









THE HAMLYN LECTURES

SIXTH SERIES

EXECUTIVE DISCRETION  
AND  
JUDICIAL CONTROL

*An Aspect of the French Conseil d'Etat*

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EXECUTIVE DISCRETION  
AND  
JUDICIAL CONTROL

*An Aspect of the French Conseil d'Etat*

BY

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“ Suivant la vieille tradition qui lui vient de l'Ancien Régime, le Conseil d'Etat a toujours considéré qu'il n'a pas seulement mandat de rendre justice: il a vis-à-vis des puissants dont il juge les actes, si élevés qu'ils soient, *imperium et summa potestas*.”—Béquet.

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## HAMLIN LECTURERS

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## ACKNOWLEDGMENTS

I most gratefully acknowledge my primary obligation to M. Maxime Letourneur, now senior Commissaire du Gouvernement. The extent of that obligation is evident. What cannot be so evident is the courtesy and patience and sympathy (as well as the great skill) with which he communicated to me some part of his extraordinary learning. I hope I have not too grossly deformed it in the result. For personal as well as professional reasons I regard it as a peculiarly fortunate accident that my first approach to the Conseil d'Etat was through him.

It is difficult to select any other name for particular mention, except that of M. René Cassin who as the Vice-Président officially welcomed me and who subsequently allowed me to believe that in the cordiality of his welcome he exceeded what was required of him by the duties of his high office. I wish through him to convey to that group of men who are the Conseil d'Etat my appreciation of their collective hospitality and continual assistance.

It is impossible to name the many persons outside the Conseil d'Etat who helped me in Paris; but I feel bound to record that it was in M<sup>e</sup> M.-Y. Cordier's chambers that I first studied the law of France and to thank him for accepting me then as a pupil and thereafter as a colleague.

The lectures were read before delivery by M. Letourneur together with M. Méric and Mme. Cadoux-

Trial, auditeurs au Conseil d'Etat, and also in England by my colleague Mr. H. W. R. Wade. I much appreciate the help which they gave me by undertaking this ungrateful task. I also thank the Publishers for the skill and rapidity with which they have made a book out of a typescript.

C. J. H.

CAMBRIDGE,  
*October, 1954.*

## THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music, and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:—

“The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may

realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

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The sixth series of four lectures was delivered by Professor C. J. Hamson, at Nottingham University in October, 1954.

JOHN MURRAY,  
*Chairman of the Trustees.*

October, 1954.

**THE CONSEIL D'ETAT IN ACTION**



# I

## THE CONSEIL D'ETAT IN ACTION

### INTRODUCTION

THE admirable Miss Hamlyn, at the invitation of whose Trustees I am delivering these lectures, left, as was eventually determined, the residue of her estate for the furtherance of the knowledge of Comparative Jurisprudence. Her equally admirable intent in so doing was that "the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples"—a most reasonable intent; for these privileges are indubitable and great. But when I was requested to lecture in this series on the French Conseil d'Etat, I suggested to the Trustees that that was not a topic in which it would be practicable to appear *directly* to promote the purposes of Miss Hamlyn's will. They replied that the immediate appearance was of little importance.

I am sure that they were right. Our law and custom is but the embodiment from time to time of the sense of justice inherent in the nation. That sense of justice has been strong enough in the past to create institutions, and especially perhaps our criminal procedure, which provide for the individual a security and protection which I believe are not only unparalleled but not even nearly approached elsewhere.

The solidity of a right recognised and enforced by an English court is extreme: I would certainly prefer a right so recognised to any right given under any guarantee anywhere. And many most important rights are today in England so recognised and enforced.

#### THE RULE OF LAW

The solidity of our rights is the visible testimony of the profundity of our determination that justice must be done, must manifestly and plainly be done, must be done not in our case only but for all equally, must appear to be done with certainty and without fail. It is perhaps an odd determination for a nation to have; but I have no doubt that this nation has it. Indeed the strength of that determination is formidable. It has not customarily found vent in disorder or revolution; it is not, as with some people, a sudden passion; it has the greater power of a deliberate human purpose intent upon an end with a tenacity which will not be denied. I think that our institutions (and not our legal institutions only) do embody this conviction, do represent (and not so badly either) the result of this conviction at work over a long and not in general discreditable past. And I am persuaded that this conviction still remains, willing to take account of real practical difficulty, capable of much patience but capable also greatly to surprise those who may seek insolently to thwart it or incautiously to neglect it.

It is with this context in mind that I wish you to consider with me the French Conseil d'Etat. I have for that institution, as will be seen, a high admiration:

I think it has achieved a result which should be attained in a civilised community and which we have not attained, at the very least not so clearly or so manifestly as they have. I therefore take, in many particulars, a view quite the contrary of Dicey's. Yet I share some of his prejudices, if prejudices they be, to an extent which today is unusual and which may in the circumstances appear both improbable and even unreasonable. It is not so much that in the matters in which he was primarily interested, the most basic and elementary liberties, such as the freedom of physical movement which is protected by the writ of Habeas Corpus and the action for false imprisonment, any comparison between the French and English systems is normally much to the advantage of the English: though I think with him that it is very proper to be concerned with these elementary matters. Much more importantly, I share with him—what seems to have been in his case more an unconscious assumption than a deliberate proposition—the view that there is great virtue in the unitary system of jurisdiction which we had adopted and which the French have rejected: in the concentration of universal judicial power into the hands of a very small number of men.

A rule of law based upon a universal jurisdiction of this sort has a quality which seems to me highly desirable: I would wish to have such a rule of law if it is possible to get it. So far am I from joining in the fashionable derision of Dicey's principal position that I would be glad to be accounted its enthusiastic

supporter. Dicey believed that such a universal jurisdiction did exist in England. That is as may be: I think it is true that it came near to existing. But it seems to me certain that in a critical particular the universality of the jurisdiction in England has today been broken. There is a most important, an increasingly important, territory into which the writs of the High Court no longer *effectively* run, if ever they did: a domain which in England the executive has made its own, in which its own will is paramount and unsubjected to any kind of judicial supervision, or interference as it is called. This domain is in France the province of the Conseil d'Etat; and in its province the Conseil d'Etat has introduced a rule of law which deserves the admiration of any observer.

The extent of the French achievement is not at all sufficiently appreciated in England. It ought to be the object of our keenest study. It is *not* impracticable, as in England it is by some supposed, that the executive should be effectively subjected to a rule of law: the French have succeeded in the undertaking. It seems to me essential to the survival of *any* rule of law in England that the executive in England should speedily be subjected to *some* rule of law. To allow the great and increasing power of the executive to be exercised against the individual arbitrarily—that is to say, according to its own will—runs directly counter to that profound conviction of the paramount importance of a manifest justice which has created and informs our institutions. If it is so important that the result be achieved, if the French have achieved it,

surely we can achieve it, surely we can achieve it better; for we are not normally unduly modest in the estimate of our ability to secure a practicable and necessary result. I have no doubt we shall: no person or thing has yet in this country finally thwarted a generally shared desire and intention of this kind. But, while for us it is still to do, it is useful to consider what our neighbours have succeeded in doing.

