d'administration* had been instituted it would still have fallen within the judicial branch,<sup>209</sup> as independent of the administration as the ordinary courts.<sup>210</sup> Therefore, the proposition to institute this tribunal did not contradict the allocation of administrative litigation to the judiciary.<sup>211</sup>

The nature of the *tribunal d'administration* is significant because it demonstrates that even the alternative solutions which were strongly opposed during the debates adhered to the unity of jurisdiction and the ordinary separation of powers. Even though administrative matters were decided in terms of different rules<sup>212</sup> such matters nevertheless came within the judicial sphere due to the unity of jurisdiction.<sup>213</sup> In terms of the prevailing principles it was theoretically possible to institute exceptional jurisdictions alongside the ordinary courts and within the judicial branch.<sup>214</sup> However,

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<sup>207</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69-70; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>208</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 58; Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 69-70; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>209</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 56, 60; Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

<sup>210</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 56.

<sup>211</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>212</sup> The decisions required simple reports and no formal procedures or costs.

<sup>213</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 58.

<sup>214</sup> 58.

it was inconceivable to allocate the function of presiding over litigation to the executive.<sup>215</sup>

#### 4 6 2 2 5      **The Import of the Law of 16-24 August 1790**

Chevallier explains quite clearly what the revolutionaries set out to achieve and what the limits of their intentions were concerning the separation of authorities.<sup>216</sup> Overall, there was a conscious attempt to prohibit and prevent all encroachments between the branches of state on the basis of the separation of powers. The separation of powers was understood narrowly, implying that each branch could exercise one function; this applied equally to the judiciary and the administration. Therefore, both the administration and the judiciary were formally prohibited from interfering with one another's functional spheres. Preventing the judiciary from exceeding its mandate was the priority, though.

However, this did not resolve all the problems related to the relationship between the administration and the judiciary. The *Assemblée* was still confronted with a dilemma dating from the *Ancien Régime*: should litigation between private individuals and the administration be allocated to the administrative or judicial branch? Consequently, the revolutionaries had to resolve the following question: does this type of litigation fall under the judicial function, the exclusive competence of the courts, or under the administrative function, the exclusive competence of the administration?<sup>217</sup>

This question was not easily resolved, however, because the specificity of administrative litigation was recognised both in relation to administrative action and to judicial litigation.<sup>218</sup> In other words, administrative litigation, administrative action and judicial litigation constituted three distinct, though overlapping, categories of state activity. Thus, the question was multipronged, but the *Assemblée's* solution would not reflect the complexity of the matter.<sup>219</sup> Since the *constituants* adhered to a dogmatic interpretation of the separation of powers, they were confined to two

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<sup>215</sup> 49, 58.

<sup>216</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 66-68.

<sup>217</sup> 67.

<sup>218</sup> 68.

<sup>219</sup> 68.

choices: either administrative litigation is decided by tribunals within the judiciary,<sup>220</sup> or administrative litigation is decided by the administration itself. Thus, in terms of the conceptual framework of the time, there were two available solutions, neither of which was satisfactory; in both cases the specificity of administrative litigation would be undermined. Evidently, the singular problem of allocating administrative litigation could not be resolved by applying a narrow separation of powers alone. Nevertheless, the *Assemblée constituante* eventually settled on the administration which implied a return to the *Ancien Régime*'s merging of the administrative jurisdiction and the active administration.<sup>221</sup>

According to those authors who critique the traditional explanation, the debates of the *Assemblée constituante* make it clear that the Law of 16-24 August 1790 neither resolved the delicate problem of administrative litigation nor prohibited the ordinary courts from presiding over administrative litigation.<sup>222</sup> The formulation adopted to prevent the courts from continuing the abuses of the *Ancien Régime* did not in any way anticipate the fate of administrative litigation, an issue which had not been resolved by 5 July or by the date that the Law of 16-24 August 1790 was promulgated.<sup>223</sup> Thus the principle of the separation of authorities did not provide a solution to the problem of administrative litigation.<sup>224</sup>

What was the scope of the separation of authorities in terms of such an analysis? Sandevour argues that the *constituants*, in proclaiming the principle of the separation of authorities, were not referring to the duality of jurisdiction but exclusively to the

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<sup>220</sup> That is, either ordinary courts, *tribunaux de droit commun*, or special courts, but then there was the concern of the multiplicity of jurisdictions, as explained.

<sup>221</sup> The reasons for this decision are discussed in the section of the separation of the administrative jurisdiction and the active administration.

<sup>222</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 51; Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 713; Velley S "La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs" (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 772.

<sup>223</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 716.

<sup>224</sup> Velley S "La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs" (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 771.



separation of powers; in turn, in proclaiming the separation of powers the *constituants* were not referring to a so-called French separation of powers, but exclusively to the separation of powers in the ordinary or narrow sense.<sup>225</sup> The distrust of the *Parlements* was absolutely independent of the existence of a *justice administrative*.<sup>226</sup>

The act of presiding over administrative litigation was only added to the political abuses<sup>227</sup> of the *Ancien Régime* in the nineteenth century.<sup>228</sup> Sandevor explains how, after the Revolution, the act of presiding over administrative litigation gradually came to be associated with the affirmation of the separation of authorities.<sup>229</sup> However, the *constituants* did not take this link into consideration. In addition, initially there was no intention to allocate administrative litigation to the executive; the drafting of the Law of 22 December 1789 indicates that the litigious competence of administrative organs was not even considered.<sup>230</sup>

Therefore, even though the Law of 16-24 August 1790 declared the principle of the separation of authorities the problem of the allocation of administrative litigation remained in its entirety.<sup>231</sup> Article 13 expressing the separation of authorities only expounded the operation of the separation of powers in relation to the judiciary and administration's relationship.<sup>232</sup> Therefore, claims that the principle of the separation of authorities implies the duality of jurisdiction and that the separation of authorities is an expression of a French separation of powers are inaccurate.<sup>233</sup>

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<sup>225</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 52.

<sup>226</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 46. This distrust certainly existed, but was relevant only as far as the separation of powers was infringed (46).

<sup>227</sup> In others words, encroachments contrary to the separation of powers.

<sup>228</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52.

<sup>229</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 46, 54-56.

<sup>230</sup> This law did not express the French separation of powers, only the separation of powers in its ordinary sense (56-57).

<sup>231</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 61; Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 52; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 718.

<sup>232</sup> Sandevor P *Études sur le Recours de Pleine Juridiction* (1964) 55.

<sup>233</sup> 51, 52, 55.

## 4 7 The Principle of the Separation of the Administrative Jurisdiction and the Active Administration

### 4 7 1 The Development of the Principle

The principle of the separation of the administrative jurisdiction and the active administration encompasses all the phases of the *justice administrative's* evolution, from the Middle Ages to the twentieth century.<sup>234</sup> Chevallier divides this evolution<sup>235</sup> into three major periods.<sup>236</sup> During the first period, from the Middle Ages to *An VIII*,<sup>237</sup> administrative and jurisdictional functions were merged; during the second, from 1799 to 1872,<sup>238</sup> the principle progressed gradually; and during the third and final period, from 1872 to the twentieth century,<sup>239</sup> the principle matured and came to be recognised as such. Thus, events such as the promulgation of the Edict of Saint-Germain or the 1789 Revolution are included in the narrative of this principle. Each period is discussed briefly in order to identify the main events during this long evolution which would lead to the development of the principle.

During the initial phase, the *Ancien Régime*, the administrative jurisdiction was unstable as the organs tasked with presiding over administrative litigation varied constantly.<sup>240</sup> The decisive factor was the allocation of administrative litigation, the specificity of which was recognised early on.<sup>241</sup>

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<sup>234</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 32.

<sup>235</sup> According to Chevallier's narrative of the *justice administrative*, the independence of the administrative jurisdiction is synonymous with the acceptance of the principle of the separation of the administrative jurisdiction and the active administration. Thus, on the whole, the development of the principle runs parallel to the evolution of the *justice administrative*.

<sup>236</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 34.

<sup>237</sup> See Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 37-85.

<sup>238</sup> See Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 87-193.

<sup>239</sup> See Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 195-287.

<sup>240</sup> 49 et seq.

<sup>241</sup> 43 et seq.

Initially, the monarchy created special jurisdictions, linked to the administration and independent of the judiciary, to preside over administrative litigation. This was a response to the *Parlements'* growing independence, towards the end of the thirteenth century,<sup>242</sup> since their adjudication of administrative matters was regarded as interference with royal power. Thus, during the fourteenth and fifteenth centuries the separation of the administrative jurisdiction and the active administration was in the process of being realised, despite a system of monarchical absolutism: all the contemporary requirements were known and only required development and synthesis.<sup>243</sup>

However, this endeavour failed: from the sixteenth century<sup>244</sup> the special jurisdictions aligned with the judiciary, against the monarchy. Therefore, the monarchy withdrew the competence to hear administrative litigation from the judiciary and allocated it to the active administrative,<sup>245</sup> a situation which would persist from the seventeenth century to the Revolution. From the middle of the seventeenth century the principle “juger l’administration, c’est encore administrer” dominated and efforts aimed at the separation of the administrative jurisdiction and the active administration stagnated.<sup>246</sup> In terms of this principle, the administrative jurisdiction was merely the complement of the administrative function.<sup>247</sup> Thus, the active administration and administrative jurisdiction were merged.<sup>248</sup> The practices instituted in the sixteenth century persisted until the end of the *Ancien Régime*,

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<sup>242</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 50. See Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 9-10.

<sup>243</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 53.

<sup>244</sup> 54.

<sup>245</sup> 50, 56.

<sup>246</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 56. See 4 9 below on the principle “juger l’administration, c’est encore administrer”.

<sup>247</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 57.

<sup>248</sup> 62-63.

influencing thinking during the Revolution to such an extent that the *constituants* retained them.<sup>249</sup>

During the Revolution, the point of departure, however, was that ordinary courts should have full jurisdiction and that all exceptional jurisdictions should be eliminated.<sup>250</sup> Therefore, from the onset, the *constituants* intended to allocate administrative litigation to the judiciary, that is, to incorporate administrative litigation with judicial litigation.<sup>251</sup> Accordingly, the *Assemblée Constituante* abolished the *intendants* on 22 December 1789 and exceptional jurisdictions on 7 September 1790.<sup>252</sup> Nevertheless, administrative litigation was incorporated with the administrative function and allocated to the active administration.<sup>253</sup> In fact, although the Revolution provided a clean slate for constitutional innovation, the practices of the *Ancien Régime* persisted, a situation Chevallier calls “le conformisme révolutionnaire” (“revolutionary conformism”).<sup>254</sup> The characterisation of the Revolution as a period of conformism with the *Ancien Régime* contrasts strongly with the traditional explanation.

Statutes such as the Law of 6, 7-11 September 1790 and the Law of 7-14 October 1790 allocated competences to the local and central administration, respectively, which fell within the sphere of the judiciary in terms of the separation of powers.<sup>255</sup> This infringement of the principles was not justified by the prevailing conceptions of the Revolution:<sup>256</sup> the solution was contrary to democratic demand, contrary to the revolutionary conception of the separation of powers, contrary to the preceding debates, and contrary to the published bills; nevertheless, it was adopted without

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<sup>249</sup> 63.

<sup>250</sup> 65.

<sup>251</sup> 68 et seq.

<sup>252</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 65; Burdeau F *Histoire du Droit Administratif (de la Révolution au début des années 1970)* (1995) 41.

<sup>253</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71-76.

<sup>254</sup> Own translation, Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 65-84. See Mestre JL “Le Contentieux Administratif sous la Révolution Française d’après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 290.

<sup>255</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57.

<sup>256</sup> 57.

discussion.<sup>257</sup> The idea that judging the administration amounts to the judiciary administering or that the administrative function includes judging the administration was not then supported.<sup>258</sup> The only definition possible in terms of the separation of powers, and the legislation promulgated during the Revolution, was that presiding over administrative litigation amounts to adjudication, a judicial function.<sup>259</sup>

Other reasons justified such a drastic deviation from the separation of powers. The reasons for this surprising turnaround in relation to the initial principles are difficult to identify, though.<sup>260</sup> Chevallier argues that a combination of factors justified a solution evidently in conflict with revolutionary principles.<sup>261</sup>

The revolutionaries were aware of the shortcomings of judicial solutions proposed by August 1790.<sup>262</sup> On the one hand, the specificity of administrative litigation precluded, as Thouret had indicated, allocating this type of litigation to ordinary courts and, on the other, the institution of any specialised court was contrary to the unity of jurisdiction and seemed like a return to the exceptional jurisdictions of the

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<sup>257</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71, 75; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 719.

<sup>258</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 717.

<sup>259</sup> Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57.

<sup>260</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 720. According to Chevallier, several explanations are clearly incorrect and should be disregarded (Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71-72): firstly, Esmein's contention that one trend of thought did not exclude the incorporation of administrative litigation with the administrative function is unconvincing: the majority intended that the judiciary hear administrative litigation. Secondly, Duguit's view that the *Assemblée* removed administrative litigation from the competence of the judiciary relies on a false assumption since political laws would have included constitutional laws. Finally, since the members of the *Assemblée* insisted on the unity of jurisdiction, any theory explaining this incorporation based on the separation of powers can be discounted.

<sup>261</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 71.

<sup>262</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 74; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

*Ancien Régime*, to which the *constituants* were fundamentally opposed.<sup>263</sup> This dilemma would be the decisive factor in the allocation of administrative litigation to the active administration.

Pezous's brief provided an alternative solution, which served as a catalyst, to the binary impasse: he argued, since either judicial solution was unacceptable, that the newly-created local administrative organs should preside over administrative disputes, in addition to their administrative tasks.<sup>264</sup> The justification for this proposition was that these institutions were democratic, that is, composed of elected officials, and that they could make decisions speedily, free of charge and without formalism.<sup>265</sup> These are the practical reasons which were identified *to justify the infringement* of the separation of powers.<sup>266</sup> Pezous countered reservations of the active administration as jurisdiction by pointing out that its democratic officials rendered it as impartial and as independent as the judiciary, whose judges were elected in the same way:<sup>267</sup> he was confident that these administrators, as elected representatives, would conduct themselves equitably and would not hesitate to denounce the administration.<sup>268</sup>

Nevertheless, some authors argue that administrative litigation was incorporated with the administrative function by Montesquieu, in terms of the “political” or “French” conception of the separation of powers. However, Chevallier argues that this

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<sup>263</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 74; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>264</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 74, 75; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>265</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 75; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>266</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721. See Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 56.

<sup>267</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 75.

<sup>268</sup> Mestre JL “Le Contentieux Administratif sous la Révolution Française d'après des Travaux Récents” (1996) *Revue Française de Droit Administratif* 289-300 at 291.

analysis is inaccurate.<sup>269</sup> While it is possible to interpret Montesquieu so as to exclude administrative litigation from the competence of the judiciary, the revolutionaries, who interpreted the separation of powers very strictly, certainly did not adhere to this interpretation. Whereas there may be a French conception of the separation of powers, this conception *resulted* from the revolutionary legislation and did not constitute the inspiration for this legislation. Far from being an illustration of the separation of powers, the allocation of administrative litigation to the active administration was a clear violation of the separation of powers, as initially understood by the revolutionaries:<sup>270</sup> the jurisdictional function was intended for the judiciary alone and no diverging view was presented at the *Assemblée* before July 1790.<sup>271</sup> This is significant in itself for Chevallier acknowledges that the separation of powers is susceptible to an interpretation as radically different as the French system's, but this is not what motivated the *Assemblée* to adopt the system it did.

Pezous's position, in addition to secondary factors,<sup>272</sup> justified the decision to allocate administrative litigation to the administration.<sup>273</sup> Accordingly, the *constituants* allocated the majority of administrative litigation to the active administration. Thus, there was a complete departure from the initial principles in the process, from the unity of jurisdiction to the principle "to judge the administration is *still* administering", a principle of the *Ancien Régime*. The latter is the only principle which could rationalise, in theory, the Law of 6, 7-11 September 1790, but only in retrospect.

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<sup>269</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 72.

<sup>270</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 72; Troper M *La Séparation des Pouvoirs et l'Histoire Constitutionnelle Française* (1980) 57.

<sup>271</sup> Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 720.

<sup>272</sup> Other explanations for the decision to allocate administrative litigation to the administration served as factors, according to Chevallier, but were not decisive (Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 72-74; Chevallier J "Du Principe de Séparation au Principe de Dualité" (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 720-721). These factors were the recollection of the abuses of the *Parlements*, the principles of the independence of the administration and "to judge the administration is still administering", and the traditions of the *Ancien Régime*.

<sup>273</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 75.

The classification of administrative and judicial litigation for allocation purposes was not arbitrary.<sup>274</sup> On the contrary, the eventual division revealed an awareness of the specificity of administrative litigation. The judicial function amounted to a mechanical application of the law, a syllogism.<sup>275</sup> Therefore, any decision not susceptible to such a mechanical application of the law fell into a category which could not be allocated to the judiciary.<sup>276</sup> Matters which fell outside the judicial power were those where the administration enjoyed a certain *pouvoir* or *latitude d'appréciation*, a so-called “power” or “scope of appreciation”.<sup>277</sup> The scope of appreciation excluded strict conformity to the law.<sup>278</sup> Wherever the administration enjoyed such a discretionary power the courts were unable to judge the matter by means of a strict application of the law because the litigious facts could not be brought under any law.<sup>279</sup> Thus these matters fell outside the judicial power’s sphere of competence.<sup>280</sup> For courts to have jurisdiction, it was absolutely necessary that the activities of the administration were capable of constituting facts capable of being brought under a law.<sup>281</sup> Thus one observes the emergence, beyond the incidental reasons, of a material or intrinsic definition of administrative litigation.<sup>282</sup>

Nevertheless, the specificity of administrative litigation was negated by its allocation to the administration, even though the division was made on the basis of the

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<sup>274</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>275</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 172. In terms of the separation of powers judges were not even permitted to interpret the law and were obliged to refer questions of interpretation to the legislature (170-172).

<sup>276</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 172.

<sup>277</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 174; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>278</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>279</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 174; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>280</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.

<sup>281</sup> Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 172.

<sup>282</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 721.



specificity of administrative litigation. Thus, through the denial of an independent administrative jurisdiction, the problem of allocating administrative litigation, a problem identified during the *Ancien Régime* and Revolution, remained in its entirety.<sup>283</sup>

As a result of the system implemented during the Revolution administrative litigation was treated as administrative action.<sup>284</sup> The solution adopted during the Revolution eventually led to the modern duality of jurisdiction, but, at first, it prevented the development of an independent administrative jurisdiction.<sup>285</sup> Thus, the revolutionary institutions were characterised by a merging of functions.<sup>286</sup> This implied that the administration would be the judge in its own cause,<sup>287</sup> which was, in principle, unacceptable.<sup>288</sup>

The maxim “to judge the administration is still administering”, dating from the *Ancien Régime*, proved to be a theoretical justification for the revolutionary system in

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<sup>283</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 75.

<sup>284</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 76; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.

<sup>285</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.

<sup>286</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 80.

<sup>287</sup> In contravention of the maxim *nemo iudex in sua causa*.

<sup>288</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 80-81. The *constituants*' interpretation of the separation of powers was the reason behind the merging of the active administration and the administrative jurisdiction (81). While the doctrine did not play a role in the *Assemblée's* decision to incorporate administrative litigation with the administrative function, since logically administrative litigation should have been assimilated with judicial litigation, it did determine which institution should preside over administrative litigation. The *constituants*' strict interpretation of the separation of powers implied that each function should be performed by one branch; to the extent that administrative litigation was incorporated with the administrative function it had to be performed by the branch which exercised this function, namely the administration. Thus the separation of powers played a negative role by prohibiting an organ specialised in administrative litigation.

the following manner.<sup>289</sup> The merging of functions, which were distinct in the *constituants*' view, and the system of the *administrateur-juge* were justified by a growing belief in the close connection between administrative litigation and administrative action. Since litigation resulted from administrative action, judging an administrative dispute amounted to the extension of the administrative action and the continuation of administration. Therefore the argument developed that it was necessary to allocate administrative litigation to the active administration.

Although the principle “to judge the administration is still administering” and its rationalisation of the merging of functions had not yet been explicitly formulated during the Revolution, it had an underlying influence; the solution adopted by the *constituants* had the effect of reinforcing a thesis with which they were at complete odds.<sup>290</sup>

According to Chevallier, the system for administrative litigation implemented during the Revolution was characterised by its conformity to the *Ancien Régime*, despite the initial desire for fundamental change.<sup>291</sup> In fact, the merging of administrative litigation and administrative action was now more systematised and complete than before and, thus, the Revolution regressed from the monarchical traditions of the *Ancien Régime*.<sup>292</sup> Accordingly, by 1799 little progress had been made towards establishing an independent administrative jurisdiction and therefore the principle of the separation of the administrative jurisdiction and the active administration did not exist.<sup>293</sup> According to Chevallier's analysis the originality of the revolutionary solution was minimal,<sup>294</sup> in direct opposition to the traditional explanation's characterisation of the revolutionary system as fundamentally novel.

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<sup>289</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 81; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.

<sup>290</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 81; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.

<sup>291</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 83-84.

<sup>292</sup> 66, 80, 84.

<sup>293</sup> 37-63, 80.

<sup>294</sup> 84.

Between 1799 and 1872 the principle progressed significantly.<sup>295</sup> From 1799 organic and formal distinctions between the administrative jurisdiction and the active administration were realised.<sup>296</sup> Chevallier and Bénéoit argue that a partial separation between the administrative jurisdiction and the administration was effected with the creation of the *conseils* and a process of internal specialisation.<sup>297</sup> Specialised organs, endowed with a degree of formal and organic independence, were now presiding over administrative litigation while respecting the independence of the administration.<sup>298</sup> Although the purpose of this reform was to separate administrative and jurisdictional functions, it did not signal the end of the merging of functions: the principle “to judge the administration is still administering” was yet to reach its pinnacle during the July Monarchy. Nevertheless, even though the administrative jurisdiction remained within the administration, administrative litigation was now the task of specialised organs. This did not imply that the separation of jurisdiction and of administrative action was complete, however, in theory or practice.<sup>299</sup>

During the Reformation the fundamental idea that administrative litigation is linked to administrative action was developed doctrinally and formulated as a principle, expressed in the maxim “to judge the administration is still administering”.<sup>300</sup> From 1799-1870 the principle played an essential role in French positive law by justifying and maintaining the strong link between the administrative jurisdiction and administrative action.<sup>301</sup> The dominance of the principle “to judge the

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<sup>295</sup> 89-90, 193.

<sup>296</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 91-130; Bénéoit F-P *Le Droit Administratif Français* (1968) 283-284.

<sup>297</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 89-90, 193; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722; Bénéoit F-P *Le Droit Administratif Français* (1968) 283-284.

<sup>298</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 193.

<sup>299</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.

<sup>300</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 97.

<sup>301</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 99. Henrion de Pansey systematised this

administration is still administering” was finally undermined during the Second Republic.<sup>302</sup> Until 1872 the system of the *administrateur-juge* prevailed, though.<sup>303</sup>

With the Law of 24 May 1872 the principle of *justice retenue* came to an end and was replaced with the principle of *justice délégué*.<sup>304</sup> Article 9 of this law conferred a true power of jurisdiction on the *Conseil d’État* which meant that it could rule sovereignly on matters of administrative litigation.<sup>305</sup> With this the principle “to judge the administration is still administering” was rejected, but the administrative jurisdiction’s newly acquired independence was still limited and the theory of the *administrateur-juge* remained.<sup>306</sup>

The theory of the *ministre-juge* still applied until it was definitively rejected in the case of *Cadot*, 13 December 1889.<sup>307</sup> By 1905 the theory of *justice retenue* had been rejected; administrative judges had been granted a degree of independence; the theory of the *ministre-juge* was abandoned; and the remnants of the *administrateur-juge* were eliminated.<sup>308</sup> However, the independence of the administrative judge did not exclude

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principle and, paradoxically, found support in the Law of 16-24 August 1790. According to him the executive is simultaneously the judge of the utility of its measures and of the complaints which these measures may cause; in other words, one can administer in two ways: by means of ordinances in the form of law and by decisions in the form of judgments. Thus, administrative litigation is a component of administering, and the right to rule on administrative litigation derives from the right to administering. (Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 97-98; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 722.)

<sup>302</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 98-99.

<sup>303</sup> 131-158.

<sup>304</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 199 et seq.; Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 16.

<sup>305</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 723.

<sup>306</sup> Chevallier J *L’Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l’Administration Active* (1970) 197-198.

<sup>307</sup> 219-243.

<sup>308</sup> 283.

the preservation of organic and functional links with the active administration, by means of which the specificity of the administrative jurisdiction is apparent.<sup>309</sup>

#### 4 7 2 The Nature and Value of the Principle

Chevallier discusses three main characteristics of the principle of the separation of the administrative jurisdiction and the active administration,<sup>310</sup> which are indicative of its nature: firstly, the principle as such is not entrenched in any legal text, but is deduced from the rule of law; secondly, the principle is ambiguous; and, thirdly, the principle is functional.