#### RECOURS EN ANNULATION

The primary purpose of these lectures is therefore to describe some aspects of the work of a foreign political institution—the French Conseil d’Etat. I desire at the outset, even at the risk of being unintelligible, to emphasise that it is with some aspects only of that work that I shall be concerned. What will occupy our attention is the *judicial* business of the Conseil d’Etat—the *contentieux administratif*. The Conseil d’Etat does much work which is not judicial: indeed possibly its principal business is to *advise* before the event rather than to *judge* after. And even within the judicial sphere, what most interests me is that particular procedure which technically is known as the *recours en annulation pour excès de pouvoir*. I prefer not to attempt a translation of this term of art: *excès de pouvoir* is sometimes translated by *ultra vires*, but only, I think, by persons who are unaware of the enormity of the difference between the two phrases. The *recours en annulation* is distinguished from another main head of judicial business, the *recours de pleine juridiction*, on the basis that in

the *recours de pleine juridiction*, and in that only, the citizen-plaintiff is suing for *damages* from the State or public authority in reparation of harm which he has suffered as the result of the wrongdoing or breach of contract by the State—for example if he has been run down by a vehicle belonging to the Army authorities. In the *recours en annulation*, on the contrary, he directly attacks the administrative act or decision and is precluded from claiming damages as such, though if he is successful he may often obtain incidentally <sup>1</sup> a monetary satisfaction also. The object of this *recours*, as its name indicates, is to quash the administrative act or decision (whether general or particular) which the citizen-plaintiff alleges to be improper: if he is successful the primary result is that that act or decision is declared null. The *recours en annulation* is, in some sense, *in rem*: the act or decision, if annulled, is null in respect of the whole world, whereas in the *recours de pleine juridiction* the plaintiff if successful obtains only reparation of the damage suffered by himself personally.

It may seem odd even to a Frenchman that I should seek thus to direct attention mainly to one branch of the judicial business of the Conseil d'Etat. He would admit the importance of this branch of the Conseil d'Etat's work, but he would probably not regard it as greater than that of the *recours de pleine juridiction*. Indeed some of the most notable judicial successes of the Conseil d'Etat have been achieved in the field of *pleine juridiction*—for example in the interpretation of

<sup>1</sup> The " incidental " result is no doubt of increasing importance,

administrative contracts and in the great extension of the State's responsibility in what we would call "tort": in the field, that is, which is covered by Professor Street's recent and applauded book entitled *Governmental Liability*.<sup>2</sup> And it would without doubt be wrong even for my purposes to seek to describe the Conseil d'Etat's work without mentioning this branch of it. Nevertheless the *recours en annulation* is for my purposes more important, and it is to it that I propose to give the primacy.

The reason for thus directing our attention is, principally, this—that the *recours en annulation pour excès de pouvoir* not only is at the heart of the *contentieux administratif* but seems to me to embody the special and characteristic quality of the Conseil d'Etat's activity. It is from what the Conseil d'Etat does in the *recours en annulation* that we in England have most to learn. It does not exceed the bounds of my imagination, at least in my more optimistic moments, to believe it possible that the High Court in England may come to devise, and even to apply against the State, principles of tortious liability as coherent and flexible as those which have for some time now been of course in the Conseil d'Etat. It is hard to believe that the High Court as it at present functions ever will or can deal with the administrative act in England as does the Conseil d'Etat in France by way of *recours en annulation*. In this sense the *recours en annulation* is the essence of the French

<sup>2</sup> Vol. IV of *Cambridge Studies in International and Comparative Law*, C.U.P. 1953.

achievement: if we can understand it, we can understand what it means to have administrative law and an administrative court—a court which is willing and able actually and directly to subject to an effective, and not merely formal, rule of law the executive acting in its most executive capacity, the decision-making executive, the executive exercising a discretionary power.

#### ENGLISH HIGH COURT AND CONSEIL D'ETAT

It is this judicial control of the executive which is the dominant interest of the Conseil d'Etat. In modern political society, and not least in the Welfare State, the powers of the executive necessarily increase. With the increase of its powers there has come in England a steadily increasing autonomy of the executive: it has quite literally become a law unto itself. In England discretionary power has been given to it in such terms (as interpreted by the courts) that the control exercisable by the courts has often, if not normally, become of a merely formal or legalistic sort.<sup>3</sup> If the Minister is required to hold a public inquiry before he can reach a decision, then no doubt he must hold an inquiry. But what the upshot of that inquiry was, or whether its result was such that it could rationally justify the subsequent ministerial

<sup>3</sup> It is in this context painful to see, even when relief is given as most unexpectedly it was in, *e.g.*, *Woollett v. Minister of Agriculture* [1954] 1 W.L.R. 1149, on what technical grounds the relief must be based (if indeed it can sufficiently be based at all) when the plaintiff is really complaining of a substantial miscarriage of justice. *Woollett's* case is now on appeal.

decision, into that the courts of England will not inquire where the Statute empowers the Minister to act if he is satisfied that it is in the public interest that he should act as he does. The courts in England conceive themselves to be debarred in such cases from any investigation into the merits of the ministerial decision upon the formal declaration by the Minister that he, the Minister, is satisfied. In such a case the courts in England are debarred from inquiring even into the question whether the ministerial decision is based upon a totally erroneous view of the *facts* upon which it is taken. And to move away from these possibly high levels, in the case of a cab-driver's licence, the Commissioner of Police being by regulation empowered to revoke the licence "if he is satisfied . . . that the licensee is not a fit person to hold such a licence," the High Court recently held<sup>4</sup> that "the court could not interfere whether by certiorari or otherwise" even though the cabby claimed that there had been a denial of natural justice.

The Conseil d'Etat in these matters acts in a manner directly the contrary of that of the High Court. It is usually possible exactly to match the decisions in the opposite sense. The pendant to *Ex p. Parker*<sup>4</sup> for example is *Dame Veuve Trompier-Gravier*<sup>5</sup> where the revocation by the Prefect of the Seine of a licence to

<sup>4</sup> *R. v. Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150, 1156. Comp. *Ex p. Fry* [1954] 1 W.L.R. 730.

<sup>5</sup> C.E. May 5, 1944, S. 1945, 3, 14—translated in Schwartz, *French Administrative Law and the Common Law World*, p. 342. N.Y.U.P. 1954.

the plaintiff to sell newspapers from a kiosk on the Boulevard Saint Denis was quashed by the Conseil d'Etat, though there appeared to be valid reasons for the revocation, upon the ground that the plaintiff had not been given an opportunity to present her case—that is to say, precisely upon the ground of the denial of natural justice, *la méconnaissance des droits de la défense*.

But more important than a matching of the cases in the opposite sense, there is between the High Court and the Conseil d'Etat a difference of spirit which is truly disconcerting. Upon my part it was marked by a pertinacious refusal, when I began to study the Conseil d'Etat, to believe what I was told about its law—especially when it sounded too good to be true. I think I ought to put upon record this preliminary but quite firm refusal upon my part, however sad a reflection it may be upon the extent of our indoctrination in England. The propaganda conducted in England has been so successful that we have, I think, really ceased to believe that it is possible to have against the executive of a modern State effective and enforceable judicial remedies. And when we are faced with the statement that the executive as such in France is subjected to a strict judicial control, our instinctive reaction is to treat the proposition as a fine phrase of a constitution-maker, as a whistling in the dark to keep up one's courage; and to remain convinced that “things do not happen that way in real life.” There “must be a snag in it somewhere when we come down to brass

tacks"—some as yet unexpressed principle or rule will intervene in the concrete event to prevent the proposition having the effect which it might be supposed by itself to have. That certainly was my state of mind. I required that it be *demonstrated* to me that the rule effectively stood in France as it was stated to stand, by a concrete instance cited and analysed to show that the precise point was raised and was determined in a manner sufficient, according to the English doctrine of precedent, to carry the proposition offered as the rule. I still marvel at the patience with which my admirable mentor <sup>6</sup> tolerated the cross-examination and at the completeness of the answer which he finally returned.

#### THE MINISTER IS SATISFIED

There was surprise and doubt upon the other side also. The cross-examination tended to take the form of putting to the witness the facts of an English decision and asking for the result on the French principle and for the nearest equivalent French decision supporting that result. When we came to the facts and the result in *Liversidge v. Anderson* <sup>7</sup>—which was offered

<sup>6</sup> M. Maxime Letourner, now senior Commissaire du Gouvernement at the Conseil d'Etat, to whose patience and astonishing knowledge of case law I am most profoundly indebted.

<sup>7</sup> [1942] A.C. 206. The lay reader is reminded that this was the case in which the Home Secretary, Sir John Anderson, who had ordered the appellant to be detained under Reg. 18B (1) of the Defence (General) Regulations, 1939, was, in an action for false imprisonment brought by the appellant, held, by the House of Lords (Lord Atkin vehemently dissenting) to be entitled to refuse to give any particulars as to the reasons which led him to issue the detention order. The

by me as an instance of an extremely wide discretion in which moreover the safety of the State might reasonably be regarded as involved and where, as I then thought, the notion of *acte de gouvernement* might in France operate to defeat a judicial control—my French witness, so far from recognising the situation, was evidently baffled. He was unable to bring himself to believe that he had rightly understood my exposition of that case. He was persuaded that I must have explained myself amiss because the proposition which he believed me to be suggesting to him—that is to say, the actual decision in *Liversidge v. Anderson*—was one which in his opinion must be unacceptable in a civilised country and which was more than strange in a country which after all had invented the term “the rule of law.”

The reluctance of my most expert French interlocutor was to me illuminating. He was willing to suggest almost any explanation—for example that the wrong tribunal had been seized: the case had no doubt been brought before the civil court when it should have been brought before an administrative court. But that the only competent court in England should have returned the answer which I alleged it to have returned was clearly nonplussing. Moreover it was evident that to him the terms of Reg. 18B<sup>8</sup>

detention order accordingly was valid by reason of the mere statement of the Home Secretary that the Home Secretary believed himself to have reasonable cause to believe that the appellant ought to be locked up.

<sup>8</sup> Reg. 18B (1) was: “If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to

there in question did not even begin to raise the problem of an unexaminable discretionary power, because, quite apart from the much-discussed "reasonable cause" requirement, the power granted appeared to him clearly to be limited by the reference to "hostile origin and associations," etc. Indeed the terms of Reg. 18B were such that on a corresponding regulation in France the Minister's act would have been subject not merely to the minimum control—the ascertainment *and* the verification of the fact alleged as cause—but to the next degree: the inquiry whether the fact proved was *de nature à justifier* the act founded upon it.

Touching provisions based upon the condition "If the Minister is satisfied" or "If it appears to the Minister," my French interlocutor was frankly scandalised not by the existence of such conditions—for they seemed to him quite normal—but by the interpretation put upon them by the English courts. He held the categorical, and refreshing, view (which is that of the Conseil d'Etat) that if a Minister is to be satisfied, he must *as Minister* have reasonable grounds upon which his satisfaction is based; and having such grounds he is automatically under duty to disclose them to the competent court should that court so require. He regarded as fantastic the suggestion that a court would hold that the condition that a Minister should be satisfied is finally fulfilled

the public safety or the defence of the realm or in preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

by the bare statement of M. Dupont (who may happen to be Minister) declaring that M. Dupont is, or believes himself to be, satisfied. That perhaps is what most shocked him that in the twentieth century the competent English court could so lightly have accepted a defence which absolutely precluded it from any inquiry into the ground and causes of an administrative act; for such a defence appeared to him to be the doctrine of *acte de gouvernement* run completely wild.

#### CONTROL OVER ADMINISTRATIVE ACTS

The reluctance of a person as informed as he, and as much at the centre of administrative business, to accept as *possibly* correct a correct statement of the English law as it stands decided was to an English lawyer a most painful commentary upon the state of this branch of the law in England. And indeed the disparity between the French and English courts in relation to the executive is extreme. In contrast to the High Court the Conseil d'Etat quite simply claims and exercises direct authority over every member, high or low, of the internal administration in respect of his administrative act as such. When *statuant au contentieux*—that is to say, when proceeding judicially—at the instance of the aggrieved subject it can, and if it sees fit it will, require the administrative officer to justify the impugned act before the Conseil d'Etat in the presence of the plaintiff and the public by a method or process which is *contradictoire*—that is to say, which permits each side to produce its case and

to see and to answer the whole case produced upon the other. What justification will by the Conseil d'Etat be required depends as much from the facts of the individual case as from the infinitely graduated law developed by the Conseil d'Etat. But the Conseil d'Etat's process is available, at least in the last resort by way of cassation, as a matter of right and not of special privilege; and the law to which it requires the executive to conform is a law which it, as a court, has freely elaborated with a high regard for the rights and liberties of the subject.

Not that the Conseil d'Etat should be regarded as necessarily hostile to the administration: it is no doubt the Conseil d'Etat's business and profession to believe that the Administration has acted reasonably. But it is the over-riding principle that an administrative act is a proper and therefore a lawful act only if it is reasonable, the opposite of capricious or arbitrary. The administrator acting in due course of office must necessarily have had a sufficient cause or reason for his act; and to such an administrator it can be no hardship to produce that reason before a body as well versed in administrative affairs as is the Conseil d'Etat, whenever to the Conseil d'Etat it appears that there is sufficient ground for the production of that reason. The Conseil d'Etat invites the administrator to justify his administrative act before itself in the manner appropriate to that act—no more and no less: in the belief no doubt that the act will be justified but upon pain that, failing the justification, the act will be declared null.

The basic principle of the *recours en annulation* has that order of simplicity and universality; its consequences are cardinal. It gives to the French citizen the right and the power to arraign the administrator in respect of his administrative act—in the literal sense of that word, to bring him and his act to the test of reason. The citizen can obtain redress of an official injustice officially done to him and, what is even more important, a fair examination by a disinterested body and with his own participation of the *claim* by him that such injustice has been done. In my opinion it can truthfully be said of the Conseil d'Etat, in the words of its present head, M. René Cassin, not only that it is “ la pièce regulatrice de la bonne marche des affaires publiques ”<sup>9</sup> but that “ sa seule présence maintient dans l'Administration la perspective d'un contrôle possible et, parmi les citoyens, la confiance dans le droit et la liberté.”<sup>10</sup>

In England by way of contrast there is, as it seems to me, a notable absence of any power to arraign the administrative act as such in front of a disinterested body. Whether justly done or not—and no doubt it is normally justly done—the administrative act cannot be inquired into. The decision emanates from the office or the department, with or without a reason adduced, as the official may choose. Provided the forms have been respected, the High Court normally declares itself disarmed. Sometimes at least the act is unjust; and very often either it is in appearance arbitrary or

<sup>9</sup> *Etudes et Documents*, 1948, p. 15.

<sup>10</sup> *Etudes et Documents*, 1949, p. 19.

it is sanctioned by arbitrary power visibly held in reserve. The final and essential arbitrariness of the *lawful* administrative act causes in England a resentment and an anger which in my opinion are dangerous to the body politic.