No legal text entrenches the principle as such, but it has been acknowledged by several *commissaires du gouvernement*.<sup>311</sup> In addition, contemporary doctrine is virtually unanimous that the principle is a general principle that explains the nature of the administrative jurisdiction as well as the corresponding body of jurisprudence.<sup>312</sup>

Since the principle has no textual foundation, Chevallier argues that it can only be a deduced principle.<sup>313</sup> He deduces the principle from the rule-of-law requirement that the jurisdictional function must be performed by an independent organ. If the active administration and the administrative jurisdiction are not separated, i.e. if the administrative jurisdiction is not independent, the administration will act as its own judge and resort to arbitrary rule. This independence is particularly important where the inequality between the litigants is significant, as is the case when the administration is party to litigation. Thus the principle is a manifestation of the rule of law, determined deductively; the principle aims to establish a relationship between the administrative jurisdiction and the active administration analogous to that between the judiciary and the administration.

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<sup>309</sup> Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 723.

<sup>310</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 13-33.

<sup>311</sup> 13, 16.

<sup>312</sup> 13.

<sup>313</sup> 17, 18, 291.

Since the principle is deduced, it also has an ambiguous nature, by implication.<sup>314</sup> By requiring the separation of the administrative jurisdiction and the active administration, the principle prohibits the administration from interfering with the administrative jurisdiction and, likewise, also prohibits the administrative jurisdiction from interfering with the administration.<sup>315</sup> Thus, the principle can be reduced to two complementary principles, although they seem contradictory: the independence of the administrative jurisdiction and the independence of the active administration, respectively.<sup>316</sup> This ambiguity is the *raison d'être* of the principle for if the independence of only one branch is established in relation to the other, either judges would control administrators or the administration would act arbitrarily.<sup>317</sup> The independence of the branches is interconnected.<sup>318</sup>

The principle results from the intention to balance or establish an equilibrium between two ideals, the one guaranteeing the autonomy of the administrative jurisdiction and the other reserving a margin of decision-making for the administration.<sup>319</sup> It is only once the independence of the administration and the administrative jurisdiction are equally secured that there is a separation.<sup>320</sup> The two concerns of the principle are often in direct conflict and numerous fluctuating factors, mostly political, influence the equilibrium.<sup>321</sup> Thus the equilibrium is dynamic and unstable.

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<sup>314</sup> 18.

<sup>315</sup> The result is that the principle can be cited for various and contradictory reasons (Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 13).

<sup>316</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 13, 18. See Hauriou M *Précis de Droit Administratif et de Droit Public* (2002, 12<sup>th</sup> ed) 334-336.

<sup>317</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 18, 291.

<sup>318</sup> 20.

<sup>319</sup> 20, 25.

<sup>320</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 20-21. However, how to even determine whether the independence of the administration and administrative jurisdiction is adequately protected to establish an equilibrium is extremely difficult; there is considerable disagreement on which criteria are relevant (21).

<sup>321</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 20.

The principle of the separation of the administrative jurisdiction and the active administration is functional because its content cannot be determined in absolute, static and abstract terms; its content is uncertain, varies and is determined empirically, often *a posteriori*.<sup>322</sup> Initially, the principle was invoked in order to stimulate the evolution of the *justice administrative* and, subsequently, to explain a body of jurisprudence: it is precisely the indeterminacy of the principle that renders it capable of accounting for the evolution of the relationship between the administrative jurisdiction and the active administration.<sup>323</sup> The principle stimulates development and has a guiding and explanatory role.<sup>324</sup> Thus the principle is useful in prompting development, but incapable of determining all the conditions necessary for the independence of the administrative jurisdiction and administration or defining the scope of a particular incidence of the principle.<sup>325</sup>

The value of the principle lies in its capacity to explain the different phases of the historical evolution of the *justice administrative*: all reforms find expression in this principle.<sup>326</sup> Nevertheless, although the principle is useful to analyse the changing relationship between the active administration and the administrative jurisdiction, it cannot in itself explain the whole of the present system: the principle should not be taken to its logical conclusion, but understood as a compromise between opposing forces.<sup>327</sup> With reference to Hauriou, Chevallier emphasises that the principle is relative and that the French system is above all a system of compromise.<sup>328</sup>

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<sup>322</sup> 25, 26, 292.

<sup>323</sup> 26.

<sup>324</sup> 30, 293.

<sup>325</sup> 292.

<sup>326</sup> 32.

<sup>327</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 32, 294. Similarly, the pure separation of powers should not be understood and applied in an absolute sense. Not only is the absolute separation of the branches inefficient, but it excludes the possibility of checks and balances

<sup>328</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 286.

#### 4 8 The French Conception of the Separation of Powers as a Theory of the Nineteenth Century

Serge Velley claims that the idea of a French conception of the separation of powers is a historical reconstruction formulated by public-law specialists during the nineteenth century.<sup>329</sup> Although it was unknown to the revolutionaries, this reconstruction has led to the characterisation of the *justice administrative* as ancient and implied.<sup>330</sup>

Velley points out that Troper has demonstrated that a so-called French conception of the separation of powers is unfounded.<sup>331</sup> Troper indicates that during the Enlightenment the separation of powers was largely a negative prohibition in condemning the accumulation of two or more state functions within one organ; any distribution of functions was possible from that point of departure as the history of French constitutions demonstrates.<sup>332</sup> The *constituants* all acknowledged the fundamental character of the separation of powers, but were divided over its application.<sup>333</sup> In addition, the *constituants* required more than a year after the promulgation of the separation of powers to find a solution for the problem of administrative litigation; the propositions were so varied that they eventually settled for an unforeseen solution, namely, the allocation to the administration of litigation strictly defined by law.<sup>334</sup> Under these circumstances it seems highly unlikely that the *constituants* adhered to a particular conception of the separation of powers or that a particular conception could prevail.

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<sup>329</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 775.

<sup>330</sup> 775.

<sup>331</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 775. See Troper M *La Séparation des Pouvoirs et l’Histoire Constitutionnelle Française* (1980) 172.

<sup>332</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 775-776, 776 n 36.

<sup>333</sup> 776.

<sup>334</sup> 776.



The idea of a “French conception” of the separation of powers only appeared after 1840.<sup>335</sup> In response to parliamentary and liberal opposition contesting the administrative jurisdiction’s existence, the French conception was introduced to reinforce the legality and the legitimacy of the administrative jurisdiction.<sup>336</sup> The manual of Chauveau, published in 1841, appears to be the first text to justify the existence of the administrative jurisdiction on the basis of the separation of administrative and judicial authorities presented expressly as the direct consequence of a particular interpretation of the separation of powers.<sup>337</sup> Subsequently, this thesis was developed by Vivien and adopted as doctrine, before benefiting from the endorsement of Laferrière.<sup>338</sup> Since then the French conception has been adopted by other notable authors such as Duguit, Barthélémy and Carré de Malberg; furthermore, the vast majority of public-law specialists has accepted it as doctrine.<sup>339</sup>

#### **4 9 “Juger l’Administration c’est aussi Administrer” and “Juger l’Administration, c’est encore Administrer”<sup>340</sup>**

According to Sandevour, the principle “to judge the administration is *also* administering”<sup>341</sup> is the *raison d’être* for and embodies the French conception of the

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<sup>335</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 776; Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712, 712 n 12.

<sup>336</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 776.

<sup>337</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 777. See Chevallier J “Du Principe de Séparation au Principe de Dualité” (1990) no. 5 *Revue Française de Droit Administratif* 712-723 at 712 n 12.

<sup>338</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783 at 777-778.

<sup>339</sup> 778.

<sup>340</sup> “To judge the administration is *also* administering” and “to judge the administration is *still* [or *only*] administering” (own translation), respectively.

<sup>341</sup> This is distinguishable from the maxim “to judge the administration is *still* [or *only*] administering” mentioned in the preceding sections.

*justice administrative*.<sup>342</sup> Sandevour emphasises the use of the term “justice administrative” as opposed to “administrative litigation” alone because the principle “to judge the administration is also administering” does not merely explain the existence of a particular type of litigation relating to administrative matters, but the system of the *justice administrative* as a whole.<sup>343</sup> In the leading text<sup>344</sup> on this principle, *Études sur le Recours de Pleine Juridiction*,<sup>345</sup> Sandevour explains the content of the principle and how the principle characterised debates on the *justice administrative* after the Revolution. In this section Sandevour’s position on the principle is set out.

Sandevour argues that even though the separation of powers, the unity of jurisdiction, France’s tradition of centralisation, and the distrust of the judicial tribunals influenced the *Assemblée Nationale* at the creation of the *justice administrative*, none of these factors was decisive.<sup>346</sup> Instead, the maxim “to judge the administration is also administering” was the driving force; this principle is unrelated to article 13 of the Law of 16-24 August 1790.<sup>347</sup>

The discussions of the *Assemblée* indicate that, from the onset of the Revolution, administrative litigation was regarded as indivisible from the administrative function and the administrative jurisdiction was seen as participating in administrative action.<sup>348</sup> These ideas were encapsulated in the principle “to judge the administration is also administering”, although this principle was as yet undeveloped.

The content of the principle was clarified during the early nineteenth century.<sup>349</sup> In 1818 Sirey argued that the function of dispensing administrative justice completes and perfects administrative action and that those who supported the allocation of that function to an independent court, rather than the king, had not considered this

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<sup>342</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 49, 69, 434-436; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 771; Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 42.

<sup>343</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 79.

<sup>344</sup> See Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 42-49; *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 42.

<sup>345</sup> Published in 1964.

<sup>346</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 49.

<sup>347</sup> 49.

<sup>348</sup> 75.

<sup>349</sup> 77-79.

attribute.<sup>350</sup> Likewise, Henrion de Pansey said that, in the person of the king, the competence to judge derives from the competence to administer, and the office of judge derives from the office of administrator.<sup>351</sup> Also, to provide for the execution of law, the security of the state, the maintenance of public order, and the needs of society, by ordinance, is to administer; and to judge the complaints caused by these ordinances and the legal disputes caused by the application of ordinances is “also” administering. In 1828 Joseph Marie-Portalis also described this foundational principle in reference to certain litigious matters which have both a judicial and administrative nature: there are questions of a mixed nature which cannot be decided by the courts without compromising administrative action and, even, constitutional order itself. In 1834 he stated that the administration does not stop administering even when it rules on litigious matters and that the jurisdiction which the administration exercises is the complement of administrative action.<sup>352</sup> Thus the foundational principle of the *justice administrative* was formulated.

The principle “to judge the administration is also administering” has diverse origins.<sup>353</sup> On the one hand, the principle is derived from the superimposition of revolutionary liberalism onto a French tradition of state control and centralisation. On the other, the principle reflects the duality of the administrative judge’s function, for as the judge who presides over administrative matters participates in administrative activity he also participates in the jurisdictional function. The principle “to judge the administration is also administering” contains three elements which reflect the traditions from which it derives and which reconciles this dual function.<sup>354</sup>

Firstly, the normative element, derived from a tradition of centralisation, resulted in a distinct body of rules for administrative litigation.<sup>355</sup> The first incidence of the normative element was the *constituants*’ realisation that administrative matters, having a singular nature, require particular rules,<sup>356</sup> i.e. an autonomous and distinct

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<sup>350</sup> Quoted by Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 77.

<sup>351</sup> Quoted by Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 77.

<sup>352</sup> Quoted by Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 78-79.

<sup>353</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 80.

<sup>354</sup> 80, 298.

<sup>355</sup> 80-82.

<sup>356</sup> Particular rules were required for administrative matters in order to prevent individual interests from superseding the general interest (Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 83).

“administrative law”.<sup>357</sup> This fundamental idea was the initial driving force behind the creation of the *justice administrative*.

Secondly, the material element, derived from liberalism, is concerned with the impact of administrative litigation on the general interest.<sup>358</sup> Therefore this element has both a positive and negative effect on the operation of the principle “to judge the administration is also administering” depending on the type of administrative litigation. On the one hand, in the event of an administrative dispute where the decision to intervene will affect administration generally, the principle will have a positive effect and attribute the competence to preside over the dispute to the specialised judge. On the other hand, the principle will have a negative effect if it appears that the decision to intervene will not influence administration; consequently, the ordinary courts will preside over the case despite the administrative origin of the dispute. In the case of the latter, individual interests will not threaten the general interest and therefore the judge presiding over a matter caused by administrative action will neither be reconciling general and individual interests nor participating in public administration. Thus the rationale for a specialised administrative jurisdiction is absent.

In addition, the material element has two significant implications for the scope and determination of administrative competence. Firstly, whether the administrative jurisdiction or judiciary is competent to hear an administrative dispute depends on the nature of the administrative litigation. The nature of administrative litigation is flexible and this flows from the principle. Thus, the same dispute caused by administrative activity may at one point in time fall within the competence of the administrative jurisdiction and at another within the competence of the judiciary. Therefore the scope of administrative competence fluctuates.

Secondly, due to the fluctuating nature of administrative competence, the determination of administrative competence involves a continuous process of delimitation and permanent difficulties.<sup>359</sup> This also flows from the principle. The scope of the competences cannot be determined absolutely, without negating the

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<sup>357</sup> This line of reasoning would culminate with the decision of *Blanco*, TC 8 February 1873.

<sup>358</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 80, 82-87.

<sup>359</sup> According to Sandevour, the only criterion according to which this determination is made is the extent to which the judge participates in administrative activity (*Études sur le Recours de Pleine Juridiction* (1964) 86).

foundational principle of the *justice administrative*. Thus the principle “to judge the administration is also administering” results, firstly, in decisions, concerning the scope of administrative litigation, which are transitory and secondly, requires, for the determination of this scope, a specific method for the classification of competences which requires an analysis of the administrative matters in question.

Finally, there is the organic element which reconciles the ideals of administration and jurisdiction (or justice) in the system of *juge-administrateur*.<sup>360</sup> In terms of a perfectly functioning *justice administrative* the administrative judge defends both justice and administration. The administrative judge protects the rights of the individual against the administration, while conscious that the individual invokes a personal interest against a defendant concerned with the general interest. In this way the administrative judge assesses the value and scope of the general interest which is an administrative function. Therefore, the organic element reconciles the dual function of the ideal *justice administrative* by combining justice and administration, it combines the two functions of the administrative judge concerned with the general interest by combining administering and judging, and it requires a specific type of judge, the *juge-administrateur*.

Sandevour explains how the separation of powers and the unity of jurisdiction prevented the development of an organic element until Napoleon’s reforms of 1799.<sup>361</sup> The debates indicate that between 1789 and 1790 the members of the *Assemblée* were unable to decide whether the executive or judicial branch is the appropriate organ to preside over administrative litigation. There were three stated alternatives: the *administrateur-juge*, royal judges and *tribunaux d’administration*.

The difficulty arose because administrative litigation displayed characteristics of two opposing, and mutually exclusive functions, namely, the administrative and jurisdictional functions. Therefore, it was necessary to find an organ which could reconcile the two functions, but the three options were all unsatisfactory. The indecision of the *constituants* over the administrative jurisdiction is indicative of the hybrid nature of administrative litigation which required a jurisdictional organ of a

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<sup>360</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 80, 88-93. See Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 44. See 4 7 2 above on the ambiguous nature of the principle of the separation of the administrative jurisdiction and the active administration.

<sup>361</sup> Sandevour P *Études sur le Recours de Pleine Juridiction* (1964) 89-93.

hybrid character. This is the organic element of the principle “to judge the administration is also administering”.

The organic element developed during Napoleon’s reign: after the creation of the *Conseil d’État* and the *Conseils de Préfecture* in 1799 the active administration and the administrative jurisdiction were gradually differentiated. Napoleon increasingly recognised that there was a degree of discretionary power,<sup>362</sup> an administrative capacity, within administrative activity which characterised administrative litigation; therefore administrative litigation had to be allocated to an organ which was simultaneously administrative and jurisdictional.<sup>363</sup>

These ideas were expressed by Napoleon to the *Conseil d’État* in 1806:<sup>364</sup>

“I require a special tribunal for the judgment of public functionaries, for appeals from the conseils de préfecture ... for certain violations of the law by the State ... for large commercial concerns the State may have as the proprietor of land and as administrator. In all of these there is an inevitable discretion: I want to institute a semi-administrative, semi-judicial corps which will regulate the employment of this part of discretion necessary in the administration of the State; one cannot leave this discretion solely in the hands of the sovereign, because he will exercise it badly or neglect to exercise it. In the first case, there will be tyranny, the worst evil for a civilised people; in the second case, the government will be despised. This administrative tribunal can be called *conseil des parties*, or *conseil des dépêches*, or *conseil du contentieux*.”<sup>365</sup>

Thus Napoleon was able to establish the organic element and counter the separation of power’s negative effect on the development of the administrative jurisdiction.<sup>366</sup>

These three elements constitute the content of the principle “to judge the administration is also administering” which is the foundation of the French *justice*

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<sup>362</sup> “[I]l existe dans l’activité administrative une portion particulière de *pouvoir ‘arbitraire’* – c’est à dire, on le sait, de *faculté d’appréciation*” (Sandevoir P *Études sur le Recours de Pleine Juridiction* (1964) 91 (emphasis added)).

<sup>363</sup> Sandevoir P *Études sur le Recours de Pleine Juridiction* (1964) 91.

<sup>364</sup> 92.

<sup>365</sup> Quoted in Sandevoir P *Études sur le Recours de Pleine Juridiction* (1964) 92 (own translation). See Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 43.

<sup>366</sup> Sandevoir P *Études sur le Recours de Pleine Juridiction* (1964) 92.

*administrative*, in terms of Sandevair's analysis.<sup>367</sup> The French *justice administrative* cannot be reduced to the application of a single factor operating in isolation, but it results from the interaction of the normative, material and organic elements which are in themselves complex.<sup>368</sup>

Chapus endorses Sandevair's characterisation of the *justice administrative* and links the principle to specific characteristics of the present system.<sup>369</sup> The administrative jurisdiction is the consequence of a specifically French conception of the *justice administrative* in terms of which an administrative judge must both be specialised in administrative matters and have the mindset of an administrator, conscious that the decision must complement administrative action.<sup>370</sup> This conception follows from the idea that presiding over administrative litigation is still administering.<sup>371</sup> In addition an equilibrium between the needs of the administration and private rights and interests is required. Chapus states that it could well be this objective of equilibrium and conciliation that Napoleon defined when he expressed the need for a *Conseil d'État* that is "a semi-administrative, semi-judicial corps", that is, an organ which combines and harmonises the "spirit of administration" and the "sense of justice".<sup>372</sup>

The principle has also been given concrete expression in practice and ensures that administrative judges have the necessary qualities to defend administrative justice. Firstly, the principle rationalises the dual function of the *Conseil d'État* as the adviser and judge of the administration. Secondly, the principle explains how administrative

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<sup>367</sup> 92.

<sup>368</sup> 93.

<sup>369</sup> Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 42-49.

<sup>370</sup> 42.

<sup>371</sup> Chapus refers to the formulation "c'est *encore* administrer" (emphasis added), but does not distinguish between "juger l'administration, c'est *encore* administrer" and "juger l'administration c'est *aussi* administrer"; he specifically cites Sandevair as the leading authority, see Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 42-49. Chapus acknowledges (43) that such a conception of the *justice administrative* entails inherent institutional risks that could result in an administrative jurisdiction that is subservient to the administration and overly concerned with the demands of administration. This imbalance occurred in the past. However, progressively an equilibrium was attained between the needs of administration and private interests as norms evolved, particularly in the sense that the general interest cannot be guaranteed unless the concern for the needs of administrative action is intertwined with the concern for redressing damages suffered by citizens.

<sup>372</sup> Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 43.

judges, unlike ordinary judges, fall within the ambit of the general statute of the public service. Finally, the principle also explains the content of the statute of administrative judges. Administrative judges are recruited from the *ÉNA* by *concours*, in the same way as active administrators. The practice of the *tour extérieur* integrates active administrators in the administrative jurisdiction; there are also numerous opportunities to perform functions other than one's principle focus, such as the *obligation de mobilité* in terms of which members of the administrative jurisdiction and active administrators perform activities different to their principle task for a period of two years.

Chevallier endorses Sandevour's analysis to a limited extent.<sup>373</sup> Chapus endorses Sandevour's view in full while referring to the principle "to judge the administration is *still* administering",<sup>374</sup> however, thereby equating the two maxims. Chevallier, by contrast, distinguishes between "to judge the administration is *also* administering", as employed by Sandevour, and "to judge the administration is *still* administering".<sup>375</sup> In terms of the latter administrative litigation is an extension of administrative action and an administrative function.<sup>376</sup>

Chevallier agrees with Sandevour that the administrative jurisdiction is within the administration and not completely separated from the administration. He also agrees with Sandevour that this institutional structure is based on a historical compromise between two opposing trends. However, Chevallier critiques Sandevour for his use of ambiguous terminology. For instance, he confuses two principles by citing authors in favour of the principle "to judge the administration is still administering" in support of

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<sup>373</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 30-31.

<sup>374</sup> Chapus R *Droit du Contentieux Administratif* (2004, 11<sup>th</sup> ed) 42. However, Gaudemet refers to the principle "to judge the administration is *also* administering" and circumscribes it as the conception relative to the very nature of the *contentieux administratif* which justified the idea to allocate litigious affairs of the administration to organs within the administration itself (Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 329).

<sup>375</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 31, 31 n 79, 97 n 26.

<sup>376</sup> For instance, this principle was employed by the partisans of the merging of the administrative jurisdiction and the active administration, early in the nineteenth century, and implies that in judging the administration, the administrative judge merely administers (Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 31).



his own argument, but these citations only confirm a movement against the principle of separation, namely equating administrative litigation with administrative action.<sup>377</sup> In particular, Sandevour does not emphasise that the maxim he employs is his formulation alone: no author has employed it and it has not been invoked in case law. Chevallier also points out that Sandevour's maxim is reminiscent of the principle "to judge the administration is still administering" which has a very different meaning. Sandevour, in referring to the principle "to judge the administration is also administering", refers mainly to the historical compromise.

#### 4 10 The *Conseil d'État*

##### 4 10 1 Historical Development

Napoleon established the *Conseil d'État* in article 52 of the Constitution of 22 frimaire An VIII (13 December 1799)<sup>378</sup>

"to draft new laws and administrative regulations, and perhaps more important, in view of later developments 'to resolve difficulties which might occur in the course of the administration'. It is this last phrase which provided the constitutional basis for the subsequent growth of the judicial activity of the Conseil d'Etat."<sup>379</sup>

However, initially the *Conseil d'État* did not have the power to preside over administrative litigation, but only advised the head of state.<sup>380</sup> As the ordinary courts were forbidden from hearing the administrative complaints of individuals, these complaints had to be submitted to the relevant minister in terms of the system of *ministre-juge*.<sup>381</sup> A minister's jurisdictional decision could be appealed before the

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<sup>377</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 31 n 79.

<sup>378</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 450.

<sup>379</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 46-47.

<sup>380</sup> 47.

<sup>381</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 47. See Uhler A *Review of Administrative Acts: A Comparative Study of the Doctrine of the Separation of Powers and Judicial Review in France and the United States* (1942) 16.

*Conseil d'État*, but under the system of *justice retenue*, the decision was still formally made by the head of state.<sup>382</sup>

Therefore, the Law of 24 May 1872 was a significant step in the development of an independent administrative jurisdiction:

“the Conseil d'Etat was empowered ... to reach decisions without the formal pretence that it was merely advising the head of state on a decision which was legally his own. Thus, it is only since the beginning of the Third Republic (1870-1940) that the Conseil d'Etat has had the acknowledged jurisdiction of a court, competent to deliver judgments, not in the name of the head of state, but (like the ordinary courts) in the name of the French people ... In French parlance, this meant a shift of theory from ‘la justice retenue’ to that of ‘la justice délégué’.”<sup>383</sup>

However, the doctrine of the *ministre-juge* would continue to have an effect: the complaint was first brought before the appropriate minister and his decision on the matter could then be taken on appeal to the *Conseil d'État*.<sup>384</sup> Therefore, the case of *Cadot*, CE 13 December 1889 “marks a decisive stage of the *Conseil's* evolution.”<sup>385</sup> In *Cadot*, the *Conseil d'État* ended the doctrine of the *ministre-juge* and recognised itself as the judge of the common law<sup>386</sup> of first and final instance; thus complaints could be brought directly before the *Conseil d'État* without first submitting it to the minister.<sup>387</sup> The rationale for the decision<sup>388</sup> was that since the Law of 16-24 August

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<sup>382</sup> Nevertheless, the advice of the *Conseil d'État* was virtually always followed (Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 47).

<sup>383</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 47-48.

<sup>384</sup> 48.

<sup>385</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 48; Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed) 37 (“[C]et arrêt ... a marqué en réalité une étape capitale dans l'évolution du contentieux administratif”).

<sup>386</sup> However, the *Conseil d'État* as the judge of the common law was replaced by the *Tribunaux Administratifs* in 1953. See Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed) 39; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 48.

<sup>387</sup> Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed) 37-39. See also Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 48; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 330-331.