#### CIVIL SERVICE IN ENGLAND

Of the extent of that anger and resentment, and of their legitimate cause, I personally have no doubt at all. They tend today in England to be directed against the civil service. It is altogether too facile to seek to attribute the blame for our condition exclusively to one class of the community. Indeed the standard of behaviour attained by the civil service as a class in England certainly was, and perhaps still is, higher than that attained in France: our condition would be more intolerable than it is had our civil service been poorer in quality. But the civil servant in England necessarily suffers a gross professional deformation, not by reason of any naturally inherent vice but mainly by reason of the condition in which he operates—namely, as the bearer collectively within the community of a power which is as great as it is arbitrary. For that professional deformation others besides the civil servant are responsible—the politician to no small degree, the judges yet more so, but most of all probably we, the subjects, who by our inert selfishness and supine acquiescence not only condone this state of affairs but actually encourage to their worst excesses the respectable and conscientious experts who feel in duty bound to attempt to deal

with the consequences of that acquiescent inertness. The deformation so suffered by the civil servant is scarcely more than a symptom, though admittedly an unpleasing one, of a disease which the body politic as a whole has generated and which by our enduring complacency we the subjects most assiduously propagate. We really behave as if we require to have, and deserve and desire, a system of administration of the sort which we presently endure.

An inquiry into the causes of this disease is not our present task. It does however seem to me, as I have elsewhere said, that the most urgent business of government whatever its political complexion—Liberal, Tory, Socialist—is to find some means not only of actually controlling power which has become arbitrary but of making it possible for the individual citizen in England again to believe that he is not the subject of merely arbitrary power, that he is not moved hither and thither by the dictates of an overriding authority as impervious to his examination as it is conscious of its own superiority. The business is to give to the citizen the possibility of justice against the administrative act which is within the *legitimate* powers of the administrator—that is, which is of a class which that administrator might lawfully and justly perform—and yet at the same time to secure to the administrator that freedom of action which he must have in order to perform his necessary duties. It is the strait and ancient business of trying to reconcile the claims of justice with the needs of government. It is because I am persuaded of the

urgency of this business in England, and because I believe that in France the Conseil d'Etat *statuant au contentieux* has made the best attempt of which I know, a remarkably successful attempt, to achieve this reconciliation, that I direct your attention to that institution, and especially to that part of its work which is concerned with the *recours en annulation*, its pre-eminent instrument of control of the administrative act as such.

#### A COMPARATIVE STUDY

By way of caution, I desire to repeat what again I have said elsewhere: that I do not suggest that the answer to our difficulties is to seek to set up in England a body modelled upon the Conseil d'Etat. Human affairs, and comparative legal studies, do not unfortunately possess that degree of simplicity. The Conseil d'Etat is itself the creature of a peculiar history, it is conditioned by its own environment, it is the special response to the special set of circumstances existing in France. It cannot as such be transported across the Channel, it will not as such fit into our circumstances and our traditions and prejudices. Nevertheless it is a proper and most instructive subject of comparative study. It is in itself a noble and notable example, the pledge of the possibility of administrative justice and a warrant that it is reasonable not to despair. And more than that. It is the ambition of the comparative lawyer, whatever the difficulty, so to render in a foreign idiom the nature and spirit of a foreign institution that the

native lawyer not only will have in the representation some reasonable resemblance of that institution as it actually exists, but informed by this picture will look with new eyes at his own system, will come to have a fresh understanding of it, will perhaps for the first time actually observe those features of it which use and custom have totally obscured for him and, which is the final purpose, may even begin to detect in his own good institutions possibilities of change, of genuine development according to their own proper and peculiar genius, which wholly would have escaped his notice had he not looked in the marvellous mirror of comparative law.

#### A CHARACTERISTIC CASE

We can form an idea of the Conseil d'Etat *statuant au contentieux* only by seeing it at work. I propose therefore immediately to take a case. There would be much advantage in taking a multitude of ordinary cases so as to give a view of the judicial control normally exercised by the Conseil d'Etat. But the exigency of a lecture compels me to select a leading case. A case is leading because it is a characteristic exercise of the powers of a court: it is a significant affirmation or reaffirmation in the critical instance of a normal principle underlying the court's activity generally. And in this respect it is valuable for our purposes. Nevertheless the leading case tends also to be spectacular, and its spectacular quality, seen in isolation, may be misleading.

The decision which I have selected certainly is

spectacular. It is not merely startling in the sense that it is inconceivable that any court in England today would have dared to claim the authority which the Conseil d'Etat did actually exercise. It is unexpected in the sense that it caused comment—though of an approving kind—even in France, and perhaps some surprise that the Conseil d'Etat acted as energetically as it did act in what was after all a rather delicate instance over which it might decently have hedged. It may even be shocking to an English audience, accustomed to the deference which our courts show towards the executive, to see a high officer of State treated as peremptorily as this defendant was treated and that too in a matter which might be considered to concern important Government policy—a policy moreover over which some of us at least would have a secret, perhaps unavowable, sympathy for the Government. I am not at all sure that the decision which I select is calculated to commend the Conseil d'Etat to us in our present condition: it is strong meat. Most of us no doubt would in principle approve the idea that the executive should be subject to the rule of law, but to compel a government to respect the rights and liberties of the citizen and the established law of the land to the extent to which the Conseil d'Etat then compelled the French Government—that might be evidently awkward and inconvenient. Nevertheless I think that such prudential reasons should be ignored: the case selected is a characteristic and significant expression of the temper and authority of the Conseil d'Etat today; and that is what we look for.

## THE FACTS

The decision is that rendered by the Conseil d'Etat *statuant au contentieux en assemblée plénière*—that is to say, in its most solemn judicial form—on May 28, 1954. It concerns the consolidated appeals of five <sup>11</sup> young men, one of whom was named *Fortuné*; and I first heard of it under that name. But it will probably become known in France as *l'affaire de l'Ecole Nationale*, though the *Ecole Nationale* was not a party to the proceedings. There can be no doubt about its leading character.

The facts were these. In order to enter the higher grades of the civil service in France, it is now necessary to pass through the *Ecole Nationale d'Administration*. Entry to the *Ecole Nationale* is obtained by means of a competitive examination, of which the nearest equivalent in England would be the civil service examination of the Administrative grade. Intending candidates are required to give notice of their intention to compete and those admitted to compete are included in a list of candidates which is prepared and signed by the relevant authority. All this is common form: for example, if a young man desires to enter upon the academic profession he has similarly to present himself for the *concours d'aggregation*, where the details of the examination would be settled and the list of candidates prepared and signed by

<sup>11</sup> No. 20238 Sieur Barel; 28493 Sieur Guyader; 28524 Sieur Fortuné; 30237 Sieur Bedjaoui; 30256 Sieur Lingois. The judgment of the court and M. Letourneur's "conclusions" are now reported in 1954 *Revue du Droit Public*, 519-538, with a note by M. Waline.

the Minister of Education. But because the *Ecole Nationale* is necessarily inter-departmental, in the case of its *concours* it is by law <sup>12</sup> provided that these necessary preliminaries will be settled not by a Departmental Minister such as the Minister of Education but by the *Président du Conseil* <sup>13</sup> des Ministres himself. The *Président du Conseil* can be rendered in English only by the term Prime Minister and the actual person concerned was M. Laniel, though in our case M. Laniel, by décret of July 18, 1953, had lawfully delegated the performance of his duties in respect of the 1953 competition to the *Secrétaire d'Etat à la Présidence du Conseil*, a personage who may fairly be regarded as reasonably august and might be described as a Minister of State holding Cabinet rank and having close personal contact with the Prime Minister. The power so by law given to settle the list of candidates was in terms entirely unconditional and unlimited.

The five appellants duly presented themselves as candidates for the 1953 competition. On August 3, 1953, four of the appellants were notified by letters of the *Directeur de l'Ecole* that the *Secrétaire d'Etat* having considered their dossiers (personal files) had come to the conclusion that he was unable to include their names in the list of candidates. The fifth appellant was on the same day notified that his name

<sup>12</sup> Décret of Oct. 9, 1945, as amended by that of Jan. 13, 1950.

<sup>13</sup> The *Conseil des Ministres* must not be confused with the *Conseil d'Etat*, the institution which is the subject of these lectures. The *Conseil des Ministres* is in France what in England we name the Cabinet.

had been included but on September 7, two days before the examination, he was also similarly notified that upon further consideration of his dossier the Secrétaire d'Etat had decided to strike his name out of the list. Against this decision of exclusion by the Minister each young man by separate process appealed to the Conseil d'Etat. "Appealed" is scarcely the correct translation. The decision of the Minister is submitted (*déféré*) to the Conseil d'Etat for the Conseil d'Etat's appraisal (*censure*) by a plaint (*requête*) which in this case seeks the quashing of the decision, by that process which we have selected for our special attention: *la voie du recours en annulation pour excès de pouvoir*.

#### CHALLENGE OF DISCRETIONARY POWER

May we pause even on the threshold to observe that something to us very extraordinary is occurring? An executive decision has been made, evidently after consideration, by a high official—a Secretary of State. He is exercising an evidently highly discretionary power<sup>14</sup>: what power can well be more discretionary than that of deciding whether to consider a young man for employment in the public service? The power he is exercising is one lawfully delegated to him by the Prime Minister himself. The exercise of

<sup>14</sup> It is of interest to note that in an excellent treatise on *Droit Administratif* (which may well become one of the standard works on the subject), published in 1953, M. de Laubadère stated (p. 227, n. 5), "le pouvoir ministériel d'admettre des candidats à concourir est un type classique et incontestable du pouvoir discrétionnaire."

the power moreover is merely negative—the Secretary of State is not imprisoning or fining the young man or taking his property: he merely states that he does not think it worth while further entertaining the young man's application to enter the civil service. Yet the young man whose station in life is evidently quite humble seems to have no difficulty in bringing his complaint, as a matter of right, before an impartial body for investigation. In fact the procuring of a requête, which will issue against the Minister, will cost him about 2s. 6d.; and he may procure it entirely informally—this kind of requête is *dispensée du ministère d'avocat* and very often is extremely informal. And the requête is powerful enough to bring the Minister and his decision before the Conseil d'Etat for investigation, in proceedings which will result in a judgment and in a legally effective order, confirming or annulling the ministerial decision. Whereas in England if the Minister of Agriculture decides to set up a model farm at Crichel Down and not to entertain Commander Marten's offer to buy or lease the land, nobody as of right can do anything about that. It may be possible, if the local M.P. is agreeable, to ask a question in the House of Commons, a question to which no trained civil servant will have much difficulty in producing a bland and plausible answer. It requires Commander Marten's energy and insistence, and his position and influence, to induce the Minister as a matter of exceptional grace and favour to refer the matter for public inquiry. It is really an exceptional matter, for how many such inquiries have there

been? And even if the inquiry is held and concludes in the applicant's favour—as did the Crichel Down inquiry—it is still wholly without any legal effect. The inquiry issues in a report which is personally and privately addressed to the Minister, which the Minister can publish or not as he chooses, and to which he is not bound to pay any heed whatsoever. In the Crichel Down case the Minister did decide to publish the report but he decided also to give no effect to it, except that he consented to pay some part of the costs incurred by the applicant in the inquiry. And even in a case as entirely exceptional as the Crichel Down case, that is the end of the business, unless there is such a public scandal that the matter becomes a major political issue. Clearly in England the order of things is wholly different from that obtaining in France, where as a matter of course by regular and extremely inexpensive process the humblest aggrieved subject effectively submits to a regularly constituted body for its impartial appraisal an act done in pursuance of the most highly discretionary power.

#### PARTIES' SUBMISSIONS

The appellants based their case, as presented to the Conseil d'Etat, upon two grounds. They alleged in the first place that they had been excluded from the examination by reason only of their political opinions as the consequence of a general policy by the Government not to admit as candidates persons having or believed to have connection with the Communist Party. They submitted that a decision to exclude

them taken upon such grounds was erroneous in law and constituted an abuse of power (*entachée d'erreur de droit ou de détournement de pouvoir*), as being contrary to the fundamental principles of the French polity, which recognise the right of a citizen to hold what lawful political opinion he pleases and guarantee to all equal access to public employment—principles enshrined not only in the preamble to the existing Constitution but in the equivalent of Magna Carta, the 1789 Déclaration<sup>15</sup> of the Rights of Man. Secondly, they maintained that there had been a failure of natural justice (*violation des droits de la défense*) in that though the decision against them was stated to have been taken upon a consideration of their dossier the said dossier had not been communicated to them so as to enable them to make reply (*sans communication préalable du dossier*—words having all the emotional overtones of “without a fair hearing”) nor had they even been informed of at least the main heads of the charges against them (*l'essentiel des griefs retenus*).

In his reply the Secrétaire d'Etat had the audacity to attempt to take what might be termed the Anderson line; and in France today before the Conseil d'Etat, it did require audacity, Secretary of State or not. He claimed that he had acted in the matter in pursuance of a *pouvoir discrétionnaire*.<sup>16</sup> The words are not readily translatable: “discretionary power” will not do; for admittedly the power is in some sense

<sup>15</sup> See especially Arts. 6, 10 and 11.

<sup>16</sup> On this see *infra*, pp. 161-2.

discretionary. The purpose of the words is to claim that the Secretary of State's act is in effect unexamined by the Conseil d'Etat, to the same extent and in the same manner as Sir John Anderson's act in *Liversidge v. Anderson*<sup>17</sup> was by the House of Lords, despite Lord Atkin's vehement and convincing protest, admitted to be. But the Secretary of State was unwilling or deemed it imprudent to make the claim in the former accustomed terms—namely, that his act was *acte de gouvernement* and therefore outside the competence of the Conseil d'Etat; for it is certain that the whole trend of the Conseil d'Etat's case law since 1872 has been to refuse the plea of "act of State" and indeed so to circumscribe it that it is not applicable to any internal executive act whatsoever in France.

If the Conseil d'Etat were incompetent, then the appellant's plaint is *irrecevable*. The Minister was no doubt well advised not to attempt to plead that the plaint was *irrecevable*, for the Conseil d'Etat evidently had no doubt that it had jurisdiction to receive and entertain the plaint. So, admitting the jurisdiction, the Minister pleaded that no further or other answer was required from him beyond the proof of the lawful vesting of the powers in himself. He declined to furnish any explanation of their exercise or to produce any document. He went on barely and categorically to deny that he was moved by any political motive in his decision to exclude these candidates and ended with a phrase of which, as the Commissaire du

<sup>17</sup> [1942] A.C. 206.

Gouvernement subsequently said, the irony will not fail to be appreciated in the case of a Minister producing nothing: "it is the prerogative of the Conseil d'Etat to select from the evidence brought forward in the cause (*pièces versées au dossier*) the material which may enable it to establish the grounds of the decision taken in respect of the excluded candidates."