1790 and the Law of 16 fructidor An III detached the administration from the judiciary a true administrative jurisdiction had developed. For a long time the *Conseil d'État* only had powers of *justice retenue*, but the Law of 24 May 1872 granted the *Conseil d'État* the power of *justice délégué*. Nevertheless, the legacy of the *Conseil d'État*'s origins was the doctrine of the *ministre-juge*. However, this last vestige of the era where the administration judged itself was no longer justified because of the existence of a true administrative jurisdiction presiding over litigation between the administration and private individuals. Thus, the active administration lost its jurisdictional function. The theoretical contribution of this finding was clearly distinguishing the administrative function from the jurisdictional function within the administration itself.

#### 4 10 2 Organisation

The *Conseil d'État* was initially established in 1799 only as adviser to the government, but has since developed a dual role:<sup>389</sup> it now advises government and judges the administration. In other words, the *Conseil d'État* has both administrative and jurisdictional functions. This dual role “is reflected in the internal structure of the Conseil [d'État].”<sup>390</sup> In what follows I discuss the membership, the organisation, and the functions of the *Conseil d'État* in order to illustrate how the principles which characterise the relationship between the administration and the administrative jurisdiction have been applied practically in institutional terms.<sup>391</sup> In the next chapter we shall see how these principles find application in doctrinal terms in the context of public contracting.

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<sup>388</sup> Long M, Weil P, Braibant G, Delvolvé P & Genevois B *Les Grands Arrêts de la Jurisprudence Administrative* (2007, 16<sup>th</sup> ed) 38-39.

<sup>389</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 450; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 62.

<sup>390</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 64. See Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 454-455.

<sup>391</sup> For a useful overview of the workings of the *Conseil d'État*, from the perspective of an ethnographic study, see Latour B *The Making of Law: An Ethnography of the Conseil d'État* (2012).

#### 4 10 2 1 Membership

The personnel of the *Conseil d'État* are all civil servants, regardless of the function they perform, whether advisory or jurisdictional.<sup>392</sup> The members of the *Conseil d'État* are distinguished as ordinary and extraordinary members.<sup>393</sup>

The ordinary members are recruited by means of two methods: a combination of the open competitive examination for *ÉNA* graduates (*le recrutement par concours*) and the “outside” round (*le recrutement au tour extérieur*).<sup>394</sup> The latter consists of, on the one hand, the recruitment of functionaries from the upper echelons of the active administration, such as directors or deputy directors in the central administration, prefects and civil administrators, and sometimes prominent persons in the private sector and, on the other hand, of members from the corps of *conseillers* of the *Tribunaux Administratifs (TA)* and the *Cours Administratives d'Appel (CAA)*.<sup>395</sup> The ordinary members of the *Conseil d'État* thus recruited are divided into three categories: *auditeurs* of either first or second class, *maîtres des requêtes* and *conseillers d'Etat (en service ordinaire)*.<sup>396</sup>

The recruitment of each category takes place as follows.<sup>397</sup> The *auditeurs* are recruited exclusively by means of the *concours* for *ÉNA* graduates. At least three quarters of the *maîtres des requêtes* are appointed from among the auditors and the remaining from the *tour extérieur*. In turn, at least two thirds of the *conseillers (en service ordinaire)* are appointed from *maîtres des requêtes* and the remaining from the *tour extérieur*. The conditions for the appointment of *maîtres des requêtes* from the *tour extérieur* are a minimum of ten years experience in the public service and a minimum age of 30 years. Appointment to *conseiller* from the *tour extérieur* requires a minimum age of 45.

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<sup>392</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 79.

<sup>393</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 451.

<sup>394</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 451-452; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 82-83.

<sup>395</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 452. The *Tribunaux Administratifs* and *Cours Administratives d'Appel* are administrative jurisdictions, inferior to the *Conseil d'État*, which operate at the regional level in France.

<sup>396</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 452; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 84.

<sup>397</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 452.

Although members of the *Conseil d'État* have the status of judge, they are not irremovable.<sup>398</sup> The independence of the *Conseil d'État's* members in relation to the government is assured by the practice of promotion by seniority, which does not permit government to favour certain persons for reasons of political convenience, and by a tradition demanding that the government respect the independence of the members of the *Conseil d'État*, which offers more protection than the best of texts.<sup>399</sup>

One of the innovations of the 1963 reforms affected the *Conseil d'État's* manner of employment:<sup>400</sup> whereas each member had previously been appointed to only one of the sections, since 1963 *conseillers* could be appointed simultaneously to an administrative section and to the litigation section. Similarly, for the *maîtres des requêtes* and *auditeurs* the rule is double membership (*la double appartenance*): in principle, they are appointed simultaneously to an administrative section and to the litigious section.

As for the extraordinary members of the *Conseil d'État* there are two categories. The first category consists of the twelve *conseillers d'État en service extraordinaire* who are prominent persons qualified in different areas of national activity, appointed by governmental decree *en conseil des ministres*<sup>401</sup> for a mandate of four years; these *conseillers*, who may be in agriculture, industry, medicine, the military, or may even be professors of law, will benefit the *Conseil d'État* as adviser only by means of their competence and experience because they are excluded from the jurisdictional function.<sup>402</sup> The second category is a single person, the president of the *Conseil d'État*, the Prime Minister of France.<sup>403</sup> The president's functions are limited to the chairmanship of formal assemblies and the effective presidency lies with the vice-president; the vice-president is chosen from among the presidents of section and the *conseillers en service ordinaire* and appointed by decree *en conseil des ministres*.<sup>404</sup>

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<sup>398</sup> 453.

<sup>399</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 453; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 85.

<sup>400</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 453; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 63, 67-68, 80.

<sup>401</sup> *En conseil des ministres* refers to a decision at cabinet level.

<sup>402</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 454; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 83-84.

<sup>403</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 454.

<sup>404</sup> 454.

Members of the *Conseil d'État* have many opportunities to be seconded to external posts or activities and they are often taken.<sup>405</sup>

#### 4 10 2 2 Structure and Functions of the *Conseil d'État*

The organisation of the *Conseil d'État* reflects its dual functions of adviser to the government and judge of the administration. The internal structure of the Conseil consists of divisions which perform the tasks allocated to the *Conseil d'État*: on the one hand, there is the litigation section, from which emanate the decisions of the *Conseil d'État* exercising its jurisdictional function and, on the other hand, there are five administrative sections.<sup>406</sup> The litigious section is known as the *section du contentieux*. The six administrative sections are the *section de l'intérieur* (home affairs), *section des finances* (finance), *section des travaux publics* (public works), *section sociale* (social), *section de l'administration* (administrative section)<sup>407</sup> and *section du rapport et des études* (report and studies).<sup>408</sup> Although the names of the administrative sections give an idea of each section's particular function, which seems limited collectively, "[t]heir spheres of interest are wider than these names suggest, as between them they span all the various government departments."<sup>409</sup>

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<sup>405</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 453. Examples of external activities include the chairmanship of administrative commissions, participation in the activities of commissions and participation in ministerial cabinets (453).

<sup>406</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 454.

<sup>407</sup> This section was created in 2008, see Conseil d'État "La Section de l'Administration" (date unknown) *Conseil d'État* <<http://www.conseil-etat.fr/fr/la-section-de-ladministration-kue/>> (accessed 27.08.2013).

<sup>408</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 454-455. Brown and Bell regard the first four sections as administrative sections and the fifth section as *sui generis*, not falling directly under the litigious or administrative functions of the *Conseil d'État* (Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 64, 67, 77-79). "The Report Section ... in view of its distinctive role, [is] neither adjudicative nor consultative in the sense applied to the original four administrative sections." (67).

<sup>409</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 68. The names of the original five sections, when Napoleon established the *Conseil d'État*, are indicative of the primary concerns of the time: there were five sections, namely, the *section de la guerre* (war), the *section de la marine* (navy), the *section des finances* (finance), the *section de législation* (legislation) and the *section de l'intérieur* (internal affairs) (47).

#### 4 10 2 2 1 The *Conseil d'État* as Court: The *Section du Contentieux*

The *section du contentieux* exercises the jurisdictional function. It is divided into ten *sous-sections* (subsections).<sup>410</sup> Litigious matters are apportioned among these ten *sous-sections* in order to prepare the cases for trial.<sup>411</sup> Once the preparation has been completed and the *commissaire du gouvernement* has compiled conclusions the matter will be submitted to a division for judgment.<sup>412</sup>

The formation for judgment can be constituted in four ways as follows.<sup>413</sup> Firstly, a matter can be judged by the *sous-section* to which the preparation was allocated, implying at least three members; secondly, by two *sous-sections* collectively,<sup>414</sup> implying the *sous-section* which handled the preparation and at least five members including a *conseiller* representing the administrative sections; by the *section du contentieux en formation de jugement*, implying the president of the section, the ten presidents of the *sous-sections* and two *conseillers* representing the administrative sections; or, finally, by the *assemblée du contentieux*, which implicates the litigation section, the administrative sections and the relevant subsection, with the vice-president presiding. The two larger formations are reserved for important cases and represent the litigation section as a whole and all seven sections of the *Conseil d'État*, respectively.<sup>415</sup>

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<sup>410</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 776; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 357; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 75.

<sup>411</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 776.

<sup>412</sup> 777.

<sup>413</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 777; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 357-358. For the composition of the various formations for judgment, see Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 108-109.

<sup>414</sup> This is the usual formation, Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 75.

<sup>415</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 75; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 358.

#### 4 10 2 2 2      **The *Conseil d'État* as Adviser: The Administrative Sections**

All the administrative sections, except for the *section du rapport et des études*, perform the advisory function by compiling *avis*.<sup>416</sup> The *avis* are only made public with the authorisation of the relevant minister and the decisions expressed in the *avis* must leave the jurisdictional divisions out of their decisions.<sup>417</sup> This implies that the jurisdictional division can annul decisions even though they conform to *avis*, but this is rare; there cannot be an *avis* in response to questions also submitted to a jurisdictional division.<sup>418</sup>

The purpose of these *avis* is to enlighten the government on the implications of their planned decisions, notably regulatory decisions, and to prevent illegalities which can taint decisions<sup>419</sup> before the actual decision is taken.

In terms of articles 38 and 39 of the Constitution of the Fifth Republic of 4 October 1958, it is obligatory for the government to consult the *Conseil d'État* on all bills, both for statutes and ordinances, before they are submitted to the *Conseil des Ministres* for deliberation.<sup>420</sup> A law or ordinance emanating from a bill upon which the *Conseil d'État* had not been consulted could be marred by unconstitutionality, a law incurring the censure of the *Conseil Constitutionnel* and an ordinance that of the *Conseil d'État (statuant au contentieux)*.<sup>421</sup>

Depending on the case, consultation of the *Conseil d'État* on bills for decrees may be obligatory or optional.<sup>422</sup> Regarding certain *avis* and the functions of the Report Section, firstly, ministers can approach the *Conseil d'État* for its opinion, by means of *avis*, on the manner in which juridical problems could be resolved; according to the importance of the issue the inquiry will be submitted to a section or to the *assemblée*

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<sup>416</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 455.

<sup>417</sup> 455.

<sup>418</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 455; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 66 n 6, 73 (“[N]o estoppel operates between the two sides of the Conseil d’Etat” (73)).

<sup>419</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 455.

<sup>420</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 456; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 64. See Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 354.

<sup>421</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 456.

<sup>422</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 456; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 354.



*générale*.<sup>423</sup> Thus, the *Conseil* will provide a *consultation juridique* in issuing its *avis* on, for example, the interpretation of a text.<sup>424</sup>

“Quite apart from the legislative process, the Conseil d’Etat has the duty of acting as general legal advisor to the government and to individual ministers. In some matters indeed its advice must be both sought and followed ... Usually, however, the advice is sought voluntarily, as where a minister wishes to be reassured that he will be acting legally in some matter. This often becomes a formal request for advice where different branches of the administration cannot agree on the interpretation of particular legislation or on the legal solution of a particular difficulty.”<sup>425</sup>

Some of these *avis* will be concerned with questions whose legal aspects cannot conceal the political implications.<sup>426</sup>

Secondly, government can ask the *Conseil d’État*, as it could any research bureau, to proceed with studies aimed at reform; this is the responsibility of *section du rapport et des études*.<sup>427</sup> Similarly, since 1945 the *Conseil d’État* could on its own initiative bring matters of legislative or regulatory reform which the *Conseil d’État* deems in the general interest to the attention of the public powers.<sup>428</sup> The reforms of 1963 included the innovation of compiling an annual report setting out the section’s activities which has facilitated this function.<sup>429</sup> Thirdly, the *section du rapport et des études* has been tasked since 1963 to effect, along with the ministers, the interventions necessary to address the execution of judgments against the administration.<sup>430</sup>

Finally, the *section du rapport et des études* compiles the *rapport annuel* of the *Conseil d’État*, which, after adoption by the *assemblée générale*, is presented to the

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<sup>423</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 459; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 65-66.

<sup>424</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 459.

<sup>425</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 65-66 (footnote omitted).

<sup>426</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 459.

<sup>427</sup> 459.

<sup>428</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 460; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 355.

<sup>429</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 460; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 355; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 66-67.

<sup>430</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 460; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 78.

president of the Republic.<sup>431</sup> The report, of which almost the full text is published in the *études et documents*, is notable because it is not merely a record or report of activities: in addition to the traditional doctrinal contributions, it includes developments in depth on a chosen theme, of both permanent interest and related to current affairs.<sup>432</sup>

#### 4 10 2 3 Implications of Organisation

The *Conseil d'État* is not simply a state institution with a dual function: the *Conseil d'État* is the most important and prestigious adviser of the government and the supreme administrative jurisdiction.<sup>433</sup> The two functions reinforce one another and contribute to establishing the moral authority of the *Conseil d'État*: the *Conseil d'État* is heard all the more as *adviser* because as judge it is able to censure decisions contrary to its advice and decisions which would be illegal; it is respected all the more as *judge* because its advisory role renders it in constant contact with the active administration, which is aware that it is known by the *Conseil* and consequently has confidence in the *Conseil*.<sup>434</sup>

“[T]he Conseil d'Etat *statuant au contentieux* ... remains part of the administrative machinery of the French state, although a highly specialized part. This very fact has helped to make the judicial control which it exercises more readily acceptable to the official. The Conseil d'Etat commands the general respect of the administrator in action because he knows his judges are fully aware of the special problems besetting public administration.<sup>435</sup> When called to account by the Conseil d'Etat *statuant au contentieux* he has to acknowledge that his judges are not strangers to the administrative process; they are not amateurs throwing legalistic spanners into the administrative works, which is how British ministers have sometimes tended to regard their High Court judges. On the contrary, the French official is well aware that his judges are peculiarly expert in the field of administration.”<sup>436</sup>

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<sup>431</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 460.

<sup>432</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 460; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 78.

<sup>433</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 450.

<sup>434</sup> 450-451.

<sup>435</sup> See Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 303.

<sup>436</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 80-81 (footnote omitted).

As for the ordinary members, the importance of the *tour extérieur* is that it contributes to the relationships between the *Conseil d'État* and the outside world, thereby averting the risk of becoming insulated and ceasing to be as well informed as is necessary of the realities, needs and difficulties of the active administration.<sup>437</sup> Furthermore, the manner of employment of the ordinary members, namely their dual responsibilities and double membership, ensures that the frame of mind which the jurisdictional function is likely to render, i.e. susceptible to legalism, is not superimposed over more realistic preoccupations which guide the exercise of the advisory function.<sup>438</sup> The *brassage* thus organised, which affects three quarters of the *Conseil d'État's* members, secures the advantages to be expected from training under *ÉNA*, from practice by the *tour extérieur*, and from the exercising of functions outside of the *Conseil*.<sup>439</sup> Thus, the personnel of the *Conseil d'État* “is composed of the cream of the French civil service” and “constitute[s] therefore an élite.”<sup>440</sup>

Where the *Conseil d'État* is consulted on the bill for a text, it will concern itself with the juridical regularity of the envisaged measures and, particularly in relation to bills of statute, with conformity to the Constitution, to prevent censure by the *Conseil Constitutionnel*.<sup>441</sup> However, the examination of bills is not necessarily limited to their juridical regularity: the *Conseil d'État* can scrutinize any question it deems necessary such as the inappropriateness of planned measures in relation to the situation to which it must apply or the poor coordination between planned measures and the legislation or regulation already in force.<sup>442</sup> The consultation of the *Conseil d'État* can result in the active intervention in the process of drafting texts, of which it could appear that it was co-author.<sup>443</sup>

As for the *avis* on bills of decree, the fact that these *avis* are only formulated at the end of the process of the text's elaboration contributes to their importance, because it permits the *Conseil d'État* to verify the regularity of the process and to be fully

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<sup>437</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 452.

<sup>438</sup> 454.

<sup>439</sup> 454.

<sup>440</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 62, 63.

<sup>441</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 458.

<sup>442</sup> 459.

<sup>443</sup> 459.

informed, notably, by the input of diverse organs, which had to or could be consulted before the *Conseil d'État* on the implications of the bill.<sup>444</sup> The value of this order of things is that these *avis* find themselves at the boundary between consultation and decision-making.<sup>445</sup>

The institution of the *section du rapport et des études* has also contributed significantly to the advisory function by

“extending the influence of the Conseil d'Etat in two directions. On the one hand, the Section operates in advance of the consultative process of the administrative sections, for its studies seek to anticipate administrative problems and offer solutions; on the other hand, its monitoring function over the execution of judgments against the administration is subsequent, chronologically, to the work of the Section du Contentieux.”<sup>446</sup>

Collegiality is a distinctive characteristic of the *Conseil d'État's* decision-making, whether advisory or jurisdictional. On the one hand, Guy Braibant points out that, regarding the process of drafting legislative texts, the “Conseil d'Etat acts *collegiately* and at a later stage, amending or rejecting a text which has already been drafted by officials within the relevant ministry.”<sup>447</sup> On the other hand, the result of the organisation of formation for judgment “is that each judgment is the product of a collegiate examination”.<sup>448</sup>

#### 4 11 Conclusion

In the wake of the 1789 Revolution, France embarked on a decisive break with the *Ancien Régime*. Politically this included revamping the monarchy's institutional structure and addressing associated concerns. One such concern was the administration and judiciary having constantly encroached upon one another's functional spheres during the *Ancien Régime*. The *constituants* considered these infringements as an abuse of power which had to be remedied. In particular,

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<sup>444</sup> 458.

<sup>445</sup> Quoting Marceau Long, Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 456.

<sup>446</sup> Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 79.

<sup>447</sup> 74.

<sup>448</sup> 77.

terminating the judiciary's exercise of political functions, that is, administrative and legislative functions, was a priority.

As far as the revolutionaries were concerned, the state had to be organised in terms of the separation of powers. The reorganisation of the judiciary was no exception: prohibiting the judiciary's encroachment on other functions was simply an exercise in defining and applying the separation of powers. The Law of 16-24 August 1790 was the legal instrument which formally prohibited the judiciary from performing administrative and legislative functions and which applied the separation of powers to the judiciary.

The crucial question is, how was the separation of powers defined and applied? There are significant differences of opinion which can be classified under two streams of thought, the one in favour of the so-called "French separation of powers", the other rejecting the possibility of a French separation of powers, except in retrospect.

In terms of the French separation of powers the duality of jurisdiction flows from a particular interpretation of the separation of powers itself. The aspect of the separation of powers which requires a separate jurisdiction for administrative litigation is the principle of the separation of authorities. The French separation of powers not only provides an alternative to the South African separation of powers, but also demonstrates that the separation of powers is susceptible to fundamentally different interpretations, beyond a narrow *trias politica*. Therefore, the separation of powers is sufficiently flexible to allow for an administrative jurisdiction within the administration. Even Chevallier, a vocal critic of the traditional explanation, acknowledges that the separation of powers can be interpreted thus.<sup>449</sup>

Arguments undermining the French separation of powers, which fall under the latter stream, have been presented. These critiques show that the separation of powers was understood narrowly during the Revolution and illustrate how dogmatic adherence to a strict separation of powers can be restrictive. Such an approach may prevent the development of a system which reflects the contextual requirements, which is the case when administrative litigation was allocated to the active administration.

Sandevour's analysis of the principle "to judge the administration is also administering" and Chevallier's analysis of the principle of the separation of the

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<sup>449</sup> Although, only after the fact.

administrative jurisdiction and the active administration provide principles which are wholly novel in the South African context. The essence of these principles is that the French administrative-law system is inherently a compromise between opposing forces, between the ideals of administration and justice. Importantly, the institutional structure of the French system reflects this interaction between the two ideals. These principles are also unique in that they explain, or at least purport to explain, the whole development of the French administrative-law system.

Finally, another concern dating from the *Ancien Régime*, the question of the allocation of administrative litigation as a hybrid function, was identified. The matter was distinct from the prohibition of the judiciary from exercising political functions. Central to the thesis rejecting the French separation of powers is the conclusion that the Law of 16-24 August 1790 did not resolve the allocation of administrative litigation. In the light of this analysis, article 13, proclaiming the separation of authorities, contains a narrow, ordinary interpretation of the separation of powers. Therefore, the Law of 16-24 August 1790 cannot in itself explain the allocation of administrative litigation to the administration, and later to an administrative jurisdiction; other explanations are required.

The course of administrative litigation, from the Middle Ages to the twentieth century, is the key to understanding the French system of today.<sup>450</sup> The central role of administrative litigation in the development of the French administrative-law system is also critical to the enquiries of this dissertation, for it is the difficulty of classifying and allocating administrative litigation, and the recognition of these difficulties, which led the French to pursue solutions which would fall outside standard separation-of-powers analysis.<sup>451</sup> Thus the French concept of administrative litigation also provides a potentially useful conceptual instrument which may be employed to analyse administrative-law systems. Chevallier's analysis demonstrates that the institutional structure was, eventually, adapted to the nature of the function performed by that

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<sup>450</sup> At least according to Chevallier and the development of the principle of the separation of the administrative jurisdiction and the active administration.

<sup>451</sup> At least, the separation of powers as understood by the revolutionaries. In retrospect the French administrative-law system can be described in terms of the separation of powers, due to its broad nature. However, when the system was still in its infancy, the separation of powers was not the decisive factor.

institution. An opportunity for further research is certainly the question of the nature of administrative litigation in the light of the French example.

In chapter five the concept of administrative litigation, the *contentieux administratif*, is explored. This is done by reference to one object of administrative litigation, the French administrative contract. The administrative contract has been selected because it illustrates how one legal instrument, the contract, comes to be classified as either subject to administrative law (i.e. public law) or to the private law of contract. A contract subject to administrative law falls within the jurisdiction of the administrative courts; a private-law contract falls within the jurisdiction of the ordinary courts. Therefore, the classification of a contract has far-reaching consequences: not only does it determine which legal rules are applicable, but it also determines which court has jurisdiction. Since administrative litigation played a formative role in the development of the French administrative-law system, administrative litigation as such is critical to understanding the system. And since the administrative contract illustrates how the jurisdiction of the ordinary courts and the administrative courts is distinguished, it is discussed in the next chapter. Chapter five is not limited to the subject of the administrative contract. The nature of public contracts as a relatively new and fundamentally different legal instrument is discussed. The South African context receives particular attention and the adjudication of public contracts in South Africa and France is compared.

## CHAPTER 5

### The Public Law of Contract and the *Contrat Administratif*

#### 5.1 Introduction

In this chapter “public contract” refers to that category of contracts where at least one of the contracting parties is a public organ. This is neither to say that administrative law should not, in certain cases, apply to contracts between private parties, nor that such contracts cannot be public in nature; nor is this choice intended to convey that all contracts concluded by a public organ are public in nature; there may well be instances where the administration contracts as a private person and the private law of contract applies. The purpose of limiting “public contracts” thus, is to identify the chapter’s focus on the legal regulation of the administration’s contractual activity. The use of “public contract” does not presuppose the existence of a distinct legal concept of governmental or public contract, in the sense of a *contrat administratif*. Rather, “public contract” merely entails that the state concludes contracts.

In South Africa, public contracts, i.e. contracts where the administration is a contracting party, are either regulated by the private law of contract or public law, specifically, *general* administrative law. Thus,

“[j]udicial regulation of state commercial activity in South African law is based on a classification approach. The basic premise of this approach is that all state legal action can be classified as either private or public in nature, and is therefore subject to private-law or public-law regulation respectively.”<sup>1</sup>

The South African courts, a unitary jurisdiction,<sup>2</sup> preside over litigation resulting from public contracts. South Africa has no “public law of contract”, in the sense used

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<sup>1</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 52. The concept “state commercial activity”, as defined by Quinot, is broader than “public contract”, as defined in this dissertation, but includes public contracting, see Quinot G *State Commercial Activity: A Legal Framework* (2009) 6-12.

<sup>2</sup> See ss 165, 166 of the Constitution of the Republic of South Africa, 1996.



by Davies,<sup>3</sup> or distinct legal concept of public contract. On the contrary, the *contrat administratif* is a public contract regulated by public law. The *contrat administratif* is also a legal category of contract separate to the *contrat de droit commun*, the private-law contract. In other words, this is not merely a situation where administrative law is applied to a contractual situation as in *Logbro Properties CC v Bedderson NO*,<sup>4</sup> for example; in the French context, the law of contract is still applied, but that law is a public law of contract and the contract itself is a public-law concept.<sup>5</sup> This may appear contradictory from the South African perspective where the contract itself is a private-law creation and even the example *par excellence* of a private-law concept. Therefore the nature of the *contrat administratif* in relation to the *contrat de droit commun* is discussed first.