To this plea the reaction of the Conseil d'Etat was energetic and prompt. To quote the subsequent words of the Commissaire du Gouvernement—it will already have appeared how singularly inappropriate today is the title of his office: the Crown agent (if that is what his title suggests to us) seems to be mainly concerned to rebut the pretensions of the Crown—"the Section du Contentieux judged it to be necessary to require the Secretary of State to produce within eight days the files upon the inspection of which the decisions in question were according to their own tenor alleged to have been taken."

#### PROCEEDINGS

But again, because this world is so different, some explanation of the new situation is needed. The appellants and their counsel (if any) appear to have receded into the background; we seem to be assisting at a public dialogue<sup>18</sup> between the Conseil d'Etat itself and a Minister at its bar, a dialogue which is itself the subject of comment by an officer of the Conseil d'Etat who shows no excess of kindness, at any rate to this Minister. The explanation of the

<sup>18</sup> Note that this dialogue is in writing. See *infra*, p. 35.

apparent change is this. Once the appellant has brought his complaint before the Conseil and it has been entertained, the Conseil d'Etat may itself be moved to action. It is not necessarily a passive spectator of a business conducted by others in front of it, nor is its function limited, as that of our High Court tends to be, to the decision of an issue upon material presented to it by the zeal, or the discretion, of the parties only. However much it may also rely upon the endeavours—*diligence*—of the complaining party, the Conseil d'Etat itself participates in the preparation of the case.

This preparation is called *l'instruction*. The instruction is entrusted to a rapporteur, who is a member of the Conseil d'Etat and, usually, to one of the nine sous-sections into which the judicial side, the Section du Contentieux, is divided for the normal conduct of business.<sup>19</sup> Actually in our instance, because of the evident importance of the case, the instruction had been entrusted not to a sous-section but to the Section du Contentieux itself, which for this purpose means the president of the Section acting with the presidents of the nine sous-sections and which already constitutes as formidable a tribunal as is likely to assemble in France, or indeed elsewhere. Again it is the Conseil d'Etat and not the parties who decide the relative importance of the cases brought before it and how they are to be dealt with. There is no appeal for example from one sous-section to the Section itself; the sous-section as much as the Section

<sup>19</sup> The normal organ of judgment is *deux sous-sections réunies*. See *post*, p. 98.

acts in the name of the Conseil d'Etat; and it is for the Conseil d'Etat to determine which of its organs is appropriate to deal with a particular piece of business: though there is power during the course of the instruction to transfer business from one organ to another; if, for example, a case which appeared simple at the outset develops complexities which call for a more meticulous scrutiny.

#### INTERVENTION FOR MORE MATERIAL

One of the duties of the body conducting the instruction, in addition to considering the material submitted to it by the parties, is to secure that there is available, for the tribunal which is to render a final decision, all that material — I wish to avoid the word “evidence” for that would have in this context quite false connotations—which *by the body conducting the instruction* is judged to be necessary “pour établir la conviction du juge”—that is to say, sufficient to enable the tribunal to reach with reasonable confidence a well-informed and well-grounded determination of the question before it. In this sense the Conseil d'Etat acts inquisitorially: it may be moved of itself to inquire further. No doubt it will *not* move unless induced to do so by the complaining party—the complainant must after all make out a *prima facie* case. But if in course of instruction the *prima facie* case appears and the material for its solution is not available the instructing body will bestir itself to obtain that material—for its own purposes, so to speak, and almost without further reference to the complainant.

It appears to the Conseil d'Etat, *prima facie* only no doubt, that something has gone amiss in the field of affairs which are within its province, and the Conseil d'Etat desires to be informed what has happened there and why. The Conseil d'Etat believes itself to have as great an interest in due administration as the aggrieved subject himself.

This notion that the tribunal—or, better, the inquiring body—has and should feel a personal responsibility to find out what has happened and to correct an error or a wrong if it has occurred is to us strange. It is, in the field of administrative affairs, a wholly admirable notion: as it has been developed by and embodied in the activity of the French Conseil d'Etat. If the complainant has succeeded in provoking this sense of duty in the Conseil d'Etat as regards his own case, he becomes in some sort the *tertius gaudens*, the spectator almost of a business now further being conducted between the Conseil d'Etat itself and the Minister or the Department. He will have in an officer of the Conseil d'Etat, the *Commissaire du Gouvernement*, a much more powerful and effective advocate than any advocate he can personally hire.

#### BURDEN OF PROOF

It is this active intervention by the Conseil d'Etat which renders idle—or rather not answerable in the terms in which it is framed—one of the first of a series of questions which, when I was attempting to understand the workings of the Conseil d'Etat I put to a long suffering and most learned member of that

body—namely the question of the burden of proof <sup>20</sup> : where does it lie and how is it discharged ?

This question of the burden of proof and of its discharge is not capable of resolution before we have further penetrated into the Conseil d'Etat's method of conducting business. In one sense it may truly be said that the burden is always on the complainant. But it would be better, I think, to say that the duty of the complainant is to state a *prima facie* case and to maintain on balance a presumption (however that may arise) in his own favour rather than to prove an issue of fact by evidence in our sense. Indeed evidence in our sense there never is in front of the Conseil d'Etat—nobody is ever orally examined. The procedure is a written one. The procedure is *contradictoire* in the sense that each party is entitled to see and to comment in writing upon all the documents produced by the other. But these documents would in the estimation of the English lawyer be an amalgam of pleadings and argument and evidence of a kind to him very disconcerting, and quite different from the documents which he is accustomed to exchange with his adversary before trial in England. I would go further and say that there is not in the Conseil d'Etat's procedure any equivalent to our notion of trial. There is indeed a last day appointed when the body charged with the duty of reaching a final decision hears in public its own rapporteur, and counsel for the parties if they desire to speak, and the "conclusions" of the Commissaire du Gouvernement,

<sup>20</sup> See a note (Mme. Cadoux-Trial) in 1953, *Etudes et Documents*, p. 85; and see Lavau, *Semaine Juridique*, Nov. 1, 1953.

before retiring into *délibéré* to formulate the terms of its decree; but this hearing does not in any way approximate to a trial. Trial in my opinion is a word to be avoided so far as possible when describing the Conseil d'Etat's procedure; for it is calculated to convey a false impression.

There not being in our sense a trial the notion of burden of proof and evidence to be produced to discharge it is itself in great measure inapposite. What is important to the complainant is that the perusal of the dossier should from time to time show on balance a presumption (however arising) in his favour particularly at that moment when the exchange of written observations between himself and the Minister has formally or virtually come to an end and when the rapporteur will ask the body conducting the instruction to give its preliminary consideration to the case. If at that moment there is such a presumption in his favour the complainant has discharged whatever burden of proof there may have been upon him, and he can safely leave the further conduct of his case to the Conseil d'Etat, particularly if the body conducting the instruction (or the Commissaire du Gouvernement) has been led to form the preliminary suspicion that the Minister or the Department is endeavouring to defend the indefensible or to conceal the truth.