Subsequently, the methods for classifying the *contrat administratif* as such are identified. This classification is an exercise in distinguishing between the *contrats administratifs* and the *contrats de droit commun* concluded by the administration. To this end two sets of criteria are applied, those derived from the law, in the broad sense of promulgated legal texts, and those derived from case law. The existence of two branches of contract law is foreign to the South African context. Therefore, understanding how the two forms of contract are differentiated is integral to an analysis of the *contrat administratif*.

Nevertheless, the *contrat administratif* is characterised by its regulation of contractual performance, rather than the rules providing for its classification. Consequently, de Laubadère et al.'s exposition of the general concepts that govern the performance of the *contrat administratif* is surveyed. This is followed by a discussion of specific rules of performance. Rules concerning the powers of the administration, the rights of the contractor, and a change in circumstances constitute this section, that is, rules which regulate contractual performance differently to private-law rules.

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<sup>3</sup> See Davies ACL *The Public Law of Government Contracts* (2008) 70-71. See also Quinot G *State Commercial Activity: A Legal Framework* (2009) 272.

<sup>4</sup> 2003 2 SA 460 (SCA). See Hoexter C *Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 36.

<sup>5</sup> This is formally distinguishable from the South African context where “[classifying] the state action as administrative action does not mean that it is not also contractual in nature, it is simply not purely contractual, ie purely private-law regulated” (Quinot G *State Commercial Activity: A Legal Framework* (2009) 52 n 2 (emphasis in original)), because, in the French context, public law itself regulates the contract in its entirety, once the contract is classified as a *contrat administratif*.

## 5 2 The Classification of the *Contrat Administratif*

In France, the administration can conclude both *contrats administratifs* (administrative contracts) and *contrats de droit commun* (private-law contracts), also referred to as *contrats de droit privé*.<sup>6</sup> *Contrats administratifs* are subject to special administrative-law rules that are distinct from the rules of the civil law of obligations.<sup>7</sup> However, *contrats de droit commun*, even if concluded by the administration, are subject to civil law.<sup>8</sup> Thus contracts concluded by the administration may be subject to administrative contract law or to the private law of contract.<sup>9</sup> In other words, either the administrative law of contract or the private law of contract regulates contracts concluded by the administration, since each of these branches of law constitutes a law of contract in its own right.

The administrative courts have jurisdiction over *contrats administratifs* and the ordinary, judicial courts have jurisdiction over *contrats de droit commun*.<sup>10</sup> Therefore, distinguishing between the two forms of contract has significant implications, since both the applicable legal rules and the competent jurisdiction depend on the classification of the contract.<sup>11</sup> However, there is no general legal definition for the *contrat administratif* or *contrat de droit commun*.<sup>12</sup>

Even though the concept of “the contract” is the same in public law as in private law, this does not imply that the legal regulation under each branch is also the same.<sup>13</sup>

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<sup>6</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 71; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 664, 671; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 202; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 125.

<sup>7</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671; see Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 72.

<sup>8</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671.

<sup>9</sup> Lichère F *Droit des Contrats Publics* (2005) 18.

<sup>10</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671; see De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 126.

<sup>11</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 125-126.

<sup>12</sup> Lichère F *Droit des Contrats Publics* (2005) 18.

<sup>13</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9, 39-41; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 672; De Laubadère A, Moderne F,

On the one hand, both administrative law and civil law define the contract as an agreement (*un accord de volontés*), between two or more persons, which creates rights and obligations.<sup>14</sup> On the other, distinct and autonomous rules regulate the *contrat administratif*.<sup>15</sup> The *contrat administratif* is subject to administrative-law rules which, on the whole, differ from those of the civil law and which even contradict fundamental civil-law rules on contracting.<sup>16</sup>

According to Richer the more important of these rules are characterised by the inequality of the contracting parties.<sup>17</sup> With reference to Jèze, Richer explains that the contracting parties are in a relationship of inequality because the contractor is obliged to facilitate the provision of a public service and not merely to refrain from obstructing it. Thus the public service is integral to the theory of the *contrat administratif*. However, the concept of public service cannot justify all *contrats administratifs* equally well. For instance, certain contracts are not closely associated with the provision of a public service. With reference to Salon, Richer points out that in these instances the inequality of the parties is linked to the general interest or the presence of public authority.

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Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 18, 28-29; Duguit L *Law in the Modern State* tr Laski F & Laski H (1970) 148-149. “La notion générale de contrat est et ne peut être que la même en droit public et en droit privé. [The general concept of the contract is and can but be the same in public law and private law.]”, Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9 (own translation); “Le contrat ... doit comporter une définition unique, commun à toutes les disciplines. [The contrat must have one definition, common to all disciplines.]”, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 28 (own translation). On the nature of the *contrat administratif* in relation to the *contrat de droit commun*, see the classic formulations of Duguit and Jèze, Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671-672; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 18. See also, generally, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 18-29; Street H *Governmental Liability: A Comparative Study* (1953) 81-83.

<sup>14</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 672; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 29-39.

<sup>15</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9.

<sup>16</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 672.

<sup>17</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 9, 22-23. “The French regard an administrative contract as essentially an arrangement between unequal parties”, Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 202 (footnote omitted).

Gaudemet states that the singularity of the *contrat administratif* is determined by the concept of the public service and its requirements: the purpose of *contrats administratifs* is to allow and facilitate the functioning of the public service.<sup>18</sup> This description can be described as an expression of green-light theory.<sup>19</sup> Contracts between a public person, as the administrator of a public service, and a private citizen result in unequal interests, and the general interest must take precedence over individual interests.<sup>20</sup> As Jean-Marc Sauvé, the Vice-President of the *Conseil d'État*, said in 2009:

“Citizens are demanding more effective and more robust justice that underpins fundamental rights and freedoms, and we must respond to that demand. The times we live in argue for a re-evaluation of the public interest, and we must ensure that that interest takes precedence over individual private interests.”<sup>21</sup>

Therefore, whenever the administration concludes a contract, the critical question is whether the contract is a *contrat administratif* or a *contrat de droit commun*.<sup>22</sup>

Broadly speaking, there are two categories of criteria for the classification of a *contrat administratif*: firstly, the *qualification légale*<sup>23</sup> (legal qualification) and,

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<sup>18</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 672; see Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 22-23.

<sup>19</sup> See Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) ch 1.

<sup>20</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 672.

<sup>21</sup> Conseil d'État “The Conseil d'État in 2009” (2009) *Public Report* 11 <[http://www.conseil-etat.fr/media/document/annual\\_report\\_ce2009\\_gb.pdf](http://www.conseil-etat.fr/media/document/annual_report_ce2009_gb.pdf)> (accessed 01.09.2013).

<sup>22</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 673.

<sup>23</sup> *Qualification légale* and *détermination de la loi* (determination by law) are often used interchangeably as synonyms, but De Laubadère et al. distinguish the two appellations, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 131-132, 231-232. The *qualification légale* occurs when a particular contract is classified by law as either a *contrat administratif* or a *contrat de droit commun* by identifying the contract as such or by allocating disputes arising from that contract to the administrative or ordinary courts. Classification by means of a *détermination de la loi* occurs when the law establishes general rules of a public-law and “exorbitant” nature that apply to the contract and that render the contract *administratif*. Richer, Lichère and Gaudemet, for example, refer to the *détermination de la loi* in instances where De Laubadère et al. would use and prefer *qualification légale*. However, in order to avoid confusion and to remain true to referenced sources, the terminology used by each author is maintained where possible, unless specifically indicated otherwise.

secondly, the *critères jurisprudentiels* (jurisprudential criteria).<sup>24</sup> In terms of the former, certain contracts are classified as *contrats administratifs* by law, especially, statutory qualification and, in terms of the latter, other contracts are classified as *contrats administratifs* by the application of jurisprudential criteria. Some legal writers, such as Richer and de Laubadère et al.,<sup>25</sup> do not, however, categorise all *contrats administratifs* under these criteria, although they are acknowledged as the main categories. Richer's two grand categories are the *critères jurisprudentiels* and *contrats administratifs* by means of qualification *a priori*, of which the category *contrats administratifs par détermination de la loi* is a subcategory. His form of classification is adopted below.

Certain types of contracts will always qualify as *contrats administratifs*, namely, *contrats administratifs par détermination de la loi* and contracts with a particular

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<sup>24</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 73-132; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 90-120; Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 73; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 277-285; Lichère F *Droit des Contrats Publics* (2005) 18-23; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671-683; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 125-240; Bénait F-P *Le Droit Administratif Français* (1968) 595-604. See Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 544-572. Bénait and De Laubadère et al. refer to a third category, the intention of the contracting parties (De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 127; Bénait F-P *Le Droit Administratif Français* (1968) 602-603). In such a case the parties themselves would decide whether or not the contract is subject to private law or administrative law. However, according to Richer and Guettier the "subjective method" is impermissible because in terms of this method jurisdictional competence is determined by the will of the contracting parties, whereas the distribution of competences between the jurisdictions is a legal and public-policy concern (Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 90; Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 72). Likewise, Chapus and Guettier, with reference to the decision *Fabre*, TC 9 June 1986, state that the nature of a contract can absolutely not be determined by the contracting parties' classification (Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 54; Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 72-73). One should bear in mind that Bénait and De Laubadère et al.'s mentioned books were published in 1968 and 1983, respectively, well before the decision of the *Tribunal des Conflits*. See also De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 212-213.

<sup>25</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 110; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 128.

purpose; other types could qualify as either *contrats administratifs* or *contrats de droit commun* depending on the circumstances.<sup>26</sup>

### 5 2 1 *Contrats Administratifs* through Qualification *a priori*

Certain contracts are classified as *contrats administratifs a priori*: thus their nature is determined from the onset and a *clause exorbitante* or a link with the public service plays no role.<sup>27</sup> Instead their status as *contrats administratifs* is derived from texts or the context of the contract and not from the content or purpose of the contract.<sup>28</sup> For instance, those contracts concluded by the administration which are classified as *contrats administratifs* through a *détermination de la loi* are always *contrats administratifs*.<sup>29</sup> A law may identify a *contrat administratif* either by classifying a certain type of contract as such or by providing that the administrative courts have jurisdiction over litigation resulting from certain types of contracts.<sup>30</sup>

#### 5 2 1 1 *Les Qualifications Légales* (Legal Qualifications)

In terms of the Law of 28 pluviôse An VIII, a contract concerned with the performance of public works or with the sale of immovable property belonging to the state is a *contrat administratif*.<sup>31</sup> Case law defines public works as work, of an immovable nature, on behalf of a public person for a general-interest purpose or work

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<sup>26</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 673; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 127.

<sup>27</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 110. Certain *contrats du droit commun* are also classified as such by statutory determination, Lichère F *Droit des Contrats Publics* (2005) 19; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 131.

<sup>28</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 110.

<sup>29</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 673.

<sup>30</sup> Lichère F *Droit des Contrats Publics* (2005) 18; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 673; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 131, 133-142.

<sup>31</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 111-112; Lichère F *Droit des Contrats Publics* (2005) 18; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 673; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 133, 140.

done by a public person towards a public service.<sup>32</sup> Therefore the presence of a public person and a general-interest purpose are requirements of public works.<sup>33</sup>

Contracts concerned with the occupation of public property fall within the jurisdiction of the administrative courts, originally in terms of the Decree-Law of 17 June 1938 and, subsequently, since 2006, article L. 2331-1 of the *Code générale de la propriété des personnes publiques* (CGPPP).<sup>34</sup> Likewise, certain contracts concerned with the occupation of private property are classified by law as *contrats administratifs*, regardless of their terms.<sup>35</sup> In terms of article L. 1311-3 of the *Code général des collectivités territoriales*, emphyteutic leases passed by local entities fall within the jurisdiction of the administrative courts.<sup>36</sup>

The Law of 11 December 2001 determines that all litigation resulting from contracts which apply the *Code des marchés publics* falls within the jurisdiction of the administrative courts.<sup>37</sup> Ordinance n° 2004-559 of 17 June 2004 on *contrats de partenariat* and article L. 1414-1 of the *Code général des collectivités territoriales* determine that *contrats de partenariat* are *contrats administratifs*.<sup>38</sup>

## 5 2 1 2 L'Identification Directe (Direct Identification)

A contract which is subject to a *régime exorbitant du droit commun* is a *contrat administratif*, even without the presence of a *clause exorbitante*.<sup>39</sup> The exorbitant

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<sup>32</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 111.

<sup>33</sup> There are instances where a the public person does not act in the general interest, Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 111.

<sup>34</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 79-82; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 113; Lichère F *Droit des Contrats Publics* (2005)18; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 134.

<sup>35</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 79-82; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 114.

<sup>36</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 75; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 114-115; Lichère F *Droit des Contrats Publics* (2005) 18.

<sup>37</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 84-86; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 115; Lichère F *Droit des Contrats Publics* (2005) 19.

<sup>38</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 82-83; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 116; Lichère F *Droit des Contrats Publics* (2005) 19.

<sup>39</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 116; Lichère F *Droit des Contrats Publics* (2005) 23; see, generally, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats*

nature results not from the terms of the contract, but from external, predetermined rules that apply to the contract. These rules are imposed by law or regulation, and thus independent of the will of the contracting parties.<sup>40</sup>

### 5 2 1 3 The Accessory Theory

Certain contracts qualify as *contrats administratifs* because they are accessories of other *contrats administratifs*.<sup>41</sup> Thus, such a contract has an administrative character regardless of the purpose of the contract, the terms of the contract or whether the parties to the contract are different to those of the original contract.

### 5 2 2 *Les Critères Jurisprudentiels* (Criteria derived from Case Law)

A fundamental enquiry, in the context of the jurisprudential criteria, is whether or not it is conceivable that a particular contract is not subject to public law.<sup>42</sup> The question is concerned with determining the appropriate legal regime that should regulate a particular contract, the *compatibilité*,<sup>43</sup> literally compatibility.

A contract is classified by the jurisprudential criteria as a *contrat administratif* when two requirements are met.<sup>44</sup> Firstly, one of the contracting parties must be a public person and, secondly, the contract must either be sufficiently linked to a public service or to the *éléments exorbitants du droit commun*; the former requirement is known as the *critère organique* and the latter as the *critère matériel*, the organic criterion and material criterion, respectively.

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*Administratifs I* (1983, 2<sup>nd</sup> ed) 131-132, 145, 229-235. Lichère and De Laubadère et al. discuss the direct method under the jurisprudential criteria because of the role played by the judge in evaluating “exorbitant elements” rendering the contract *administratif*.

<sup>40</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 116-117; Lichère F *Droit des Contrats Publics* (2005) 23; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 103; Lichère F *Droit des Contrats Publics* (2005) 22; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 210, 229.

<sup>41</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 71; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 118.

<sup>42</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 92.

<sup>43</sup> 93.

<sup>44</sup> Lichère F *Droit des Contrats Publics* (2005) 20; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 144, 163-171.



In the case of the *critère de la clause exorbitante du droit commun*, the qualification of a contract depends on the presence of a certain type of contractual term that is unusual in civil-law contracts or incompatible with ordinary private-law relationships.<sup>45</sup> Thus,

“‘exorbitant’ in this phrase does not mean ‘inordinate’, ‘outrageous’ or ‘excessive’ and tends only to emphasize the fact that it derogates from private normal law. But the word ‘exorbitant’ may also serve to underline the ‘abnormal’ characteristics of this law, suggesting in turn that it should be made more ‘normal’ and acceptable.”<sup>46</sup>

In the case of the *critère du service public*, the qualification depends on the contract having a sufficiently close connection with the public service.<sup>47</sup>

### 5 2 2 1 The Organic Criterion

In the vast majority of cases the presence of a public person is a requirement.<sup>48</sup> This is the case to the extent that the contract will not be a *contrat administratif* despite a link to the general interest or a *clause exorbitante du droit commun*.<sup>49</sup> Where the contracting parties are both public persons, the contract is in principle a *contrat administratif*, after the decision of the *Union des Assurances de Paris*, TC 21 March 1983.<sup>50</sup>

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<sup>45</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 92; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 144. Therefore, these clauses are also known as “clauses dérogatoires au droit commun [clauses exceptional in relation to the common law]” (144 (own translation)).

<sup>46</sup> Picard E “The Public-Private Divide in French Law through the History and Destiny of French Administrative Law” in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation* (2009) 17-83 at 18.

<sup>47</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 92.

<sup>48</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 675; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 163-168; see Lichère F *Droit des Contrats Publics* (2005) 20.

<sup>49</sup> Lichère F *Droit des Contrats Publics* (2005) 20.

<sup>50</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 546-548; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 677; see Lichère F *Droit des Contrats Publics* (2005) 20.

Few exceptions to the organic criterion exist.<sup>51</sup> Firstly, a contract concluded between two private persons is a *contrat administratif* where one of the contracting parties is the proxy (*mandataire*) of a public person. This is rather a mode of application than an exception, since the contract, which is concluded between two private persons, in the material sense, is legally concluded between a public person, represented by its proxy, and a private person. Secondly, contracts concluded between two private persons will be *contrats administratifs* if one of the contracting parties acts on behalf of a public person, without a mandate.

### 5 2 2 2 *Le Critère de la Clause Exorbitante* (The Exorbitant-clause Criterion)

Once the organic criterion is satisfied, a contract qualifies as a *contrat administratif* when it contains *clauses exorbitantes du droit commun*.<sup>52</sup> The rationale for the presence of such a clause rendering a contract administrative is twofold: the criterion has a subjective and objective basis.<sup>53</sup> The contracting parties can choose between *gestion publique*, and *gestion privée*, public management and private management, respectively. When the parties adopt provisions that derogate from private-law provisions, an intention to adopt public-law regulation is expressed. This is the subjective basis of the *clause exorbitante*. The objective basis implies that the *clause exorbitante* renders a contract administrative because of its nature, being unusual and a matter for public law.

Despite attempts at a definition in case law and legal literature, there is no general definition to determine whether a clause qualifies as *exorbitante* or not.<sup>54</sup> For example, a clause allowing unilateral termination is not necessarily a *clause*

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<sup>51</sup> Lichère F *Droit des Contrats Publics* (2005) 20-21; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 168-171.

<sup>52</sup> Lichère F *Droit des Contrats Publics* (2005) 22; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 91; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 211.

<sup>53</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 211-213; see Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 93; Lichère F *Droit des Contrats Publics* (2005) 22.

<sup>54</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 94, 97-99; Lichère F *Droit des Contrats Publics* (2005) 22. See De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 213 et seq.

*exorbitante*.<sup>55</sup> However, the following are guiding elements indicating the presence of *clauses exorbitantes*.<sup>56</sup> Firstly, *clauses exorbitantes* can result from references in the contract to external sources that would render the contract administrative. For example, references to sources such as a *cahier des charges*<sup>57</sup> of the administration, to texts enacting *règles exorbitantes* (exorbitant rules) that apply through reference to them and not automatically, or to a type of contract, such as a public-works contract. Secondly, *clauses exorbitantes* can be linked to a *prérogative exorbitante*, or *prérogative de puissance publique* (public-power prerogative), such as a clause providing for the *procédure de la décision exécutoire*, or a clause recognising the right of the administration to impose unilateral measures (right to impose sanctions, rescind, modify etc.) Thirdly, clauses which are impossible in terms of private law, illegal or unusual in private-law contracts are sometimes *clauses exorbitantes*.<sup>58</sup> Mostly the *clause exorbitante* is either a clause that is impossible or extraordinary in the context of private relations.<sup>59</sup> Impossible clauses require the public party to exercise functions which do not exist in private law; unusual clauses establish a notable inequality between the parties.<sup>60</sup>

Finally, certain clauses are particular to public law due to their content or purpose, rendering them *clauses exorbitantes*. For example, clauses concerned with securing the general interest, which are extraordinary in private-law relationships, conform to this requirement.

In the decision of the *Stein*, CE 20 October 1950, the *clause exorbitante* was defined as a clause which aims to confer rights or obligations on the contracting

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<sup>55</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 94-95; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 219.

<sup>56</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 215-229.

<sup>57</sup> Standard terms and conditions, see Mitchell JDB *The Contracts of Public Authorities: A Comparative Study* (1954) 214-217.

<sup>58</sup> For example, an obligation that can only be performed by exerting public authority would be impossible in an agreement between private persons; a clause which results in an unequal relationship between the parties, such as clauses for unilateral termination for general-interest purposes, would qualify as a *clause exorbitante*; but the fact that a clause is illegal in private law does not necessarily mean that the clause is *exorbitante*, Lichère F *Droit des Contrats Publics* (2005) 23.

<sup>59</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 97.

<sup>60</sup> 97.

parties which, due to their nature, are extraneous to those clauses freely consented to in the context of civil and commercial law.<sup>61</sup> The definition in *Soc. des combustibles*, TC 19 June 1952 is considered more appropriate than the narrow definition of the *Conseil d'État*: a *clause exorbitante* is established where the reciprocal position of the contracting parties is not such as would typically result from an agreement in terms of the *droit commun*.<sup>62</sup>

The idea of *normalité* (normality) is foundational to the jurisprudential definitions formulated in case law and therefore the *clause exorbitante* is defined as a clause that one would not normally find in a private-law contract.<sup>63</sup> Thus the idea of normality plays a critical role in distinguishing between *contrats administratifs* and *contrats de droit commun*.

### 5 2 2 3 *Le Critère du Service Public* (The Public-service Criterion)

A contract, which is connected to a public service to a sufficient degree, qualifies as a *contrat administratif*.<sup>64</sup> Therefore, the decisive inquiry, problematic in itself, is whether a connection with the public service is sufficiently strong.<sup>65</sup> Three types of connection have been identified which would render a contract *administratif*.<sup>66</sup> Firstly, in terms of the decision of *Bertin*, CE 20 April 1956, a contract which aims to assign the performance of a public service, i.e. to delegate the public service itself, to a private citizen is a *contrat administratif*. Secondly, contracts which amount to a method or means of performance (*modalité d'application*) of a public service are also *contrats administratifs*, in terms of *Min. de l'agriculture c/ Grimouard*, CE 20 April 1956. Contracts which assign the execution of a public service and contracts which

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<sup>61</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 97. See *Commune de Bourisp*, TC 19 November 1999.

<sup>62</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 97.

<sup>63</sup> 97.

<sup>64</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 102; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 189-210.

<sup>65</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 102; see De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 190.

<sup>66</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 103; Lichère F *Droit des Contrats Publics* (2005) 22; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 193, 197-207.

merely require the performance of the requirements of a public service are distinguishable. Finally, contracts which do not delegate the execution of a public service or do not amount to a method of performance may be *contrats administratifs* if the contracting party participates closely enough with the administration in providing a public service.

Thus, in order to apply the *critère du service public* the court must first determine whether there is a public service and, subsequently, whether the contract has the necessary connection to the public service.<sup>67</sup> The three forms of connection are not a closed list, but represent the most common forms found in the case law.<sup>68</sup>

### **5 3 General Concepts Applicable to the Performance of *Contrats Administratifs***

De Laubadère et al. identify three fundamental considerations, as well as other distinctive concepts, which inform the content of the *contrat administratif's* performance.<sup>69</sup> The general concepts are discussed in this section, with heavy reliance on De Laubadère et al.'s exposition, due to his identification and analysis of these concepts in the context of the *contrat administratif*, specifically. In addition, de Laubadère et al.'s *Traité des Contrats Administratifs* is the leading work on the *contrat administratif*.<sup>70</sup>

#### **5 3 1 The Common Will of the Contracting Parties**

Firstly, the common will of the parties is the primary consideration determining the content of a contract's performance.<sup>71</sup> For this reason the *contrat administratif* is also

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<sup>67</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 105.

<sup>68</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 197, 207-210.

<sup>69</sup> 699-700.

<sup>70</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 23.

<sup>71</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 699, 701-705; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 228-232; Lichère F *Droit des Contrats Publics* (2005) 81-82; Bénéot F-P *Le Droit Administratif Français* (1968) 616. "En matière d'interprétation des contrats administratifs, la référence fondamentale a toujours été la commune intention des parties" (Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 228-

referred to as “the law of the [contracting] parties” (*la loi des parties*).<sup>72</sup> This builds on the foundation of modern French contract law,<sup>73</sup> *le consensualisme*. One incidence of the primacy of consensus is that the general common-law rules of interpretation contained in the Civil Code are applicable to *contrats administratifs* since these rules are derived from the idea of consensus.<sup>74</sup> Nevertheless, certain principles of interpretation apply only to *contrats administratifs*. For instance, the concept of public service requires a stricter interpretation of the contractor’s obligations since they are connected to the general interest.<sup>75</sup>

### 5 3 2 The Public Service

The *contrat administratif* provides for the needs of the public service. Thus, secondly, the “requirements of the public service” (*les exigences du service public*) is another consideration that determines the content of contractual performance.<sup>76</sup> This concept operates alongside the will of the parties. Therefore, the satisfaction of the contract’s obligations amounts to both the performance of the terms of the contract and, in addition, to a method for the provision of public services.<sup>77</sup> This dual nature of the *contrat administratif* is important towards understanding the rules regulating its performance.

Through the conclusion of a *contrat administratif* concerned with the public service, the contractor, in effect, collaborates with the administration in providing for

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229). Chapus expresses the role of consensus in less absolute terms: “[l]’exécution des contrats administratifs n’est sans doute pas soumise à un régime qui ignorerait purement et simplement l’obligation pour les parties contractantes de respecter les engagements souscrits et qui, par suite, ne laisserait pas beaucoup de raison d’être à la conclusion de tels contrats.” (Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1202).

<sup>72</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 228.

<sup>73</sup> That is, the law regulating both *contrats administratifs* and *contrats du droit commun*.

<sup>74</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 701-703; Lichère F *Droit des Contrats Publics* (2005) 82.

<sup>75</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 703.

<sup>76</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 699, 706-708; see Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 202.

<sup>77</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 706.

the general interest.<sup>78</sup> Thus, the contractor is placed in a position and enjoys a role wholly different to that of the private-law contractor, who contracts for private interests. Likewise, Gaudemet identifies the objective of permitting or facilitating the public service as the foundation of the *contrat administratif's* singularity.<sup>79</sup>

The conclusion of Corneille to the decision of *Société d'éclairage de Poissy*, CE 8 February 1918, is a classic formulation of the public-service consideration's role in distinguishing the rules of performance of *contrats administratifs* from those of the *contrat de droit commun*.<sup>80</sup> According to Corneille, whenever the state concludes a contract concerning the operation of public services it does not contract as a mere private individual. In this context the state is not managing private interests; rather the state is contracting on the public's behalf for the general interest. Since this is different to private-law contracts, different rules apply.

Furthermore, as mentioned, the concept of public service plays a role in interpreting the content of the contractor's obligations.<sup>81</sup> The administration has the right to demand the *maximum d'efforts et de diligence* and the judge will interpret the obligations of the contractor more strictly than under civil law.

The concept of public service also confers rights on the contractor.<sup>82</sup> In various cases the contractor has the right to indemnification for losses incurred.<sup>83</sup> This right is based on *l'équilibre financière* which, in turn, is based on both equitable considerations and on enabling the contractor to continue performing the public service.

### 5 3 3 The State as Contracting Party

Thirdly, that one of the contracting parties is the state itself is another fundamental consideration.<sup>84</sup> The state remains a public authority with certain public-law

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<sup>78</sup> “Le contrat administratif fait du cocontractant un collaborateur ... de l'administration” (De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 699).

<sup>79</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 696.

<sup>80</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 706.

<sup>81</sup> 707.

<sup>82</sup> 708.

<sup>83</sup> 708.

<sup>84</sup> 699-700, 709-710.

prerogatives, privileges and characteristics, even when it concludes contracts. The incidence of public authority and the consensual nature of the contract must be balanced for the concept of the contract will be undermined by excessive unilateral decision-making.<sup>85</sup>

Certain public-law prerogatives are integrated within the theory of *contrats administratifs*.<sup>86</sup> These prerogatives can be employed to impose sanctions that ensure the performance of the terms of the contract or to align the obligations of the contract with the general interest independently of strict adherence to the terms of the contract.<sup>87</sup> Thus the administration could impose obligations not provided for by the contract, which are necessary for the public service; the administration could also terminate the contract in the general interest.<sup>88</sup> De Laubadère et al. point out that these rules illustrate the more significant differences between the legal regulation of performance under public and private law and where a balance between public authority and the will of the parties is difficult to achieve.<sup>89</sup>

#### **5 3 4 *La Mutabilité (Adaptability)***

In addition to these three fundamental considerations there are other distinct and generally applicable concepts which distinguish the *contrat administratif*, namely, *mutabilité* and *l'équilibre financier du contrat*.<sup>90</sup> The two concepts discussed below can be regarded as incidences of the fundamental considerations identified by de Laubadère. The concept of adaptability entails that a change in circumstances affects the scope of performance.<sup>91</sup> This contrasts strongly with the private-law position in terms of which the clauses are considered fixed and legally guaranteed as such.<sup>92</sup> Nevertheless, the terms of the *contrat administratif* are also binding, but changes in

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<sup>85</sup> 700, 709.

<sup>86</sup> 710.

<sup>87</sup> 709.

<sup>88</sup> 710.

<sup>89</sup> 710.

<sup>90</sup> 700.

<sup>91</sup> 700, 711-715.

<sup>92</sup> 700.



the requirements of public service and in circumstances are additional considerations.<sup>93</sup>

The role of a change in circumstances manifests itself in several ways.<sup>94</sup> Firstly, a change in circumstances can be used in interpreting the obligations of the parties. Secondly, a change in circumstances could lead to novation. Thirdly, changes in circumstances might entitle the administration to exercise its exorbitant powers, such as imposing new obligations or modifying the obligations of the contractor. Finally, a change in circumstances is the basis of the contractor's pecuniary rights.<sup>95</sup>

### 5 3 5 *L'Équilibre Financier du Contrat* (The Financial Equilibrium of the Contract)

Due to the impact of a change in circumstances on the *contrat administratif*, the contractor is in a precarious position relative to that of private law. Therefore, the concept of *l'équilibre financier du contrat*, also known as *l'équation financière*, counterbalances the adaptability of the *contrat administratif* by maintaining contractual security/certainty.<sup>96</sup>

More specifically, in terms of private law, contractual security or equilibrium is ensured by the fixed and static nature of the contract's provisions.<sup>97</sup> The ability to rely on the performance of the terms of the contract fosters contractual certainty, as expressed by the maxim *pacta servanda sunt*. However, since a change in circumstances can alter the original obligations, contractual security is also undermined and the public service itself could be harmed. *L'équilibre financier* enables the contractor to claim the restitution of the initial equilibrium established at the conclusion of the contract.<sup>98</sup>

*L'équilibre financier* is the approximate correlation or balance between obligations and benefits, *l'équivalence honnête*, which the contractor agreed to at the conclusion

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<sup>93</sup> 700.

<sup>94</sup> 711-715.

<sup>95</sup> See, for instance, the right to indemnification under *l'imprévision*.

<sup>96</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 700, 716-721.

<sup>97</sup> 700.

<sup>98</sup> 716.

of the contract, expressed as a calculation, (*comme un calcul*).<sup>99</sup> In the event that this balance is disturbed it may have to be restored.<sup>100</sup>

De Laubadère et al. argue that the principle that the administration incurs liability for disturbing the equilibrium of the contract is a rule derived from case law and based on equitable concerns (counterweight to exorbitant powers of administration) and on the public-service interest (collaborator).<sup>101</sup> Other authors argue that the principle is linked to the common will of the parties, which is to maintain the initial equilibrium of the contract.<sup>102</sup> Thus the mechanism of *l'équilibre financier* serves as an example of the role of consensus, despite the existence of exceptional rules relative to the private-law regime.

#### 5 4 The Performance of *Contrats Administratifs*

The singularity and originality of the *contrat administratif*, in relation to the private-law contract, is exemplified in particular by the rules that regulate its performance.<sup>103</sup> According to De Laubadère et al. the rationale behind this singularity in relation to private-law contracts is twofold.<sup>104</sup> Firstly, the *contrat administratif* provides for the needs of the public service. Secondly, one of the contracting parties is the state and its public authority is not nullified merely because it concludes contracts. Thus, the nature of the *contrat administratif* can be described as a conglomeration of interests and considerations, in particular the public service and general interest, in addition to those established by the parties through consensus. As a result of these

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<sup>99</sup> 717.

<sup>100</sup> 717.

<sup>101</sup> 721.

<sup>102</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 721. This view is critiqued by De Laubadère et al. (703-705, 720-721).

<sup>103</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 377; Lichère F *Droit des Contrats Publics* (2005) 79; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1202; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 696; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 699. See Boyron S "The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort" in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 231-232; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 202.

<sup>104</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 699-700.

considerations the administration and the contractor enjoy exceptional powers, rights and obligations from a private-law perspective.<sup>105</sup>

#### 5 4 1 The Powers<sup>106</sup> of the Administration

The powers of the administration concerning the performance of the contract are extensive. In fact, according to Chapus and Guettier, the regulation of the performance of *contrats administratifs* is characterised by these powers.<sup>107</sup> The administration has four principal types of power at its disposal.<sup>108</sup>

The administration enjoys certain powers which can be categorised as methods to guarantee performance (*les garanties de l'exécution*).<sup>109</sup> These powers include the power of control and management, the power to impose sanctions and the rejection of the exception of non-performance. The administration also has powers of intervention in the performance of the contract, namely, the power of control and management and the power of unilateral modification.<sup>110</sup>

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<sup>105</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 700. Nevertheless, the *contrat administratif* remains a contract (699). The requirements of the public service and the identity of the state as contracting party operate in addition to the common will of the parties and do not replace it; the common will of the parties remains the primary consideration for both *contrats de droit commun* and *contrats administratifs* in line with the fundamental notion of *consensualisme*.

<sup>106</sup> Or prerogatives. Some authors refer to the “powers” of the administration (see Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 248, 261, 266, 269; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 697) while others refer to the same powers as “prerogatives” (see Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 80-81; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 709).

<sup>107</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 379; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1202.

<sup>108</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 699-705. See Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 80-81.

<sup>109</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 266-274. See Boyron S “The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort” in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 234.

<sup>110</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 377.

In principle, the administrative courts cannot annul these powers; in the event that the exercise of these powers was irregular, the contractor is only entitled to claim damages.<sup>111</sup> This principle dates back to the nineteenth century.<sup>112</sup>

#### 5 4 1 1 *Le Pouvoir de Contrôle* (The Power of Control)

Firstly, the administration has a power of management and control over the performance of the contract.<sup>113</sup> This power is not absolute and varies according to the type of *contrat administratif*. In terms of the legal literature, the power of control over the contract is traditionally associated with public-service concessions and the public service justifies its existence.<sup>114</sup> In addition, this power is counted among the powers of unilateral modification, sanction and unilateral rescission, i.e. those powers at the administration's disposal regardless of the terms of the contract.<sup>115</sup>

“Control” is a wide term and encompasses a variety of methods of intervention by the administration.<sup>116</sup> The power of control, in a strict sense, enables the administration to supervise the performance of the contract and to ensure the proper

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<sup>111</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1205-1206; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 701.

<sup>112</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1205.

<sup>113</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 386-390; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 266-269; Lichère F *Droit des Contrats Publics* (2005) 87-88; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1203; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 699; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 379, 383-387; Benoît F-P *Le Droit Administratif Français* (1968) 644-652. See Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 80; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 300; Mitchell JDB *The Contracts of Public Authorities: A Comparative Study* (1954) 183-188. Mitchell discusses the administration's power to impose sanctions under the administration's power of control. However, in the French legal literature the power to impose sanctions is considered as a separate category.

<sup>114</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 267; Lichère F *Droit des Contrats Publics* (2005) 87.

<sup>115</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 267. Cf. Lichère F *Droit des Contrats Publics* (2005) 87.

<sup>116</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 379, 383.

provision of public service.<sup>117</sup> Supervision may entail “physical acts” of verification, such as site inspections or the request for information, or “legal acts”, such as injunctions. The power of management, another aspect of control, goes further.<sup>118</sup> The administration intervenes by determining the modes of application that were not specified by the contract. This intervention does not entail any modification of the contract itself, but completes the contract.

However, “control” does not extend to the alteration of a clause and is thus distinguishable from “modification” which implies a deviation from the initial conditions of the contract, although admittedly the two concepts are sometimes closely related.<sup>119</sup> De Laubadère et al. illustrate the distinction with the following example.<sup>120</sup> When the administration, in the context of a public-works contract, verifies whether the contractor is employing a material envisaged by the contract, or prescribes a certain material in the absence of such a provision, the administration would be exercising its power of control. By contrast, when the administration requires the use of a material other than the one stipulated in the contract, the administration would be exercising its power of modification.

#### **5 4 1 2 *Le Pouvoir de Sanction* (The Power to Impose Sanctions)**

Secondly, where the contractor is in breach of its contractual obligations the administration can impose sanctions.<sup>121</sup> The range of sanctions is wide and includes

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<sup>117</sup> Lichère F *Droit des Contrats Publics* (2005) 87; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 383.

<sup>118</sup> Lichère F *Droit des Contrats Publics* (2005) 87-88; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 383.

<sup>119</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 379, 389.

<sup>120</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 379; see Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 386.

<sup>121</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 405-412; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 269-273; Lichère F *Droit des Contrats Publics* (2005) 88-89; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1204-1205; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 700-702; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 99-178. See Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 81; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 297-299; Benoît F-P *Le Droit Administratif Français* (1968) 618-621.

pecuniary (whether damages or penalties), coercive, and resolute sanctions (the right to resile from the contract).<sup>122</sup> These sanctions differ fundamentally from those available under civil law.<sup>123</sup>

Pecuniary sanctions<sup>124</sup> can be imposed for reasons such as the failure to perform, late performance or inadequate performance.<sup>125</sup> Such a sanction implies a payment by the contractor to the administration.<sup>126</sup> The purpose of the pecuniary sanction is to prevent deficient performance or to secure restitution for deficient performance.<sup>127</sup> In general, the sanction is not imposed by a court, but by the administration itself.<sup>128</sup>

Coercive sanctions<sup>129</sup> aim to secure performance regardless of the contractor's insolvency, or in order to overcome the contractor's insolvency, and at the contractor's own risk and expense.<sup>130</sup> The rationale of the coercive sanction is that the public service and, more generally, the general interest require the performance of the contract.<sup>131</sup> The administration secures performance by temporarily stepping into the

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<sup>122</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 269-270; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 700; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 100. De Laubadère et al. also identify criminal sanctions, but these are especially rare and only exist where provided for by statute (100, 174-178).

<sup>123</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 99. Either the sanctions are unique to *contrats administratifs* or, where a particular type of sanction exists under civil and administrative law, the rules which regulate the sanction are quite different.

<sup>124</sup> See, generally, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 132-144.

<sup>125</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 269-270. Richer claims that it is unlikely that this power will be available in the absence of a provision determining the calculation of penalties (269).

<sup>126</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 132.

<sup>127</sup> 100.

<sup>128</sup> 132.

<sup>129</sup> See, generally, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 144-155.

<sup>130</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 270; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 100, 145.

<sup>131</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 701; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 144.

contractor's position or by substituting a third party for the contractor.<sup>132</sup> The contract is not terminated.<sup>133</sup> Examples of coercive sanctions are state control of public procurement contracts or the sequestration of the contractor's public-service concession.<sup>134</sup> The imposition of coercive sanctions presupposes gross misconduct by the contractor.<sup>135</sup> The administration has recourse to coercive sanctions even if the *contrat administratif* does not provide for such a sanction.<sup>136</sup>

The resolute sanction<sup>137</sup> is the most severe sanction that the administration can impose and requires serious misconduct on the part of the contractor.<sup>138</sup> The resolute sanction terminates the contract.<sup>139</sup> The resolute sanction must be distinguished from rescission in the general interest.

According to Gaudemet, these sanctions are justified by the inadequacy or inappropriateness of the ordinary private-law sanctions such as the *exceptio non adimpleti contractus* or recourse to the courts.<sup>140</sup> By contrast, the administrative-law sanctions aim both to address the shortcomings of the contractor and to ensure the continuation of the public service. Thus the power to impose sanctions illustrates how the actual impact of the legal instrument informs the applicable legal rules.

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<sup>132</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 701-702; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 100, 144, 145.

<sup>133</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 702.

<sup>134</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 270; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 100, 145. In general *contrats administratifs* provide for these sanctions, but they are available regardless of the terms of the contract according to legal writers (270). For example, Gaudemet argues that the power to impose sanctions is always available to the administration (*Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 700).

<sup>135</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 702.

<sup>136</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 145.

<sup>137</sup> See, generally, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 155-174.

<sup>138</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 702.

<sup>139</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 100.

<sup>140</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 700.

### 5 4 1 3 *Le Pouvoir de Modification Unilatérale* (The Power of Unilateral Modification)

Thirdly, in the course of the *contrat administratif's* performance, the administration can unilaterally modify contractual provisions without the need for fault on the part of the contractor.<sup>141</sup> The decision of *Union des transports publics urbains et régionaux*, CE 2 February 1983 confirmed the existence of this power among the *règles générales applicables aux contrats administratifs* (general rules applicable to *contrats administratifs*).<sup>142</sup> Examples of the exercise of this power include changing the duration or the particular method of the performance.<sup>143</sup>

The characteristics of the power of unilateral modification are the following.<sup>144</sup> Firstly, the power of modification is a general power that applies to all types of *contrats administratifs*; however, the scope of the power varies according to the *contrat administratif's* association with the public service, and this varies with the type of *contrat administratif*.<sup>145</sup> Secondly, the power exists even in the absence of a

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<sup>141</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 390-393; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 261-265; Lichère F *Droit des Contrats Publics* (2005) 90-91; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 702; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 388-408. See Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 80-81; Auby J-B & Cluzel-Métayer L “Administrative Law in France” in Seerden RJGH (ed) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2007, 2<sup>nd</sup> ed) 61-92 at 73; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 300-301.

<sup>142</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 263; Lichère F *Droit des Contrats Publics* (2005) 91; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 396. For the argument against the existence of a power of unilateral modification, obsolete since the decision of *Union des transports publics urbains et régionaux*, CE 2 February 1983, see Bénait F-P *Le Droit Administratif Français* (1968) 655-659. For an overview of this debate, see De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 395-396.

<sup>143</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 389.

<sup>144</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 264-265; Lichère F *Droit des Contrats Publics* (2005) 90, 91-92; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 703-704; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 403-408.

<sup>145</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 404.



clause providing for it and it cannot be excluded by agreement (the general interest is decisive). Thirdly, not all the clauses of a *contrat administratif* are susceptible to modification and only certain modifications are permitted. Thus the scope of this power is restricted. For instance, the administration can modify the scope of the contractor's performance, within certain limits.<sup>146</sup> However, a modification may not cause a "disruption" (*bouleversement*) of the essential terms of the contract; the modification may not affect the financial clauses (*clauses financières*) since the *équation financière* must be maintained; and the modification may not change the nature of the contract. Finally, the interests of the contractor are protected by the right to full indemnification against any loss caused by the modification.

The rationale for the power of modification is rooted in the requirements of the public service, particularly the general principles of the adaptability and continuity of the public service.<sup>147</sup> Since these requirements can change, the general interest may require modifying the original obligations of the contractor. However, De Laubadère et al. indicate that the power of unilateral modification does not mean that the administration is not bound to the contract.<sup>148</sup> This would conflict with the obligatory nature of contracts. Therefore, to avoid this conflict, the fundamental private-law principle of *l'immutabilité* does not apply with the same consequences to *contrats administratifs*.

It is due to the rationale of the power, and the status of the power of modification as on of the *règles générales applicables aux contrats administratifs*, that the power

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<sup>146</sup> 406-407.

<sup>147</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 703; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 402-403. Cf. Lichère F *Droit des Contrats Publics* (2005) 91. "L'idée générale est que l'administration ne doit pas être indéfiniment liée par des contrats devenus inutiles ou par des stipulations contractuelles devenues inadaptées aux besoins du service. [The general idea is that the administration must not be bound indefinitely to contracts which have become unnecessary or to contractual provisions which have become unsuitable to the requirements of the [public] service.]" De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 402 (own translation).

<sup>148</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 394.

exists regardless of the terms of the contract, i.e. a clause establishing the power is unnecessary and the power cannot be excluded by agreement.<sup>149</sup>

The rules applicable to the power of unilateral modification achieve a balance between the interest of public service and the private interest of the contractor.<sup>150</sup>

#### **5 4 1 4 La Résiliation Unilatérale pour Motif d'Intérêt Général (The Power of Unilateral Rescission in the General Interest)**

Finally, the administration can rescind the contract in favour of the general interest at any time without the need for fault on the part of the contractor.<sup>151</sup> The characteristics of the power of unilateral rescission are the following.<sup>152</sup> Firstly, the power of rescission is a general power applicable to all *contrats administratifs*.<sup>153</sup> Secondly, the power exists regardless of the terms of the contract. Since the power numbers among the *règles générales applicables aux contrats administratifs* it exists despite the absence of a clause providing for it. The decision to rescind is also a public-policy decision and linked to the functioning of the public service which implies that the parties cannot exclude it by agreement. Thirdly, the decision to rescind is a discretionary power of the administration. Finally, the contractor is

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<sup>149</sup> Lichère F *Droit des Contrats Publics* (2005) 91; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 703.

<sup>150</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 703.

<sup>151</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 393-396; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 249-256; Lichère F *Droit des Contrats Publics* (2005) 90, 91-92; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1205; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 704; Benoît F-P *Le Droit Administratif Français* (1968) 661-663. See Boyron S “The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort” in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 235; Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 81, 83; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 301.

<sup>152</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 249-256; Lichère F *Droit des Contrats Publics* (2005) 92; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 704.

<sup>153</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 704; cf. Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 249-252, where the question whether the power of unilateral rescission in the general interest is applicable to all *contrats administratifs*.

entitled to indemnification against any loss. The rationale for this power is also founded on the interest of public service.<sup>154</sup>

#### 5 4 2 The Rights of the Contractor

The contractor has a right to remuneration in terms of the contractual provisions.<sup>155</sup> To this end, the financial interests of the contractor are secured in two ways.<sup>156</sup> Firstly, the administration may not unilaterally modify provisions securing the financial interests of the contractor. Secondly, the contractor is entitled to indemnification against prejudice, under certain circumstances. The more significant rights to indemnification are based on the *équilibre financier du contrat*, “a fundamental element of the theory of the *contrat administratif*”.<sup>157</sup>

In the context of the *contrat administratif*, the contractor is exposed to more risk of prejudice than in that of the private-law contract due to its adaptability as illustrated by, for example, unilateral modification.<sup>158</sup> This is the *raison d'être* for the *équation financière*. When the equilibrium is undone, the contractor is entitled to have the equilibrium restored by means of compensation.

The concept of financial equilibrium was formulated by Blum in his conclusion to the decision of *Compagnie générale française des tramways*, CE 11 March 1910.<sup>159</sup>

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<sup>154</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 249; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1207; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 704.

<sup>155</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 412; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 705.

<sup>156</sup> Lichère F *Droit des Contrats Publics* (2005) 92; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 705.

<sup>157</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 705 (own translation).

<sup>158</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 706; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 716.

<sup>159</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 706; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 716-717.

The financial equilibrium is the approximate relationship between the obligations and interests of the contractor, as determined in the contract, expressed as a calculation.<sup>160</sup>

### 5 4 3 The Effect of a Change in the Circumstances

During the performance of a contract, a change in circumstances may alter the conditions within which performance will have to take place; “this might render performance more onerous or even impossible.”<sup>161</sup> In terms of French private law, a change in circumstances might also entail legal consequences different to those foreseen by the contracting parties; however, the solutions to a change in circumstances envisaged by French administrative law are different to those of private law.<sup>162</sup> The following theories regulate a change in circumstances under French administrative law: *la force majeure*, *les sujétions imprévues*, *le fait du prince* and *l'imprévision*.<sup>163</sup> *La force majeure* is distinct from the other theories since it is the only theory that operates to release the contractor from the contractual obligations due to the impossibility of performance.<sup>164</sup>

The rationale for these distinct theories is the requirements of public service.<sup>165</sup> Except for *la force majeure*, all of the theories require the continuation of performance, despite a change in circumstances; however, in these cases the contractor benefits from a right to indemnification.<sup>166</sup>

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<sup>160</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 717.

<sup>161</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 709; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 497.

<sup>162</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 709.

<sup>163</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 497.

<sup>164</sup> 497.

<sup>165</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 709.

<sup>166</sup> Auby J-B & Cluzel-Métayer L “Administrative Law in France” in Seerden RJGH (ed) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2007, 2<sup>nd</sup> ed) 61-92 at 73; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 709; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 497.

### 5 4 3 1 *La Force Majeure*

The *force majeure* is an external and unforeseeable event that renders the performance of the contract absolutely impossible and has the legal effect of releasing the contractor from its obligations.<sup>167</sup> De Laubadère et al. define these requirements as follows.<sup>168</sup> Externality implies that the event occurred independently of the contracting parties and the contract. Therefore, the parties should neither have caused the event nor have been able to prevent it. The event should have been unforeseen and reasonably unforeseeable at the time of the conclusion of the contract. The event must be insurmountable, in an absolute sense given the context and circumstances of the contractor.<sup>169</sup>

Examples of events that might qualify as *forces majeures* are natural phenomena, such as storms and flooding, accidents and acts of third parties, such as sabotage, or the outbreak of war.<sup>170</sup> Another example is the promulgation of social legislation that, for instance, reduces the number of hours in a workday. Contractors regularly invoke

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<sup>167</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 556-557; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 292; Lichère F *Droit des Contrats Publics* (2005) 97-98; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 709-710; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 727-736, 740-741; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 647-651; Benoît F-P *Le Droit Administratif Français* (1968) 617-618. See Boyron S “The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort” in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 235-236; Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 83; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 210.