#### ORDER OF DISCOVERY

Thus when in the *affaire de l'Ecole Nationale*, the Section du Contentieux intervenes to require the Secretary of State within eight days to produce before

it the files upon which he based his decision, the Section is doing something more than merely making an order for discovery—if “merely” be the right adverb. It is an order of discovery, and one of a sort startling to a lawyer in England where the competent court cannot<sup>21</sup> against a recalcitrant Minister order the production even of the report of a prison medical orderly or of a written statement made by a witness shortly after the event. But it is also something other and more than an order of discovery. As I see it, it embodies a preliminary or provisional decision of the Section—namely, that on the dossier as it then stood, taking into account the entire narration of the episode made by the complainant and also the manner in which the Secretary of State was attempting to defend himself, the Section was of opinion<sup>22</sup>

<sup>21</sup> *Ellis v. Home Office* [1953] 2 Q.B. 135. The court in England is powerless against an affidavit made by a Minister claiming privilege for a document, even if the court is convinced, as Singleton L.J. was in this case (p. 142), that the disclosure could have been made “without any danger whatever to the public weal.” Singleton L.J. went further and said (p. 141) that “the administration of the law will become impossible if that attitude is adopted.” According to the law as it at present stands, the Minister is, as regards discovery, made the final judge in his own cause, and the court is not entitled to draw any inference adverse to the Minister from the non-production of the document. Privilege can moreover be claimed for a document, itself innocuous, on the ground that it belongs to a specific class. It seems particularly regrettable that a privilege having in this individual case such consequences should have been claimed by the Home Office which in England is regarded as having a special concern with law and order.

<sup>22</sup> The Commissaire du Gouvernement set out in his conclusions the grounds upon which this opinion was based. Few if any of these grounds would in an English court have been admissible as evidence. Nevertheless, I have as little doubt as had

that the presumption in favour of the truth of the complainant's allegation that he had been excluded from the examination by reason only of his political opinions was so strong that only affirmative proof of the existence of other and good reason for his exclusion, made by the actual production of the relevant file, would be sufficient to enable the Secretary of State to rebut that presumption.

The Conseil d'Etat will not enforce its order of discovery—or indeed any order—by attachment or committal. It will not lodge the Secretary of State in jail if the Secretary of State does not produce the files. But it does give him notice—and the peremptory nature of the order is a measure of the strength of its opinion—that at its preliminary consideration of this particular complaint *and of all its circumstances* the Conseil has reached the interlocutory conclusion not merely that a further answer is required from the Secretary of State but that the only sufficient answer will be a justification by the production of the files.

It must not therefore be supposed that there is a standard order of discovery at the Conseil d'Etat, or that that body customarily or even often makes an order of this kind against a Minister. The Conseil d'Etat is more empirical than our own courts: it thought proper to issue this order only upon the particular facts of this case, and it will distinguish between cases with a finer appreciation of differences of shades than even we customarily use. Indeed the

the Conseil d'Etat that the opinion is well grounded, the Secretary of State's formal denial notwithstanding.

Minister protested to the Conseil d'Etat against the order upon ground that in a case<sup>23</sup> nine months previously which appeared to the Minister exactly similar—it concerned the exclusion of one of the appellants from a previous competitive entrance examination—the Conseil d'Etat had made no such order against the Minister and indeed had appeared to recognise in the Minister a discretionary power of exclusion of a virtually unlimited sort. To this protest, the only answer made by the Commissaire du Gouvernement was that in the *affaire Lingois* a valid ministerial reason for excluding that candidate appeared sufficiently clearly to the Conseil d'Etat from the consideration of that dossier as a whole and no further information or explanation was therefore in that case required; whereas in the present case the need of a full and satisfactory answer was in the Conseil d'Etat's estimation so overwhelming that only the production of the actual ministerial files would be sufficient.

#### JUDICIAL CONTROL

On May 13, 1953, the Minister in a written reply, the terms of which were by no means conciliatory, indicated that he would make some production in the case of three of the candidates. On May 19 the Section du Contentieux specified the files of which it required the production within four days as regards all five candidates and set down the case for final judgment. On May 26, outside the time limit, the Minister made

<sup>23</sup> *Sieur Lingois*, C.E. July 29, 1953.

a production which may fairly be described as derisory. On May 28 the Conseil d'Etat sitting *en assemblée plénière*, having in public audience heard its rapporteur, the counsel of the Minister and of the parties, and the conclusions of the senior Commissaire du Gouvernement, without taking the customary fortnight for consideration, on the very day of the hearing gave judgment quashing and annulling as being *entaché d'erreur de droit* the five ministerial orders excluding the five appellants from the competitive examination.

A real grievance against the Conseil d'Etat is that its justice is dilatory. There was nothing here markedly dilatory. The energy with which the Conseil d'Etat acted and the peremptory nature of the authority it claimed and exercised is an indication no doubt of the importance which it attached to the particular instance before it. But the case is to an English lawyer even more striking as a revelation of the power and independence of the administrative tribunal in France and of the extent and solidity of the rights of the ordinary French citizen even—what is today in England unknown—against an exalted Minister acting *within* the scope of a highly discretionary power.

The Conseil d'Etat's decision was well received by public opinion in France. The "conclusions" of the Commissaire du Gouvernement, M. Letourneur, were set out at length in the leading daily newspaper,<sup>24</sup> a degree of reporting which is quite exceptional in France in cases of this kind. They will certainly take

<sup>24</sup> *Le Monde*, May 31, 1954. See now 1954 *Rev. Droit Public*, 519.

their place among the classical conclusions of his equally courageous predecessors which established the jurisdiction and the law of the Conseil d'Etat; and I propose to examine them further. But the first question which arises is, I think, this: what is this body, this court if it be a court, of which it can be claimed, as it was claimed of that other *curia quae consuevit imperare imperatoribus et regibus*, that it has grown old in the business of dealing with persons who are, or who fancy themselves to be, kings and emperors, arbitrary autocrats unrestrained by law?



## DEVELOPMENT OF THE COURT



## 2

### DEVELOPMENT OF THE COURT

#### A DOUBLE FUNCTION

A CASE such as the *affaire de l'Ecole Nationale*, some aspects of which were rehearsed on the last occasion, gives us not merely a startling instance of the Conseil d'Etat's authority and jurisdiction but, as I think, a valuable insight into the nature of its activity. Nevertheless a spectacular case is calculated by itself to give a quite misleading impression of what the Conseil d'Etat really is. It would be gravely mistaken to believe that the Conseil d'Etat is normally at loggerheads with the executive, or that it regards itself as having a mission to lie in wait for an incautious Minister and triumphantly to quash the ministerial order in which it can discover a technical flaw—which is the impression sometimes, and no doubt erroneously, conveyed of the relation subsisting between the executive and the High Court in England. Indeed, so far from being the executive's natural enemy, the Conseil d'Etat is much more truly to be regarded in France as the confidential and trusted adviser of the executive. But it is an adviser who has attained both independence and power; and when acting as the Section du Contentieux the adviser turns judge. In the Section du Contentieux, the Conseil d'Etat does not make suggestions to the executive: it expresses its opinion in a form which is absolute and carries with it a legal

sanction (*force exécutoire*): if adverse, the opinion, in the situation concerning us, has the effect of annulling the previous executive decision, with the consequence that any act of which the legality depends from the existence of that decision automatically becomes wrongful.

There is here an extraordinary paradox—the Conseil d’Etat consists of a body of men who are in one of their functions the confidential advisers of the executive, sharing their inmost secrets and who yet, at the instance of the subject and in another function, set themselves up as the uncommitted judges of the executive act of which the subject complains, publicly inquiring into that complaint by means of a litigious and adversary (*contradictoire*) procedure and where necessary condemning the offending executive act in a manner which is wholly unambiguous. It is precisely this paradox which is the essence of the matter. It is because the Conseil d’Etat has this double function that it has become what it is. And it is my firm conviction that the Conseil d’Etat will retain its efficacy—which today is extreme—only if and so long as it is able to retain, in their most uncompromised state, both of these apparently opposite and contradictory functions. The Conseil d’Etat as it seems to me, in the form in which it exists today, consists entirely in this tension between extreme opposites which by a remarkable act it manages still to contain within itself. It is these opposites, the tension between them and the resulting paradox, which I now wish to examine.