<sup>168</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 727-731.

<sup>169</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 729-730. An event which renders performance extremely difficult is insufficient for the operation of the theory of *force majeure*. However, for the theories of *fait du prince* and *l'imprévision*, circumstances which render performance more onerous suffices for the operation of these theories. Cf. the so-called *force majeure administrative*, another administrative-law variation of the *force majeure* that does not require impossibility of performance as a requirement (De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 730-731; see Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 558-559).

<sup>170</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 731-736.

these interventions, but they are rarely granted. However, in principle, social legislation could lead to the operation of the theory of *force majeure*.

The presence of all of the necessary requirements does not *per se* terminate the contract.<sup>171</sup> The legal effects of the theory of *force majeure* only apply during the existence of the *force majeure*. Thus, the duty to perform the contractual obligations is only suspended for the duration of the events that render performance impossible: once the *force majeure* has come to an end the obligations are revived. However, if the performance is permanently rendered impossible, the *force majeure* provides a ground for rescission. Since the contractor is released from its obligations, the administration is precluded from imposing sanctions.<sup>172</sup>

### 5 4 3 2 *Le Fait du Prince*

In terms of public law, *le fait du prince* refers to those acts of a public authority that render the contractor's obligations more onerous and result in liability without fault for the administration.<sup>173</sup> Strictly speaking, the following requirements must be met for the theory of *le fait du prince* to apply.<sup>174</sup> The contractor must be prejudiced

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<sup>171</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 710; 740-741.

<sup>172</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 710; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 739.

<sup>173</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 417-419; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 296-297; Lichère F *Droit des Contrats Publics* (2005) 96; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1209-1211; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 710; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 515-558; Benoît F-P *Le Droit Administratif Français* (1968) 635-642; Mitchell JDB *The Contracts of Public Authorities: A Comparative Study* (1954) 193-198. See Boyron S "The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort" in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 232-233; Davies ACL *The Public Law of Government Contracts* (2008) 56-57; Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 81-82; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 207-208.

<sup>174</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 711; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 521. The concept of *fait du prince* is defined in a wide sense, *lato sensu*, and in a strict sense, *stricto sensu* (Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 710-712; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup>

by measures taken by a public authority. In addition, *le fait du prince* is only applicable if the contracting public authority itself took the measures that affect the contractor. Only certain measures will entitle the contractor to a right of indemnification. Finally, the action must have been unforeseeable. Consequently the contractor is entitled to full indemnification against detriment to its situation and loss.<sup>175</sup>

Determining which measures qualify as a *fait du prince* is a difficult and complex exercise.<sup>176</sup> The public authority can take measures aimed at the contractor specifically, in terms of its power of unilateral modification, or that affect the contractor indirectly. These measures may be general or specific. General measures such as legislation or regulations generally preclude a right to full indemnification on the ground that all citizens are affected by the general measure.<sup>177</sup> However, where the general measures affect the contractual provisions themselves there may be a right to full indemnification. Where the measures only affect the conditions of performance, there is in principle no such right. This is the case unless the general measure affects the “essential purpose” (*l’objet essentiel*) by changing the situation the parties agreed upon.<sup>178</sup> In principle, all specific measures imply a right to full indemnification.

The right to full indemnification is based on the contractual liability of the administration and the maintenance of the *équilibre financier du contrat*.<sup>179</sup>

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ed) 516-518. Since the contractor is entitled to full indemnification when the *fait du prince* applies in the strict sense, only this definition is discussed.

<sup>175</sup> Lichère F *Droit des Contrats Publics* (2005) 96; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 711, 712; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 521, 552.

<sup>176</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 711; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 527-551.

<sup>177</sup> “Here compensation to the contractor is ruled out by the general principle that all must support equally burdens imposed by the state - the theory of ‘Egalité devant les charges publiques’ [“Equality before public duties].” Mitchell JDB *The Contracts of Public Authorities: A Comparative Study* (1954) 194 (own translation).

<sup>178</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 711; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 535-536.

<sup>179</sup> Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 712; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 553.

### 5 4 3 3 *Les Imprévues*

*Les sujétions imprévues* are exceptional and unforeseeable physical impediments, which render the obligations of the contractor more onerous.<sup>180</sup> Physical impediments refer to natural phenomena, such as unexpectedly encountering hard rock instead of soft soil while digging, or human acts, such as the presence of a canal that is not indicated on the relevant map.<sup>181</sup> The cause of the difficulties must be external. Therefore the contractor should not have contributed to the difficulty, exacerbated the difficulty or have been able to prevent the difficulty.<sup>182</sup> The requirement of unforeseeability requires that, at the time of the conclusion of the contract, the difficulty was both unforeseen and unforeseeable.<sup>183</sup> Consequently, the contractor will be entitled to full indemnification for the additional costs, unless the contractor does not continue to perform.<sup>184</sup> As Lichère points out, *les sujétions imprévues* do not render performance impossible, but significantly more difficult.<sup>185</sup>

According to De Laubadère et al. this theory is based on equitable considerations and on the need for a collaborative relationship between the administration and the contractor.<sup>186</sup> Where the proper performance of the contract requires works, additional and essential to those foreseen in the contract, the contractor will be indemnified.<sup>187</sup> In such a case the contractor completes works which are not required or foreseen by the

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<sup>180</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 419-422; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 275-276; Lichère F *Droit des Contrats Publics* (2005) 95; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1208; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 499-513; Benoît F-P *Le Droit Administratif Français* (1968) 623-625.

<sup>181</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1208; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 507.

<sup>182</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 507.

<sup>183</sup> 507-509.

<sup>184</sup> 512-513.

<sup>185</sup> Lichère F *Droit des Contrats Publics* (2005) 95.

<sup>186</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 505. This stands in contrast to the general view that the theory of *les sujétions imprévues* is based on the implicit common will of the parties (504-505).

<sup>187</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 276-277; Lichère F *Droit des Contrats Publics* (2005) 95.



contract. That the additional works are essential, and not merely useful, to the performance of the contractual works is a requirement.

#### 5 4 3 4 *L'Imprévision*

If events, unforeseeable at the time of a contract's conclusion and which cause a *bouleversement de l'économie du contrat*, occur during the performance of the contract, the theory of *l'imprévision* applies.<sup>188</sup> The events must occur independently of the parties. A *bouleversement de l'économie du contrat* is a lower standard than the impossibility of performance required by the theory of the *force majeure*.

The purpose of *l'imprévision* is to safeguard the continuity of public service and the concept of the public service is central in this context.<sup>189</sup> Continuity is ensured by *l'imprévision* in two ways.<sup>190</sup> Firstly, the contractor is obliged to continue performance despite the change in circumstances in order to qualify for the indemnification. This is an absolute precondition for the operation of the theory of *l'imprévision*. The operation of the *l'imprévision* does not release the contractor from its obligations.<sup>191</sup> Secondly, the administration is obliged to come to the contractor's

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<sup>188</sup> Guettier C *Droit des Contrats Administratifs* (2008, 2<sup>nd</sup> ed) 423-429; Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 277-281; Lichère F *Droit des Contrats Publics* (2005) 96-97; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1211-1215; Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 712-716; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 559-630; Benoît F-P *Le Droit Administratif Français* (1968) 625-634. See Boyron S "The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort" in Ruffert M (ed) *The Public-Private Law Divide: Potential for Transformation?* (2009) 221-244 at 233-235. Davies ACL *The Public Law of Government Contracts* (2008) 57; Peiser G *Droit Administratif Général* (2008, 24<sup>th</sup> ed) 82; Gaudemet Y *Droit Administratif* (2005, 18<sup>th</sup> ed) 299-300; Brown LN & Bell JS *French Administrative Law* (1998, 5<sup>th</sup> ed) 208-209.

<sup>189</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 279; Lichère F *Droit des Contrats Publics* (2005) 97; Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1212; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 562-563. De Laubadère et al. and Richer refer the continuity of public service as a principle (*le principe de la continuité du service public*).

<sup>190</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 279; Lichère F *Droit des Contrats Publics* (2005) 97; De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs II* (1984, 2<sup>nd</sup> ed) 562-563.

<sup>191</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1213.

assistance in preventing the contractor's bankruptcy. However, *l'imprévision* does not entitle the contractor to full indemnification; the additional costs are shared between the contractor and the administration, although, in principle, the administration assumes responsibility for 90 per cent<sup>192</sup> of the expenditure. *L'imprévision* only applies for the duration of the event which renders performance more onerous.<sup>193</sup>

## 5.5 A Comparative Analysis of the *Contrat Administratif*

In France, the administration can conclude two types of public contract: the *contrat administratif* and the *contrat de droit commun*, the former regulated by public law and the latter by private law. However, both fields of law together constitute the French theory of contract law. Thus, there is a public law of contract and a private law of contract. This can be contrasted to the South African position where the law of contract is inherently, even quintessentially, private in nature. Where administrative-law rules are applied to contractual relationships, it is general administrative law.

The critical question at this juncture is how are the *contrat administratif* and the *contrat de droit commun*, the public-law contract and the private-law contract, differentiated? The answer is not straightforward. In the first place the concept of "the contract" needs to be defined. An aspect of this definition is the inquiry whether the *contrat administratif* and *contrat de droit commun* are different legal concepts. Even though the vast majority of authors agree that the general concept is the same under both private and public law,<sup>194</sup> this should neither obscure the differences identified

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<sup>192</sup> Richer L *Droit des Contrats Administratifs* (2008, 6<sup>th</sup> ed) 281.

<sup>193</sup> Chapus R *Droit Administratif Général I* (2001, 15<sup>th</sup> ed) 1213.

<sup>194</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 28. Gaudemet identifies an "important doctrinal debate", in the context of the relationship between the theory of the *contrat administratif* and the *contrat de droit commun*, between Duguit and Jèze who represent opposing views, the former claiming that "essentially, there is no difference between a civil contract and a *contrat administratif*" and the latter that the two forms of contract are fundamentally different, Gaudemet Y *Traité de Droit Administratif I: Droit Administratif Général* (2001, 16<sup>th</sup> ed) 671-672 (own translation); see Mewett AW "The Theory of Government Contracts" (1959) 5 *McGill Law Journal* 222-246 at 222-223. However, de Laubadère et al. mention that this distinction should not be overstated and that Jèze should not be taken literally. Rather, Jèze merely intends that many fundamental rules of the *contrat administratif* differ from those of the *contrat de droit commun*, De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 18 n 3.

by some authors, particularly Duguit, between civil and public-law definitions of the contract, nor the particular difficulties associated with distinguishing the *contrat administratif* from other bilateral administrative acts, unilateral acts and regulatory acts.<sup>195</sup> Nevertheless, the *contrat administratif* is defined, in line with the private-law contract, as an agreement (*un accord de volontés*) that creates legal obligations.<sup>196</sup> This concept is quite familiar in the South African theory of contract law.<sup>197</sup>

On the basis of the nature of the *contrat administratif*, criteria have developed to identify the *contrat administratif* and to distinguish it from private-law contracts. It is through the application of these criteria that *contrats administratifs* are differentiated from *contrats de droit commun*.

It is noteworthy that there are various categories of classification, i.e. the *qualifications légales* and the *critères jurisprudentiels*. On the one hand, this demonstrates that the *Conseil d'État* has played an integral role in determining how *contrats administratifs* are classified. Uncharacteristically for French law in general, the law of the *contrat administratif* is largely judge-made. As a result, the rules pertaining to the *contrat administratif* have been able to adapt to changing circumstances over a long period of time, evolving during unprecedented developments such as World War II and the expanding role of the administration. However, the legislature has on occasion established a category of *contrats administratifs* from the onset or intervened where the *Conseil d'État* failed to regulate a particular sphere of contractual activity satisfactorily.

The variety of sources constituting the criteria is valuable because through them different methods and motivations for classifying particular contracts as *administratif* are provided.<sup>198</sup> Certain types of contract are always *contrats administratifs*, such as those classified as such by statute. Although statutory qualification does not necessarily simplify the process of classification, it does indicate that certain types of contract are in principle always subject to public-law regulation, ostensibly simply by

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<sup>195</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 19-28, 54-123.

<sup>196</sup> 29-30, 35-41.

<sup>197</sup> Van der Merwe SWJ, Van Huyssteen LF, Reinecke MFB, Lubbe GF *Kontraktereg: Algemene Beginsels* (2012, 4<sup>th</sup> ed) 7-8. “’n Kontrak word oor die algemeen ‘n verbintenisskeppende ooreenkoms genoem.” (7, footnote omitted).

<sup>198</sup> See De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 127.

virtue of being a particular type of contract. From a South African perspective, French statutory classification provides a diverse set of *contrats administratifs*, thus providing an extensive list of contract types that are virtually always subject to public-law regulation. These contracts illustrate that the nature of the contract can be indicative of which rules will be applied. At the very least, the type of contract can be adopted as a factor in determining the appropriate legal rules to apply. However, the rationale for classifying certain contracts as *contrats administratifs* is more significant than the set of contract types.

The general principles that inform the distinction between *contrats administratifs* and *contrats de droit commun* have been formulated by the courts in case law.<sup>199</sup> These general principles constitute the *critères jurisprudentiels*, of which there are two, the exorbitant-clause criterion and the public-service criterion. Through these criteria various indicators are provided that contribute to differentiating between the nature of the *contrat administratif* and the *contrat de droit commun*. In the first place, there is the notion of compatibility. Though vague, it draws attention to an awareness that the rules regulating a contractual relationship should correspond to the nature of the contract. Secondly, the exorbitant-clause criterion renders contracts that contain a clause that is impossible, illegal or unusual in the private-law context as *contrats administratifs*. These clauses themselves render the contract *administratif* due to their nature. This classification is based on general administrative-law principles that require that all “matters or questions of public law” fall within the competence of the administrative court; the exorbitant clause is such a matter of public law.<sup>200</sup>

Finally, in terms of the public-service criterion contracts that have a close link to the provision of a public service are *contrats administratifs*. De Laubadère et al. quote Long’s rationale for this position, as expressed in his conclusions to the case *Bertin*, CE 20 April 1956:

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<sup>199</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 132.

<sup>200</sup> 212.

“One cannot permit the administration to entrust a public-service task to an ordinary private individual and simultaneously deprive it of the rights and prerogatives with which the public-law regime provides it.”<sup>201</sup>

The fundamental justification for this criterion is that the administration must retain control over the public service and the rules of the *contrat administratif* enable the administration to do so.<sup>202</sup>

The rules of contractual performance demonstrate how the public-law powers of the administration and the general interest are safeguarded. In addition, the general principles applicable to the performance of the *contrat administratif* indicate that the *contrat administratif* and *contrat de droit commun* are not exclusive legal entities. To a significant extent the *contrat administratif* is an integrated legal concept that combines aspects of private and public law regulation. The primary role of consensus in determining the scope of the contractual obligations testifies to the integrated nature of the *contrat administratif*. This counters one of the principal critiques of an independent concept of public contract, namely, that the primacy of consensus is compromised.

The *contrat administratif* also demonstrates that certain aspects are better regulated by public law, regardless of the incorporation of public-law values into private law itself. Examples include the legal facilitation of the administration in performing its functions and the protection of the general interest, as argued by Davies.<sup>203</sup> Therefore, interests such as the adaptability and continuity of the public service can be protected. The *contrat administratif* also acknowledges the nature of the state or administration; the legal instrument it chooses to employ should not supersede its status automatically and comprehensively. Nevertheless, through these rules the contractor is in a position of risk, which is the platform for unique rules, the *équilibre financier du contrat* and strict limits to the administration’s capacity to unilaterally modify the contract. These opposing rules establish a balance between public-law concerns, such as the general

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<sup>201</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 198. Own translation from “Nous ne pouvons pas laisser l’administration confier à un simple particulier l’exécution d’une mission de service public et se dépouiller en même temps des droits et prérogatives que lui assure le régime de droit public”.

<sup>202</sup> De Laubadère A, Moderne F, Delvolvé P *Traité des Contrats Administratifs I* (1983, 2<sup>nd</sup> ed) 198.

<sup>203</sup> See Davies ACL *The Public Law of Government Contracts* (2008) chs 1, 2.

interest or the provision of public service, and private-law interests, such as the economic security of the contract and contractual certainty.

Thus, the French system maintains the institution of the contract in the public or administrative-law context, thereby combining interests characteristic of private and public law.<sup>204</sup> This transcends the classic critique of the public-private divide, which the either-or, all-or-nothing classification process ostensibly perpetuates. However, this does not mean that the French system has no shortcomings concerning the public-private divide, which can be regarded as formalistic. Nevertheless, the *contrat administratif* is instructive on how to combine interests that are typically public and private within a single branch of law, a sophisticated branch of law that has developed over a considerable period of time,<sup>205</sup> evolving with the changing role of the administration.

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<sup>204</sup> See Quinot G *State Commercial Activity: A Legal Framework* (2009) 172.

<sup>205</sup> For a discussion on the development of the *contrat administratif* see the conclusion of Achille Mestre to the decision of the CE 21 January 1938.

## CHAPTER 6

### Conclusion

#### 6 1 The Contextualised Administrative-Law System: A New Concept

This dissertation introduces the concept of “the contextualised administrative-law system”. The administrative-law system emphasises the legal relationship between the public administration and the judiciary. However, the legal relationship is only one aspect of the administrative-law system. The administrative-law system in context recognises the impact of choices in political theory on the system itself as well as on administrative mechanisms such as public contracting; it also recognises the role of a given geo-political and socio-economic context. Thus, inquiries concerning alternative administrative-law systems or specific changes to that system should not be considered in isolation. Therefore, the interrelated and interdependent nature of political theory, context and the administrative-law system is set out;<sup>1</sup> the contextualised administrative-law system constitutes the point of departure for investigating an alternative administrative-law system. The contextualised administrative-law system also constitutes the approach for the investigation into an alternative administrative-law system in South Africa.

In the South African context, the Constitution of the Republic of South Africa, 1996 expresses choices in political and constitutional theory. More specifically, the Constitution embodies a project of “transformative constitutionalism” that is driven by the Constitution itself and that entails a project of social and political transformation grounded in law.<sup>2</sup> The Constitution also entrenches the separation of powers.<sup>3</sup> Thus, the Constitution frames the political objectives of South Africa and determines, to an extent, the arrangement and functions of political institutions. The

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<sup>1</sup> See ch 2.

<sup>2</sup> Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188.

<sup>3</sup> Ss 44, 85, 165 of the Constitution of the Republic of South Africa, 1996; *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 18-22.

political objectives and constitutional structure are all informed by the South African context, which includes South Africa's past and its aspirations.<sup>4</sup>

The administrative-law system as such is central to this project. Firstly, the democratic function of the public administration, namely, implementing legislation and policy, includes the implementation of socio-economic rights and the right to administrative justice. Secondly, the judiciary's function of upholding the supremacy of the Constitution entails protecting all rights, including socio-economic rights and the right to administrative justice, and ensuring the legality of all state conduct.

Thus, on the whole, Klare's idea of transformative constitutionalism also reinforces the interrelatedness of geo-political and socio-economic context, political theory and the administrative-law system.<sup>5</sup> The South African administrative-law system operates within the normative context of the Constitution. The importance of considering the administrative-law system as such is the prominence of the relationship between the public administration and judiciary. They are not merely components of the system. Considering either institution in isolation fails to address their interaction and their position within a broader project and context. The argument is made that the judicial function has meaning in relation to the administrative function and, likewise, that the administrative function is informed by the judicial function. Thus, the functional spheres of the administration and the judiciary are not considered in isolation. Where either function is considered in isolation analysis tends to focus on the functional sphere of each institution and whether a particular act falls within that sphere. This amounts to a narrow separation-of-powers discussion and can descend into formalism. Also, where the judiciary adjudicates upon the administration, even legitimately, the administration and the performance of the administrative function are implicated. This contention is explained in the chapter on the French administrative-law system. Whether the judiciary finds for or against the administration also implicates the administration and the administrative function. This logical inference should not be neglected. Thus it is the interaction of the judiciary and the administration that is of critical importance. In turn, the relationship reveals whether judges understand administrative arguments, whether judges take account of administrative arguments, and whether the administration respects orders made against it.

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<sup>4</sup> See, for instance, the Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>5</sup> See also the Preamble of the Constitution of the Republic of South Africa, 1996.



## 6 2 The Separation of Powers: Normative, Flexible and Dynamic

Given the importance of the administrative-law system, particularly in relation to the project of transformative constitutionalism, the separation of powers, which is the fundamental constitutional principle shaping the legal relationship between the public administration and judiciary in South Africa, is analysed. Firstly, the origins and development of the separation of powers are traced. The history of the separation of powers indicates that it is a normative doctrine, in terms of which particular normative objectives find institutional expression and protection. The separation of powers recognises that institutions should be arranged in a particular manner in order to promote identified normative objectives. Thus, the separation of powers is not an end in itself and implies neither the pure separation of powers nor the *trias politica*. The separation of powers understood thus can make all the difference in accommodating the rise of the administrative state.

Although the value of the separation of powers in the modern context is contested, it is argued that the normative, flexible and dynamic nature of the doctrine can usefully be employed to evaluate fundamental political changes in society such as the rise of the administrative state and even the contracting state.<sup>6</sup> The essential separation-of-powers concerns remain: for instance, only power can check power. In addition, the separation of powers is essential to understanding the administrative-law relationship. However, traditionally the separation of powers implies a threefold classification of functions and state institutions, conflating the administration and executive. This obscures the impact of the rise of the administrative state as well as the distinct relationship between the public administration and the judiciary. Historically, the relationship between the executive and parliament, for instance, has been the subject of intense analysis, due to the power of each institution, among other reasons. The administration as such has been neglected in this sense. What is needed is a comprehensive analysis of the administration in terms of the separation of powers. In order to benefit from what the separation of powers has to offer, the administration as such should enjoy the same attention as the other branches under the separation of

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<sup>6</sup> See Vile MJC *Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) ch 13; Harlow C & Rawlings R *Law and Administration* (2009, 3<sup>rd</sup> ed) 23; Ackerman B “Good-bye, Montesquieu” in Rose-Ackerman S & Lindseth PL (eds) *Comparative Administrative Law* (2010) 128-133 at 129.

powers. Vile recommends distinguishing between the policy branch and administrative branch.<sup>7</sup> Thus, with the recognition of at least a fourth branch the administration's relationship with the policy branch, with the legislature and with the judiciary should be assessed. The separation of powers provides the conceptual framework for such an assessment by identifying the normative objectives that the institutional structure promotes. These normative objectives include, at least historically, efficiency, the common interest, the impartial rule of law, accountability and balance.<sup>8</sup> The historical development and nature of the separation of powers provides a profound conceptual framework which can be employed to analyse the rise of the administrative state and its constitutional position. In South African law the need for this exercise has hardly been acknowledged, not to mention undertaken. Consequently, the separation of powers understood thus facilitates the formulation of new, fundamental questions such as what constitutes the administrative *branch and function*? Is the administration held accountable by the other branches? If so, how? Does the relationship between the branches safeguard the common interest?

The administration wields immense power. It creates its own rules in response to broad policy and legislative constraints and mandates. The scale of the administration means oversight is limited and accountability to the executive branch is not feasible. The independence of the administration and the executive has not been investigated to the extent of the other branches. Thus, even though the separation of powers has limitations,<sup>9</sup> it draws attention to a wide variety of values, objectives and potential solutions which affect institutions and are affected by institutions, such as the deconcentration of power and the necessity of independent political institutions. This can be applied to the administration.

All these questions are prompted by the separation of powers properly understood as a normative and dynamic doctrine. In addition, the doctrine can assist in responding to these questions. On these terms and standards the administration as a distinct

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<sup>7</sup> Vile MJC *Constitutionalism and the Separation of Powers* (1998, 2<sup>nd</sup> ed) 416.

<sup>8</sup> Gwyn WB *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (1965) 127-128. See Bellamy R "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy" (1996) 44 *Political Studies* 436-456 at 255; Meyerson D "The Rule of Law and the Separation of Powers" (2004) 4 *Macquarie Law Journal* 1-6.

<sup>9</sup> See ch 2 above.

branch and function should be included in separation-of-powers analysis. This involves a “new separation of powers”<sup>10</sup> and a change in legal culture.<sup>11</sup>

### 6.3 Analysing the South African Administrative-Law System

The historical failure to recognise the distinct nature of the administration and the administrative function is illustrated by the example of South Africa. As a result of this failure, the South African context is characterised by the equating of judicial review and administrative law, by the over-emphasis of judicial review in the absence of a bill of rights, by a judicial rhetoric of deference and, generally, by a juridical approach which is pro-review and anti-administration.<sup>12</sup>

In chapter three, the concept of the “contextualised administrative-law system” is drawn upon to analyse the legal relationship between the public administration and the judiciary in South Africa. That South Africa has a particular geo-political and socio-economic past that informs the aspirations of transformative constitutionalism is the point of departure. Therefore the geo-political and socio-economic context and political theory are not discussed in detail. The focus in the first part of the chapter is on the characteristics of the South African administrative-law system. To this end the

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<sup>10</sup> Ackerman B “Good-bye, Montesquieu” in Rose-Ackerman S & Lindseth PL (eds) *Comparative Administrative Law* (2010) 128-133 at 129.

<sup>11</sup> Klare K “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-188 at 156:

“The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods. They cannot have assumed that the document’s lofty ambitions would be interpreted according to, and therefore constrained by, the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era. On my reading, the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method”. (Emphasis in original).

<sup>12</sup> Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519 at 484.

development and nature of this system is set out. On the whole, the South African system is still emerging from Dicey's shadow and is characterised by the prominence of judicial review.

On the basis of the administrative-law system's nature, components and characteristics, as identified in the first part of chapter three, the legal relationship between the public administration and the judiciary is considered. The legal relationship is assessed by means of six elements that inform this relationship, namely: one, the constitutional mandates of the South African courts and public administration; two, the South African understanding and application of the doctrine of the separation of powers; three, the idea of deference or respect; four, the public/private-law distinction; five, democracy and the counter-majoritarian dilemma; and, six, co-operative government. These elements determine the nature, components and characteristics of the legal relationship between the administration and judiciary.

#### **6 4 Calling for a Debate on Deference, Again**

As a matter of South African positive law, the main characteristic of this relationship is deference. Authors such as Dyzenhaus, Hoexter and Daly consider deference as pivotal to developing a new, integrated approach to adjudication that reflects the role of the administration in the modern state.<sup>13</sup> The prominence of deference reinforces the notion of a fourth branch in terms of the separation of powers. In administrative-law adjudication, deference has developed into the courts' main descriptor of the relationship between the administration and the judiciary in the event of judicial review.<sup>14</sup> Deference dominates the debate on the relationship between the administration and the judiciary without acknowledging the nature of the relationship between the two institutions. The emphasis is on the functional spheres and characteristics of the branches, which is largely a separation-of-powers matter.

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<sup>13</sup> See Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307; Hoexter C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *South African Law Journal* 484-519; Daly P *A Theory of Deference in Administrative Law: Basis, Application and Scope* (2012).

<sup>14</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) paras 21-22; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 50; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 48.

Quite how deference differs from the ideas of the separation of powers is unclear, especially in South African case law. The new terminology might contribute to emphasising a particular aspect of the separation of powers in general, but without underlining the relationship and the role of the contextualised administrative-law system, deference as such cannot provide holistic solutions nor describe the nature of the problems associated with this relationship. As the French system illustrates the administrative-law relationship is particularly problematic due to the hybrid nature of administrative litigation.

Hoexter called for a debate on deference in the year 2000 for two reasons:<sup>15</sup> to determine an appropriate, integrated role for judicial review and to formulate a theory of intervention and non-intervention. This debate has not yet taken place in the sense called for by Hoexter. As far as the South African courts are concerned deference is simply the broad strokes identified by Hoexter.

Deference “flows” from the separation of powers, according to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>16</sup> With the publication of Hoexter’s article, “The Future of Judicial Review in South African Administrative Law”,<sup>17</sup> deference became a prominent topic that soon enjoyed judicial notice. However, without considering the credentials, nature or content of deference, the courts have established and applied it as a legal principle and rule.<sup>18</sup> Nevertheless, despite the courts’ apparent enthusiasm for a principle of deference, the actual role of deference is not only obscure, but seems merely to repeat the language of the pure separation of powers. This approach threatens to descend into a method characterised by formalism and conceptualism. Instead of grappling with questions such as the appropriate role of administrative and judicial review or the content of administrative justice, courts invoke deference in a manner that suggests deference and its application are straightforward. On the basis of factors such as expertise, democratic legitimacy, seniority and complexity courts avoid substantive argument on the

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<sup>15</sup> See Hoexter C “The Future of Judicial Review in South African Administrative Law” (2000) 117 *South African Law Journal* 484-519.

<sup>16</sup> 2004 4 SA 490 (CC) para 46.

<sup>17</sup> (2000) 117 *South African Law Journal* 484-519.

<sup>18</sup> See *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA); *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA).

implications the Constitution entails for the judicial and administrative functions. Thus, deference as applied is largely empty. This is precisely what calls for a new legal culture have sought to avoid. Consequently, courts do not engage with informing principles and considerations, including extra-legal considerations such as political theory, and therefore potential doctrinal and institutional innovations that the new constitutional dispensation may require are left unexplored.

In response to the position of deference today, the following steps are suggested. First, a debate on deference, as proposed by Hoexter, should be conducted and regarded as the point of departure. Secondly, an integrated approach for judicial review must be considered. Hoexter has called for an integrated role for judicial review. This means that judicial review is one of a variety of methods to protect the right to administrative justice. PAJA supports this approach. Section 7 of PAJA obliges the courts to require applicants to first make use of internal remedies before applying for judicial review:

“no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.”<sup>19</sup>

This suggests a move towards green-light theory. An integrated role for judicial review is supported by the high cost, long duration and formal procedures of litigation. Litigation also has a narrow focus on the dispute between the parties and the court must rely on the arguments presented before the court.

Therefore, on the basis of various, cogent reasons, other forms of effective protection must be investigated, both potential and existing forms of protection. If judicial review is integrated, in actual fact, then deference is a function of the administrative-law system in the sense that where protection increases within the administration or elsewhere, judicial review will arguably be informed by such a development. However, if the administrative-law system has not adapted to protect the interests of private individuals in ways other than judicial review, then the courts cannot remain passive as if alternative, adequate protection were available. Potentially, where the administration fails to transform, judicial review could conceivably retain its prominence.

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<sup>19</sup> S 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000.

Nevertheless, by considering the administrative-law system as a whole attention is drawn to the role of judicial review within the system as one form of control among others. This emphasises the value of the concept of the administrative-law system as well as the relationship as a conceptual tool for analysis and comparison. Considering jurisdictional control, i.e. legal control of administrative acts, provides a far clearer picture of the protection available than simply discussing the judiciary's role. In the French context this is more obvious, since analysing the relationship between the administration and judiciary would provide a warped impression of the protection against administrative acts available to an individual.

Thirdly, the concept of deference is yet to be contextualised in the South African context, particularly the human-rights context.<sup>20</sup> Similarly, in the fourth place, an appropriate theory of deference requires an assessment of deference in relation to considerations such a culture of justification, rule of law and equality as understood by Dyzenhaus. These considerations are integral to a South African understanding of deference, whatever it may turn out to be, given the primacy of equality and democracy in the South African context. Once again the connections between political theory, context, institutional arrangements and particular rules are evident.

In the fifth place, Dyzenhaus's entreaty to take administrative determinations of the law seriously requires further examination. Taking administrative determinations seriously requires at least the capacity to do so. To this end the French example is instructive. It exemplifies the measures that can be taken to guard against an isolated administrative jurisdiction, ignorant of administration.

In the sixth place, the extent to which deference is already part of the law should be acknowledged. The distinction between appeal and review is already a form of respect towards the administrative function. The definition of "administrative action"<sup>21</sup> also limits the application of administrative law and thereby the purview of the courts, although this may be sidestepped in certain circumstances by relying on the constitutional principle of legality. The variable standard of review, which excludes correctness or the substitution of the court's view for the administration's, also respects the administration. Section 6(2)(f)(ii) of PAJA provides for a rationality test and section 6(2)(h) provides for the general reasonableness test. Even though the latter

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<sup>20</sup> See Davis DM "To Defer and then When? Administrative Law and Constitutional Democracy" (2006) *Acta Juridica* 23-41 at 39.

<sup>21</sup> S 1 of the Promotion of Administrative Justice Act 3 of 2000.

does allow for proportionality<sup>22</sup> this standard maintains the distinction between appeal and review.

The remedies available to the courts are also limited. Section 38 of the Constitution authorises the courts to “grant appropriate relief” where “a right in the Bill of Rights has [allegedly] been infringed or threatened”. Section 172 authorises the courts to “make any order that is just and equitable”. Similarly section 8(1) of PAJA provides that the courts “may grant any order that is just and equitable”. Seemingly these provisions grant wide and far-reaching powers to the courts. However, only in “exceptional circumstances” may the court replace or change the administrative decision or order the administration to pay compensation.<sup>23</sup> The scope of remedies reflects the distinction between appeal and review and is also an incidence of deference.

In the seventh place, the link between deference and the separation of powers is problematic if not questionable. According to O’Regan J “the need for Courts to treat decision-makers with appropriate deference or respect flows ... from the fundamental constitutional principle of the separation of powers”.<sup>24</sup> She quotes from the House of Lords judgment, *R (on the application of ProLife Alliance) v British Broadcasting Corporation*,<sup>25</sup> to support her view, where Lord Hoffmann indicates that

“[i]n a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.”<sup>26</sup>

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<sup>22</sup> See Hoexter *C Administrative Law in South Africa* (2012, 2<sup>nd</sup> ed) 346-350.

<sup>23</sup> S 8(1)(c)(ii)(aa) and (bb).

<sup>24</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 46 (footnote omitted).

<sup>25</sup> [2003] 2 All ER 977 (HL).

<sup>26</sup> [2003] 2 All ER 977 (HL) para 75.



Thus,

“[t]he allocation of these decision-making responsibilities is based upon recognised principles ... [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.”<sup>27</sup>

Lord Hoffmann’s position is not that deference is underpinned by the separation of powers, as argued by O’Regan J, but that deference is empty in the sense that the allocation of functions by the courts is nothing more than a legal question in terms of the separation of powers and the rule of law.

In addition, the emphasis on the separation of powers is not shared by Dyzenhaus and Daly, for instance. Daly points out that “developing general principles of judicial review from the separation of powers is a difficult task.”<sup>28</sup> He nevertheless

“explore[s] four lines of reasoning which might lead to the conclusion that the separation of powers can compel the adoption of a doctrine of curial deference. Each line of reasoning will be rejected in turn, but they are not to be dismissed out of hand: each contains a seed of truth which will flourish under different conditions.”<sup>29</sup>

The four lines of reasoning are checks and balances, curial deference as discipline, automatic deference and curial deference as enhancing the legislature power.<sup>30</sup>

In the final analysis, Daly states that “the tripartite division tells us little or nothing about the functions that are properly assigned to each branch”.<sup>31</sup> This is even more so with political organs and functions that have developed more recently, such as the administration. Instead, Daly’s theory of deference is founded on the delegation of powers to the administration by the legislature and “practical justifications” for

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<sup>27</sup> [2003] 2 All ER 977 (HL) para 76.

<sup>28</sup> Daly P A *Theory of Deference in Administrative Law: Basis, Application, Scope* (2012) 44-45.

<sup>29</sup> 45.

<sup>30</sup> 45-48.

<sup>31</sup> 44.

deference.<sup>32</sup> For Dyzenhaus a theory of deference is based on democratic principles, the rule of law understood as equality and a “culture of justification”.<sup>33</sup>

I do not attempt to argue that the separation of powers should be disregarded in relation to deference. Rather, the separation of powers, as such and without more, does not and cannot give content to a fully-fledged theory of deference. The separation of powers certainly informs deference. However, as illustrated by Dyzenhaus and Daly, the normative objectives that shape the separation of powers are more relevant to deference than the pure doctrine or *trias politica*. This emphasises the interrelatedness between political theory, context and the administrative-law system once again.

Finally, the inquiry “when does deference apply” requires particular attention. At this stage it seems that deference permeates the entire legal landscape, from the allocation of constitutional competences to the application of particular rules and the formulation of remedies. Deference plays a role at the determination of justiciability, e.g. the definition of administration action;<sup>34</sup> deference determines the type of scrutiny available to the courts, i.e. review instead of appeal; deference determines the standard of review, i.e. rationality, reasonableness or proportionality; and the scope of remedies are influenced by deference. Deference also influences the interpretation of legislation<sup>35</sup> and deference is constituted by factors external to the facts of the particular case such as expertise, complexity, democratic legitimacy and discretion.<sup>36</sup>

Thus, deference seems to be quite undeveloped in the South African context. Even where deference has a long history and established role, in Canada for example, deference as such is contested and critiqued. However, on a close reading of Hoexter, Dyzenhaus and Allan there is significant potential for a principle of deference. Without compromising on a “culture of justification” and context, deference can make at least three vital contributions. Firstly, deference can emphasise and embody the

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<sup>32</sup> 5, ch 2, ch 3.

<sup>33</sup> Dyzenhaus D “The Politics of Deference: Judicial Review and Democracy” in Taggart M (ed) *The Province of Administrative Law* (1997) 279-307 at 302-305.

<sup>34</sup> S 1 of the Promotion of Administrative Justice Act 3 of 2000.

<sup>35</sup> See Daly P *A Theory of Deference in Administrative Law: Basis, Application, Scope* (2012) ch 2.

<sup>36</sup> Ch 3.

distinct relationship between the administration and the judiciary.<sup>37</sup> Secondly, on Dyzenhaus's interpretation, deference implies that courts should take administrative determinations of the law seriously. This involves a change in legal culture and, arguably, institutional innovation. Above all, it requires an appreciation of the administration and the administrative function and the capacity to do so.<sup>38</sup> Finally, deference can facilitate a discussion on the appropriate role for judicial review within the administrative-law system, as proposed by Hoexter in 2000. I reiterate that this is a discussion that is yet to take place, despite the enthusiasm of the South African courts for a rhetoric of deference.

## **6 5 The Relationship between the Administration and the Judiciary: Deference Aside**

Constitutional constraints can assist in the formulation of a South African theory of deference, but also of the administrative-law system as a whole. Although broad, the constitutional constraints within which the administration and judiciary must operate are identified. The judiciary is bound by section 172 to secure the supremacy of the Constitution. Section 195 sets out the values and principles to which the administration must adhere. Other broader principles such as the rule of law and legality are also entrenched by the Constitution, all of which establish the values of the administrative-law system and define the relationship between the administration and the judiciary. The Constitution also establishes a commitment to broad, societal change that includes justiciable, socio-economic rights. The sheer scale of the administration's activities<sup>39</sup> renders it absolutely integral to the steering and achievement of these aspirations.

The doctrine of the separation of powers and checks and balances also defines the relationship between the administration and the judiciary. The separation of powers is

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<sup>37</sup> To an extent this is already the case, since the courts do not employ a rhetoric of deference to describe the expertise of the judiciary or all of the other branches of state and the respect their decisions and reasons should be accorded. If deference flowed from the separation of powers as a general principle one would expect the principle of deference to be equally valid between all branches of state.

<sup>38</sup> To this end the principles explaining and justifying the existence of independent administrative courts in France are examined in ch 4.

<sup>39</sup> See Quinot G *Administrative Law: Cases and Materials* (2008) 2-3, 3 n 8.

problematic, however, given the rise of the administrative state in South Africa and the adherence to a triadic conception of the separation of powers. Nevertheless, given the wording of the Constitution, a South African separation of powers can be formulated on the basis of the Constitution as is. The Constitution recognises the constitutional role of the administration.<sup>40</sup> According to Constitutional Principle VI and *South African Association of Personal Injury Lawyers v Heath*<sup>41</sup> the separation of powers is entrenched in the Constitution. Fortunately, the Constitution does not define the separation of powers. On the basis of Constitutional Principle VI and *South African Association of Personal Injury Lawyers v Heath*<sup>42</sup> one can assert that the Constitution requires a separation between the executive, legislature and judiciary as a minimum requirement. The addition of the administration is in line both with the Constitution as a whole and the constitutional description of the separation of powers.

The public/private-law divide also informs the relationship between the administration and the judiciary. In the first place, the public/private-law dichotomy has a restrictive effect on the analysis of concepts such as public contracting. Instead of engaging with the substance of public contracting, its role and impact, the focus is on classification, which can result in formalism.<sup>43</sup> Secondly, the public/private-law dichotomy also reduces the analysis to an exercise in binary selection.

Judicial review of administrative action is critiqued for being counter-majoritarian. Certainly, democratic principles are foundational to the role of the judiciary in relation to the administration and to the role of law in administrative action. However, democracy should not be reduced to populism or majoritarianism. One should also bear in mind that it is not the judiciary that institutes litigation against the administration, but private citizens or institutions.<sup>44</sup> Although the appropriate role of the judiciary and of judicial review is the function of a variety of factors, notably choices in political and constitutional theory, which need to be balanced,<sup>45</sup> judgments on administrative matters are not even inherently anti-democratic:

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<sup>40</sup> S 195 of the Constitution of the Republic of South Africa, 1996.

<sup>41</sup> 2001 1 SA 883 (CC).

<sup>42</sup> 2001 1 SA 883 (CC).

<sup>43</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 52-53.

<sup>44</sup> See Mokgoro JY “Ubuntu, the Constitution and the Rights of Non-citizens” (2010) 21 *Stellenbosch Law Review* 221-229 at 225.

<sup>45</sup> Such as the rule of law embodied in human rights versus democracy as the will of the majority.

“the adjudicative powers of the Courts are derived from the Constitution, which is the basic law of our democracy, *based on the will of the people*. In other words, when Courts set aside legislative enactments or executive action, they do so on the basis that the legislation or executive action does not pursue the set constitutional project. The Courts thus fulfil a mandate assigned to them by the Constitution, pursuing a common goal they share with the other arms of government.”<sup>46</sup>

Finally, the nature of the public administration and the role of the judiciary in intervening with administrative action should be circumscribed by the concept of co-operative government. From a normative position, all of these elements that characterise the legal relationship between the administration and judiciary are equally important. As mentioned, the emphasis on deference is due to its enthusiastic reception by the South African courts and their identification of the concept as a principle informing the relationship between the administration and judiciary.

## **6 6 Beyond the Pure Separation of Powers: The French Administrative-Law System**

It is suggested that taking administrative determinations of the law seriously involves judges having the capacity to do so and that this may require institutional innovation. The French administrative-law system is the classic example of an integrated administration and administrative jurisdiction, where the staff forms an elite specialised in administration. The *Conseil d'État* is well known for its prestige and for its judges trained in administrative matters at the *ÉNA*. Before setting out the structure of the *Conseil d'État* that allows for such an integrated system, the characteristics, explanations and justifications of the system are discussed. The development and structure of the system are drawn upon in order to explore the different institutional arrangements that are possible in terms of the same basic principle, the separation of powers.<sup>47</sup> Thus, chapter five complements the theoretical discussion on the separation of powers set out in chapter two.

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<sup>46</sup> Mokgoro JY “Ubuntu, the Constitution and the Rights of Non-citizens” (2010) 21 *Stellenbosch Law Review* 221-229 at 225-226 (emphasis added).

<sup>47</sup> At least in terms of the prevalent narrative, the traditional explanation.

The French administrative-law system is also the example *par excellence* of an alternative to the British constitutional model due to the early recognition of administrative law and the existence of a separate administrative jurisdiction. Dicey's comparison of the British and French systems, though dated now, exemplifies the novelty of the French system in relation to common-law systems. This makes the French system useful for comparative purposes from the South African perspective as well. The French administrative-law system is characterised by an independent administrative jurisdiction, within the administration itself, performing a dual advisory and jurisdictional function. In chapter four the explanations and principles that describe and justify the French system are identified. This is mainly a historical discussion of the system's development from the Middle Ages to the twentieth century. The present organisation, membership, structure and functions of the *Conseil d'État* are discussed briefly as the embodiment of these explanations and principles.

The existence of administrative courts is explained in several, sometimes contradictory, narratives. The "traditional explanation" is the point of departure, even though it is not the earliest explanation, because it is the generally accepted explanation for the French system and it has been endorsed by the *Conseil Constitutionnel*.<sup>48</sup> Also, the significance of other narratives is clearer in relation to the traditional explanation, which also justifies discussing this explanation first.

In terms of the "traditional explanation" the French Revolution of 1789 is the critical event leading to the creation of the administrative jurisdiction. Article 13 of the Law of 16-24 August 1790 promulgated the principle of the separation of administrative and judicial authorities. This principle signified a break with the past by prohibiting the courts from adjudicating on administrative matters; the establishment of an administrative jurisdiction followed. The separation of authorities expresses the French interpretation of the separation of powers. The traditional explanation demonstrates that the separation of powers is not a narrow doctrine, allowing for interpretations as diverse as the French and pure versions. Even alternative explanations acknowledge this: according to Chevallier and Velley the

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<sup>48</sup> CC decision n° 86-224 DC of 23 January 1987.

separation of powers is capable of such an interpretation and was interpreted in this manner, but only retrospectively.<sup>49</sup>

The traditional explanation also illustrates that the separation of powers, even when it is considered as the main principle behind the French system, is not omnipotent or all-pervasive. The separation of powers is one important principle amongst others, ultimately dependent on political theory and context. France is an example of how institutional structure and values are tied to context, although the system is constructed in terms of the very same principle as the common-law systems, namely the separation of powers.

However there are other explanations and justifications for the French system. Another argument holds that the earliest incidence of the French system dates from the late Middle Ages.<sup>50</sup> In terms of this narrative administrative jurisdictions resulted from a division of labour as state functions increased. Therefore, administrative jurisdictions were simply a practical solution. Thus, the duality of jurisdiction is regarded as a historical development based on the division of labour. One should guard against the retrospective superimposition of principles to developments such as the administrative jurisdiction. A contextual approach will contribute to the avoidance of this pitfall. This approach also shows that the characteristics and structure of the South African administrative-law system is possibly due more to its English heritage and the Diceyan legacy, than the separation of powers as such. This leads to a more nuanced debate about the role and potential of the separation of powers.

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<sup>49</sup> Chevallier J *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (1970) 72; Velly S "La Constitutionnalisation d'un Mythe: Justice Administrative et Séparation des Pouvoirs" (1989) *Revue du Droit Public et de la Science Politique en France et l'Étranger* 767-783 at 775-776, 776 n 36.

<sup>50</sup> Mestre JL *Un Droit Administratif à la fin de l'Ancien Régime: Le Contentieux des Communautés de Provence* (1976); "Les Racines Seigneuriales du Droit Administratif Français" (1981) IV *Annuaire Européen d'Administration Publique* 783-799; "La Contribution des Droit Romain et Canonique à l'Élaboration du Droit Administratif" (1982) V *Annuaire Européen d'Administration Publique* 925-943; "Les Fondements Historique du Droit Administratif Français" (1982-1983) n° 34 *Études et Documents publiés par Le Conseil d'État* 63-80; *Introduction Historique au Droit Administratif Français* (1985); Bénoit F-P *Le Droit Administratif Français* (1968); "Les Fondements de la Justice Administrative" in *Mélanges offerts à Marcel Waline. Le Juge et le Droit Public II* (1974) 283-295. See also Weidenfeld K *Les Origines Médiévales du Contentieux Administratif (XIVe – XV Siècles)* (2001).

Even the originality of the principle of the separation of authorities, as expressed during the Revolution, is questioned. The Edict of Saint-Germain, promulgated in 1641, already contained wording virtually synonymous with article 13 of the Law of 16-24 August 1790. This illustrates that from an early stage the French government regarded decisions on administrative matters as undue interference with the administration. It also questions the centrality of the Revolution itself to the development of the French administrative jurisdiction.

More importantly, the early origins of the French administrative jurisdiction reveal other justifications for eventually removing administrative litigation from the jurisdiction of the ordinary courts. Firstly, it implicated and undermined the authority of the state or administration. Secondly, these reasons include a preference for administrative expertise and knowledge, speed and lower costs associated with “administrative” litigation. Thus, the reasons for the lack of separation reveal the distinct nature of administrative litigation.

Chevallier also identifies another factor from well before the 1789 Revolution leading to the administrative jurisdiction: the French monarchy recognised the specificity of administrative litigation early on. Velley argues that the traditional explanation is a retrospective rationalisation, formulated in the nineteenth century, for the allocation of administrative litigation to the active administration.<sup>51</sup> All of these observations challenge the originality of the revolutionary developments.

Other explanations for the administrative jurisdiction are based on interpretations of the Revolution that differ from the traditional explanation. In other words, critiques of the “traditional explanation” do not disregard the role of the Revolution, but view the Revolution in a different light. Chevallier argues that the specificity of administrative litigation and the adherence to an ordinary separation of powers left the *constituants* with a dilemma. They recognised the hybrid nature of administrative litigation, but their dogmatic commitment to the unity of jurisdiction and the elimination of exceptional jurisdictions lead to difficulties in allocating administrative litigation. Unable to resolve this dilemma, the *constituants* allocated administrative litigation to the active administration. This shows that dogmatic adherence to the

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<sup>51</sup> Velley S “La Constitutionnalisation d’un Mythe: Justice Administrative et Séparation des Pouvoirs” (1989) *Revue du Droit Public et de la Science Politique en France et l’Étranger* 767-783.



separation of powers in a narrow sense can limit the potential options to a significant degree.

However, eventually an independent administrative jurisdiction developed alongside the active administration, both falling within the administration. This realised the principle of the separation of the administrative jurisdiction and the active administration. This principle explains the entire process leading to an administrative jurisdiction, from the Middle Ages to the twentieth century.

The principle “to judge the administration is *also* administering”, formulated by Sandevour, is another comprehensive explanation for the administrative jurisdiction. This principle also recognises the hybrid nature of administrative litigation and it emphasises the link between administrative litigation, on the one hand, and administrative action and administration, on the other. Ultimately, adjudicating on administrative matters is a form of administration and administrative judgments complement administrative action. The principle consists of three elements. The normative element concerns the recognition of the necessity for a distinct and autonomous administrative law. The material element is concerned with the impact of administrative litigation on the general interest. Finally, the organic element balances the need for effective administration in the general interest and the need to protect individual rights.

The reasons for the initial lack of separation between the active administration and the administrative jurisdiction are the result of dogmatic adherence to a narrow conception of the separation of powers. It was also the result of the dilemma of allocating administrative litigation. Thus the specificity of administrative litigation is central to the problems associated with the administrative jurisdiction as well as the allocation of administrative litigation. The solution can only take the form of balancing the opposing concerns embodied in administrative litigation, a balance between the administrative activity and administrative justice. This is in line with Sandevour’s characterisation of the French development as a narrative of compromise and balance.

Therefore the French comparison is instructive in the following regard. The opposing functions both implicated in administrative litigation are inherent and unavoidable. Administrative litigation concerns the spheres of both the administration and administrative jurisdiction. Above all, the French system introduces the nature of administrative litigation as a consideration that informs the relationship between the

administration and the administrative jurisdiction, with doctrinal<sup>52</sup> and institutional implications. The French example also indicates just how flexible the separation of powers can be. In addition, the development of the administrative jurisdiction provides principles in addition to the French separation of powers with which to evaluate the legal relationship between the administration and judiciary, such as the principle of the separation of authorities, the principle of the separation of the administrative jurisdiction and the active administration, the principle “to judge the administration is *also* administering”, as set out by Sandevour, and, finally, the principle “to judge the administration is *still* administering”.

The *Conseil d'État* is the outcome of the various explanations and principles discussed in chapter four. For example, the hybrid nature of administrative litigation finds expression in the dual function of the *Conseil d'État*: the *Conseil d'État* is simultaneously the supreme administrative jurisdiction and the adviser to the administration. The administrative sections of the *Conseil d'État* encompass all the administrative functions of the state. Thus the same institution is simultaneously involved with the active administration and performing the jurisdictional function.

There is also significant interaction between the *Conseil d'État* and the active administration. In this way the members of the *Conseil d'État* are well versed in administration and the specific challenges encountered by the administration. This cultivates the perception that the decisions of the *Conseil d'État* are informed decisions in an administrative sense. Within the *Conseil d'État* itself there is co-operation and interaction. Members work for both the advisory and jurisdictional sections. In other words, members of the *Conseil d'État* are enabled to take administrative determinations of the law seriously, because they have the training and experience to do so. Notably, the structure of the administrative-law system enables and promotes close interaction between the administration and administrative jurisdiction.

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<sup>52</sup> See ch 5 above.

## 67 The French Administrative-Law System in Practice: The *Contrat Administratif*

In France the development of the administrative jurisdiction was influenced by the distinct nature of administrative litigation, i.e. the specificity of administrative litigation was recognised from an early stage and this contributed to the development of an independent administrative jurisdiction. The *contrat administratif* is one form of administrative litigation. The *contrat administratif* has been chosen as the subject of chapter five because the public contract embodies the opposing interests, values and characteristics of the public/private-law divide. On the one hand there are private interests, namely, the interests of the contracting parties as such. On the other hand, the administration often contracts in the general interest. Public contracts also question the boundaries of the judicial and administrative functions. The judicial function, in the sense of applying or stating the law, and the administrative function, in the sense of implementing legislation in the general interest, are both implicated. Thus, public contracts operate at the threshold of these concepts. Thus the rules in place to distinguish between private and administrative contracts in the French context implicate all of these considerations.

In chapter five the legal status and regulation of the *contrat administratif* are discussed. Firstly, the classification of *contrats administratifs* is explained. A variety of methods exist to classify contracts as administrative. It is noteworthy that the *contrat administratif* is a distinct legal concept. In other words, the regulation of the *contrat administratif* is not equivalent to the application of general administrative-law rules to a private contract, as was the case in *Logbro Properties CC v Bedderson NO*.<sup>53</sup> The adjudication of a *contrat administratif* implies the application of specific administrative-law rules of contract to an administrative contract by the administrative courts. The importance of this comparison is that the French system provides a list of criteria for distinguishing between administrative and private-law contracts.

Once a contract is classified as administrative different rules of contract apply than in the case of a private-law contract. The singularity of the *contrat administratif* is exemplified in the rules regulating performance and therefore the focus of the chapter is on the rules regulating contractual performance.

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<sup>53</sup> 2003 2 SA 460 (SCA).

The rules of performance are characterised by a number of general concepts. Firstly, the *contrat administratif* is a concept distinct from the private-law contract in the sense that the former is regulated by different rules and falls within the jurisdiction of the administrative courts. Nonetheless, secondly, the common will of the parties is the primary consideration determining the content of performance. Thus, an essential feature of the concept of contract is maintained, namely, the foundation of consensus.

The “requirements of the public service” is an additional consideration. It acknowledges the participation of the administration in the contractual relationship and the *contrat administratif*'s role as an administrative instrument. Furthermore, the contractor itself is viewed in a particular light, illuminating the specificity of the *contrat administratif*: the contractor *collaborates* with the administration in performing a public service in the general interest. Thus the nature and purpose of the administrative act itself is reflected in the applicable legal rules.<sup>54</sup>

The *contrat administratif* has a particular perspective on the inequality of the contracting parties that can be instructive in the South African context. In South Africa the inequality of the contracting parties is concerned with the relative bargaining power of the parties.<sup>55</sup> However, in the context of the *contrat administratif*, inequality relates not only to the presence of superior authority or power, but to the discrepancy between the interests each party represents. The interests each contracting party represents is directly related to the conclusion of the contract. On the one hand, the private party contracts for what can be described as individual or private interests. However, on the other hand, the administration contracts for the provision of public services and in the general interest. It is the relative interests of the respective parties that are unequal. Thus inequality is not limited to the characteristics of the contracting parties, but extended to include the content and impact of the contract. Inequality understood thus does not favour the administration as such *vis-à-vis* the private contracting party, but the administration *contracting in the public interest*, which is protected. This perspective could broaden the role of contractual inequality in the South African law of contract and addresses the charge of a “monolithic notion” of contract law. An over-emphasis on the interests of the contracting parties is a charge levelled against the South African law of contract: the privity of contract

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<sup>54</sup> As opposed to factors external to the nature of the act.

<sup>55</sup> See Quinot G *State Commercial Activity: A Legal Framework* (2009) 139.

“has the effect of limiting the substantive interests that are regarded as relevant in regulating state commercial activity. Not only are third parties and the public in general barred from enforcing judicial regulation of such state conduct, but their interests are also removed from private-law regulatory scrutiny. In the private-law approach such wider interests simply never enter the regulatory picture. This has the effect of reducing the perceived impact of the regulated conduct. Since the wider interests involved are not placed before the court, the wider impact of the (state) conduct on the environment and society is made to seem less important. Freedland notes another way in which the privity doctrine reduces the public interests involved in state conduct. He argues that where the relationships between the state and citizens are analysed in terms of contract, the result is that each instance of interaction amounts to a single contract, isolating it from other identical relationships and hence breaking up the cumulative public interest ... All of this obviously has a significant impact on the court’s weighing of interests which inevitably informs (whether expressly or not) the court’s conclusions. As Collins notes ‘the contractual relation creates new, more specific expectations, but simultaneously it tends to exclude the surrounding normative context in the evaluation of whether those expectations have been fulfilled or disappointed’.”<sup>56</sup>

Acknowledging the inequality of the contracting parties as an incidence of public service and the general interest goes some way towards regulating contracts “on a continuum”.<sup>57</sup>

The administration’s status as such also informs the rules of performance. This consideration recognises both the public authority of the administration and the consensual nature of the contract. These interests need to be balanced. If either interest dominates, either the public-law nature of the administration is undermined or unilateral decision-making is excessive, thereby undermining the will of the parties. “Adaptability” and the “financial equilibrium of the contract” illustrate how particular rules reflect the considerations of the will of the parties, the needs of the public service and equity.

The broader purpose of the contract is not neutralised by the contractual relationship. However, it is a factor operating in addition to the will of the parties. Thus the agreement is protected, but the nature of the contract is not thereby denied. This arrangement illustrates a valuable consideration: the public/private-law divide

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<sup>56</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 204 (footnotes omitted).

<sup>57</sup> 273-285.

fosters a binary approach to legal regulation. The contract is regulated either by private law or by public law. This approach limits thinking on potential alternative solutions. Above all, the French administrative-law system, and the *contrat administratif* as a legal instrument within that system, draws attention to the core of administrative adjudication: the inherent, internal conflict and instability of adjudicating on administrative decisions. Judging the administration implicates the boundaries, overlaps and limitations of constitutional arrangements, such as the separation of powers, the delineation of functions, and the dynamic nature of the contextualised administrative-law system. Acknowledging the internal conflict and instability is a necessary step to developing institutional and doctrinal solutions that respond to the nature of the administrative-law system.

Introducing administrative contracts is not necessarily a guarantee against the flaws of formalism, but the *contrat administratif* illustrates that various solutions are viable, even in terms of the framework of basic and established legal principles, such as the concept of contract founded on the will of the parties. In terms of this approach the applicable legal rules respond to the nature of the act. For example, the fact that the administration contracts for the general interest informs the rules applicable to such a contract. A formalistic and monolithic approach can artificially conform a singular act to the available legal categories; this can be described as “pigeonholing” public contracts. The hybrid nature of administrative litigation, in general, and of public contracting, in particular, militates against such an approach.

This is compatible with the basic legal principles of South African law. Firstly, it acknowledges the primacy of consensus. Secondly, to an extent, the incidence of a variety of opposing public and private-law norms simultaneously regulating contract has been acknowledged by the South African courts. In *Logbro Properties CC v Bedderson NO*<sup>58</sup> Cameron JA, responding to the argument that the province could rely on contractual conditions to evade principles of administrative justice, states that

“[e]ven if the conditions constituted a contract ... its provisions did not exhaust the province’s duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties

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<sup>58</sup> 2003 2 SA 460 (SCA) paras 5-7.

under the Constitution and any applicable legislation.”<sup>59</sup>

Thus, in *Logbro Properties CC v Bedderson NO*<sup>60</sup> it was not a case of exclusively applying either private law or administrative law as a whole to the contract: “[t]o classify the state action as administrative action does not mean that it is not *also* contractual in nature, it is simply not purely contractual, ie *purely* private-law regulated.”<sup>61</sup>

The underlying values of the *contrat administratif*, such as the needs of the public service, reflect the nature, role and impact of the act. These considerations are integrated in the applicable legal rules. They illustrate why the specificity of administrative litigation has been recognised from an early stage and how to respond to this specificity: ultimately developing a system informed by the specificity of administrative litigation itself.

The fact that one instrument is employed by the administration rather than another is not wholly decisive for the applicable rules. It is problematic when the choice of instrument in the exercise of a particular function, such as the implementation of legislation in the general interest, can sidestep legal regulation based on the nature of the function. The assertion here is not that the French approach is somehow without defect, but that the French system, at the very least, acknowledges broader institutional and social actualities within the applicable rules themselves, even when the administration performs its constitutional mandates through contract.

The distinct nature as such of administrative litigation is not discussed or analysed. This can be explained by means of the purpose of the comparison with the French system: the purpose is to identify the reasons behind the existence of an independent administration jurisdiction. One of the contributing factors is the specificity of administrative litigation. The discussion on the development of the French system does reveal, however, that administrative litigation is distinct because it concerns decisions where the administration has discretion, it precludes the direct application of the law as a mechanical process, it concerns the public interest, and it affects the administrative authority.

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<sup>59</sup> *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 7.

<sup>60</sup> 2003 2 SA 460 (SCA).

<sup>61</sup> Quinot G *State Commercial Activity: A Legal Framework* (2009) 52 n 2 (emphasis in original).

## 6 8 On the Question of an Alternative South African System

In this dissertation I have not attempted to develop an alternative administrative-law system for the South African context. Therefore, concrete recommendations for an alternative system as such are not proffered. Rather, the study develops an approach to inquiries concerning administrative-law systems. This does not imply that specific recommendations are impossible or undesirable. However, without acknowledging the impact of the conceptual framework on administrative-law systems, determinations concerning such systems are inherently limited. Administrative-law systems do not operate in a vacuum and should not be considered in a vacuum only. Thus, on the whole, the dissertation is concerned with how one goes about developing an alternative system and not with proposing a particular alternative; instead a methodology for thinking about and developing alternative systems is proffered.

The content of the South African conceptual framework has been extended. South Africa's conceptual framework does not have to be restrictive; alternative systems can be developed by means of the principles that are already entrenched in South African law, such as the separation of powers and deference. The potential of the separation of powers to incorporate the administration as a fourth branch, or even multiple branches,<sup>62</sup> illustrates this finding. The normative nature of the separation of powers, rather than its form as *trias politica*, provides a nuanced and multifaceted principle by means of which alternative systems can be assessed and developed.

In the South African context the relationship between the administration and the judiciary must be informed by the Constitution and, it is argued, the project of transformative constitutionalism.<sup>63</sup> Transformative constitutionalism, which builds on the idea of a culture of justification, sets out the normative content of the Constitution and, by implication, of the administrative-law system and the relationship between the administration and the judiciary. Thus, in the South African context, the separation of powers and deference should be considered and developed in the light of the normative framework established by the Constitution.

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<sup>62</sup> Such as the "integrity branch", in addition to the four proposed branches, incorporating institutions such as those created in chapter nine of the Constitution in the South African context. See 2 5 above.

<sup>63</sup> See 2 3 2 above.



In chapter three, on the South African system, six elements that characterise the relationship between the administration and the judiciary were identified. The concept of deference was discussed in particular detail, however.<sup>64</sup> The relative weight accorded to deference as an element does not constitute a normative position. Rather, the discussion sought to establish the discrepancy between the debate on deference Hoexter proposed, on the one hand, and the reception by the South African courts of deference as a legal rule and its application as such, on the other. Thus, the importance of deference as a point of positive law explains the focus on deference; the other elements are equally important in understanding the relationship between the administration and the judiciary, nevertheless.

Despite the value of a broader, normative understanding of principles such as the separation of powers or checks and balances, certain preliminary debates cannot be avoided in the development of any alternative system. For instance, debates on deference or on the constitutional roles of the administration and judiciary must be conducted before concrete proposals on an alternative system can be formulated. The purpose of this dissertation has been to widen the discussion on an alternative system without pre-empting the necessary debates that are yet to be conducted. Again deference is a good example as the discussion of deference in chapter three concluded that the debate Hoexter called for must still take place.

In chapter four, the discussion on the content of the separation of powers continues. This chapter, on the principles underpinning the French administrative-law system, demonstrates that the concept of the separation of powers is susceptible to numerous interpretations. This also broadens the potential role for the separation of powers in the South African context. Thus chapter four can be regarded as an extension of the discussion in chapter two on the content and nature of the separation of powers, rather than a purely comparative chapter.

Chapter four also indicates that in France the distinct nature of the administration and the difficulty of reconciling the administrative and jurisdictional functions have been recognised for centuries. This contrasts strongly with those nations whose systems are still affected by a Diceyan legacy, such as that of South Africa. The French comparison provides several conceptual approaches to these difficulties and so provides a point of reference for the South African debate on an alternative

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<sup>64</sup> See 3.3.3 above.

administrative-law system, including practical examples of how French principles find expression in practice, such as the training and recruitment of the members of the *Conseil d'État* and its organisation. The French example also demonstrates that the separation of powers is not necessarily the decisive factor in the structure of the French system: the separation of powers operates in conjunction with other principles and considerations that, collectively, characterise the French system. The separation of powers need not be the only principle informing the constitutional structure of the state or the relationship between the administration and judiciary. Consideration of French engagement with the notion of an administrative-law system thus serves a valuable function in opening up the debate that is put forward here in the South African context. As this dissertation has shown, at the level of principle the debates about the structure of a South African administrative-law system can be conceptualised more broadly than traditional views on the guiding principles in South Africa would suggest, without having to reject those principles.

Where one moves from the level of principle to doctrine, the regulation and adjudication of public contracts provides a useful doctrinal perspective of the administrative-law system, providing a reference within a given context for the reconceptualisation of that system. The public contract is therefore discussed here as one form of administration, partly due to its conceptual ambiguity as a legal instrument on the boundary between public law and private law and partly due to the administration's increasing contractual activity. The regulation of public contracts thus tests at doctrinal level most, if not all, of the important elements of principle that characterise the relationship between the administration and judiciary and that inform the administrative-law system. To an extent the *contrat administratif* of French law indicates that particular legal rules are an extension of the broader principles and considerations discussed in chapter four. The *contrat administratif* provides useful alternatives to the monolithic South African conception of contract and its binary approach to contractual regulation, illustrating at doctrinal level how a significantly different conceptualisation of one element of the administrative-law system can be achieved within the same framework of principles.

This dissertation introduces an approach that emphasises the relationship between the administration and the administrative jurisdiction as well as the conceptual framework within which the administrative-law system operates. Through the application of this approach to the South African and French contexts and to public

contracting the key concepts and debates that could lead to an appropriate administrative-law system in South Africa are identified and investigated. This constitutes a platform for the development of a particular administrative-law system and an exposition of viable alternatives to the conceptual framework within which the system operates.

## GLOSSARY OF FRENCH TERMS

***Accord de volontés*** Agreement, consensus.

***Administrateur-juge*** Literally, administrator-judge. Where an administrator acts as judge over the administration.

***Ancien Régime*** French constitutional regime before the French Revolution of 1789.

***Assemblée du contentieux*** A formation of the *Conseil d'État* as administrative jurisdiction. The court is constituted by the vice-president of the *Conseil d'État*, the section presidents, the president of the *sous-section* concerned and the *rapporteur*.

***Assemblée Générale*** General Assembly.

***Auditeurs*** Legal assistant. Junior members of the *Conseil d'État*.

***Avis*** Formal advisory opinion of the *Conseil d'État*.

***Bouleversement de l'économie du contrat*** Disruption of the economic balance of the contract.

***Brassage*** The simultaneous attachment of members to the administrative and litigious sections of the *Conseil d'État*.

***Cahier des charges*** Terms and conditions of a contract.

***Chambre des Comptes*** Chamber of Accounts.

***Clause exorbitante du droit commun*** Extraordinary clause in the context of the private-law contract.

***Clauses financières*** Financial clauses.

***Commissaire du gouvernement*** “Commissioner of the law”, a member of the *Conseil d'État*.

**Compatibilité** Compatibility of the type of law of contract, whether administrative or private-law, with the contract itself.

**Conseil Constitutionnel** Constitutional Council.

**Conseil d'État statuant au contentieux** The *Conseil d'État* presiding over administrative litigation as administrative jurisdiction.

**Conseil d'État** Council of State.

**Conseil des Ministres** Council of Ministers, the French Cabinet.

**Conseil du Roi** Council of the King, *Curia Regis*.

**Conseiller d'État (en service extraordinaire)** Counsellor of State (in extraordinary service). Senior member of the *Conseil d'État*.

**Conseiller d'État (en service ordinaire)** Counsellor of State (in ordinary service). Senior member of the *Conseil d'État*.

**Conseils de Préfecture** Councils of prefecture.

**Consensualisme** The principle of (contractual) consensus.

**Constituant** Member of the French National Constituent Assembly.

**Consultation juridique** Legal opinion.

**Contentieux administratif** Administrative litigation, dispute.

**Contrat administratif** French administrative contract

**Contrat de droit commun/de droit privé** French private-law contract.

**Contrats administratifs par détermination de la loi** Administrative contracts in terms of law.

**Contrats de partenariat** Type of administrative contract defined by Ordinance no 2004-559 of 17 June 2004.

*Cours Administratives d'Appel* Administrative Courts of Appeal.

*Critère du service public* Public-service criterion.

*Critère matériel* Material criterion.

*Critère organique* Organic criterion.

*Critères jurisprudentiels* Criteria derived from case law.

*Double appartenance* Double membership.

*Dualité de juridiction* Duality of jurisdiction.

*École Nationale d'Administration* National School of Administration.

*Équation/équilibre financière* Financial equation/equilibrium.

*Équivalence honnête* Balance between a contractor with the state's rights and obligations.

*Faculté/latitude/pouvoir d'appréciation* Scope for discretion.

*Fait du prince* Governmental act or fiat.

*Force majeure* Major force.

*Garanties de l'exécution* Guarantees of performance.

*Gestion privée* Private management.

*Gestion publique* Public management.

*Grand Conseil* Grand Council, a division of the *Curia Regis* concerned with governmental and legislative matters.

*Immutabilité* Immutability refers to the obligatory nature of contracts and that contracts cannot be amended unilaterally.

***Imprévision*** Principle in terms of which supervening circumstances result in the amendment of the terms of the contract.

***Intendants*** Royal administrative official.

***Juge-administrateur*** Literally, judge-administrator. Sandevour's term for the administrative judge.

***Juger l'administration, c'est aussi administrer*** To judge the administration is *also* administering.

***Juger l'administration, c'est encore administrer*** To judge the administration is *still* administering.

***Justice administrative*** French administrative jurisdiction.

***Justice déléguée*** The capacity of a French court to hand down judgments independently in the name of the French people.

***Justice retenue*** The system in terms of which French courts hand down judgments in the name of the sovereign and the judgment's validity is subject to the sovereign's approval.

***Le recrutement au tour extérieur*** Recruitment from the administration.

***Le recrutement par concours*** Admission or recruitment by competitive examination.

***Les exigences du service public*** The requirements of the public service.

***Loi des parties*** Law of the contracting parties.

***Maîtres des requêtes*** Legal adviser. Middle-ranked member of the *Conseil d'État*.

***Maximum d'efforts et de diligence*** A high and strict standard of contractual performance.

***Ministre-juge*** Literally, minister-judge. A post-revolutionary arrangement in terms of which ministers were the supreme administrative jurisdiction.

***Modalité d'application*** Mode or manner of implementation.

***Mutabilité*** The principle of the variability, in the general interest, of contractual terms.

***Normalité*** Normality.

***Objet essentiel*** Primary purpose of the contract.

***Obligation de mobilité*** Obligation of mobility, in terms of which members of the *Conseil d'État* are obliged to perform activities different to their principle task.

***Parlements*** Literally, parliaments. *Parlements* were pre-revolutionary courts exercising wide powers.

***Pouvoir de contrôle*** Power of control.

***Pouvoir de modification unilatérale*** Power of unilateral modification.

***Pouvoir de sanction*** Power to impose sanctions

***Prérogative de puissance publique*** Public-power prerogative.

***Prérogative exorbitante*** Extraordinary prerogative in relation to the civil law.

***Principe de séparation de la juridiction administrative et de l'administration active***  
Principle of the separation of the administrative jurisdiction and the active administration.

***Procédure de la décision exécutoire*** The process followed by the administration in unilaterally exercising its public authority to modify a juridical position.

***Qualification légale*** Legal qualification or classification of the *contrat administratif*.

***Rapporteur*** Office occupied by members of the *Conseil d'État* in the administrative and litigious sections.

***Régime exorbitant du droit commun*** Extraordinary regime in relation to civil law.



**Règles exorbitants** Extraordinary rules in relation to civil law.

**Règles générales applicables aux contrats administratifs** General rules applicable to *contrats administratifs*.

**Résiliation unilatérale pour motif d'intérêt générale** Unilateral termination of the *contrat* for the purpose of the general interest.

**Section administrative** Counsel section or division of the *Conseil d'État*.

**Section de l'administration** Administrative department or division of the *Conseil d'État*.

**Section de l'intérieur** Department or division of home affairs of the *Conseil d'État*.

**Section des finances** Finance department or division of the *Conseil d'État*.

**Section des travaux publics** Department or division of public works of the *Conseil d'État*.

**Section du contentieux** Litigation section of the *Conseil d'État*.

**Section du contentieux en formation de jugement** A formation of the *Conseil d'État* as administrative jurisdiction. The court is constituted by the president of the litigation section, three vice-presidents, the ten presidents of the *sous-sections*, the *rapporteur*, and two *conseillers* from the administrative departments.

**Section du rapport et des études** Department of reports and studies of the *Conseil d'État*.

**Section sociale** Social department or division of the *Conseil d'État*.

**Séparation des autorités administratives et judiciaires** Separation of the administrative and judicial authorities.

**Sous-section** Subsection of the *Conseil d'État*.

**Sujétions imprévues** Unforeseen physical constraints or impediments.

**Travaux publics** Public works.

**Tribunal Administratif** Administrative courts of first instance.

**Tribunal d'administration** Specialised administrative court proposed during the 1789 Revolution.

**Tribunal des Conflits** Jurisdiction Disputes Court. This court determines whether the administrative courts or ordinary courts have jurisdiction where there is an apparent conflict.

**Unité de juridiction** Jurisdictional unity, i.e. a single jurisdiction.

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Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Marine Living Resources Act 18 of 1998

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

South Africa Act 1 of 1909

## **UNITED KINGDOM**

Human Rights Act 1998

Settlement Act 1701