## A GROUP OF CIVIL SERVANTS

Though in the *affaire de l'Ecole Nationale* we have seen the Conseil d'Etat exercising a function which on this side of the Channel we must describe as judicial—the function, in truth, of a very authoritative and absolute judge—it is important to bear in mind that in the French scheme of things the Conseil d'Etat not only does not belong to the judicial order or system but is sharply to be distinguished from or even opposed to that order. In the *séparation des pouvoirs* as it is conceived of in France—and the conception is so different from our separation of powers that the literal translation is as misleading as anything can be—the judicial order is contrasted as much to the executive order as it is to the legislative. In the contrast so established, the Conseil d'Etat belongs wholly and entirely to the executive. Indeed, more than that, the Conseil d'Etat may be regarded as the most perfect example in France of the notion of what it is to be executive: it is the finest flower of the civil service as such—*le fonctionnaire en tant que tel*.

As in England it is commonly believed that the unblemished specimen of the English civil servant is likely to be found in the Treasury, so in France we would be asked to look in the Conseil d'Etat for the French counterpart and prototype. The bright young man looking for a civil service career in France may aspire, if he is bright enough, to join the Conseil d'Etat upon entry into the service; and to the Conseil d'Etat may hope to attain the more mature civil servant who has distinguished himself in his career.

The Conseil d'Etat always has been, and still is, a hand-picked body of civil servants, selected in varying manner at different stages in their lives: though once of the Conseil d'Etat the civil servant in practice cannot be removed therefrom except at his request—which however is not unusual in an ambitious man requiring fresh fields for his abilities and skill.

#### PROTECTION OF THE CIVIL SERVANT

The Conseil d'Etat is thus primarily a group of the ablest and most experienced civil servants in France. It is precisely because they belong to the executive that according to the French notion of the separation of powers they are entitled to exercise any kind of control or supervision over the executive. According to that notion the French civil service, Conseil d'Etat and all, presents a solid front against the judiciary. As much in practice as in theory, the French judiciary is denied all right or power to interfere with the executive: each order is self-contained and independent. So if in judicial proceedings the validity of an administrative act is questioned, the question is *prejudicielle*—that is to say, the court cannot normally<sup>1</sup> inquire into the matter but must refer it to the executive (which usually is for this purpose the Conseil d'Etat

<sup>1</sup> There are exceptions: for example in penal proceedings the criminal court may hold that regulations imposing a sanction are ineffective—see, e.g., *Proc.gen.Angers v. Arranche* T.C. July 5, 1951, S 1952.3 1, D 1952 J.271. And by way of the lately fashionable doctrine of *voie de fait* the judicial tribunals have sometimes held that the alleged administrative act was so far not an administrative act that of itself it constituted an outrage.

itself) for the executive to determine the status of the act of the executive. And moreover the executive is zealous, through the instrumentality usually of the préfet, to prevent any attempt by the judicial tribunals to proceed civilly against a civil servant in respect of any wrong committed by him in his administrative capacity. The judicial tribunal is usually anxious enough to abstain from any interference with the executive; but if it appears that the judicial tribunal is trespassing beyond its province, the préfet or other qualified administrative official can stay the judicial proceedings by "raising a conflict"—that is to say, by objecting to the jurisdiction of the tribunal. The tribunal is bound to stay the proceedings until the question of jurisdiction is settled by another court. Though now such questions are referred to a special tribunal (Tribunal des Conflits)<sup>2</sup> until 1872 it was the Conseil d'Etat itself which decided whether the judicial tribunal should be allowed to proceed with the cause or whether the cause should be transferred to the Conseil d'Etat. Thus from this point of view, and also in the protection it afforded to civil servants individually against the acts of their hierarchical superiors, the Conseil d'Etat not only was of the civil service, but appeared in some sense as the protagonist of that service. The position which it thus established for itself, and maintains, within the executive is capital for any understanding of the Conseil d'Etat as an institution: it is primarily and indubitably, of the executive, executive.

<sup>2</sup> See *post*, p. 83.

## DICEY'S VIEW

This merger of the Conseil d'Etat with the executive struck Dicey when he studied the French *droit administratif* in the 1880s: and there is a sense in which his observation not only was correct but is still valid. He concluded from his observation that the executive was therefore judge in its own cause—a conclusion which was in an important degree misleading—and further that the citizen in France was denied an effective remedy against the executive: a further conclusion which was already doubtful at the time (1885) when Dicey first published his book and which was certainly false before his death.

It is fashionable today to criticise Dicey, and on the points mentioned Dicey no doubt was in error, though he largely mitigated his errors towards the end of his life. Nevertheless it seems to me that Dicey was not only justified but acute in his main and central observation: that the French system is based upon, and possible only because of, a recognition of the autonomy and independence of the executive. Such an autonomy of the executive in relation to the judiciary is directly contradictory of the rule of law as it was understood in England especially in Dicey's second sense<sup>3</sup> of that rule—namely, that every man (and therefore every official) is subject to the jurisdiction of the ordinary tribunals. Dicey is right in stating that an administrative jurisdiction in the French sense exists in France, and can exist, only because, and to the extent that, it is a jurisdiction

<sup>3</sup> See, e.g., *Law of the Constitution*, 9th ed., p. 193.

parallel to and outside the jurisdiction of the ordinary tribunals. Dicey, moreover, was indubitably right in believing that the great strength of the English system was its concentration of a universal jurisdiction into the hands of a single small group of men—the High Court. He disliked and doubted the French system primarily, I think, because instinctively perhaps, but in my opinion correctly, he attributed high importance to a continuance in England of that concentration of jurisdiction: he had observed that the French system exemplified, if it did not require, a splitting of the jurisdiction. And this splitting of the jurisdiction does cause much difficulty even in France. It is the price which they pay, no doubt gladly, for an effective administrative jurisdiction; but it is quite a considerable price.

When Dicey first published his book, it was a tenable and not unreasonable belief that the central universal jurisdiction of the High Court would be strong enough to cope with a new province—the Minister or Department acting within a discretionary administrative power. It was because of his faith in the ability of the High Court effectively to maintain a truly universal jurisdiction and because of his belief in the value of such a jurisdiction that Dicey was the critic and opponent of the French system. It would have been of inestimable advantage to us if the High Court had maintained a universal jurisdiction and had effectively subjected to it the new political and social instrument—the Minister and the Government Department vested with discretionary power. It is not so much Dicey who was wrong as the High Court which

has abdicated or made a grand refusal, the full extent of which is still to measure. What we have today to observe is that in England the English system of a universal jurisdiction has in reality broken down, with the result that the entity which today wields the most vast power—the Minister and his Department—is in England subject to a merely formal legal control and is beyond all effective judicial supervision. In France on the other hand, the exemption of the administration from the control of the ordinary tribunals having been accepted and even proclaimed as a matter of principle, the autonomous executive, almost as a consequence of its own autonomy, has succeeded in putting its own house in reasonable order, though at the cost of instituting a parallel jurisdiction. Even if Dicey were right, as I think he was, in perceiving great advantage in a centralised universal jurisdiction, had he lived to observe the extent to which the High Court has abdicated from its jurisdiction, he would, I have no doubt, have preferred today the French result (which, splitting the jurisdiction, effectively subjects discretionary power to judicial control) to the English situation which, upon pretence of maintaining a single universal jurisdiction, effectively exempts from any judicial control the critical entity in our present social system—the Minister and his Department.

Be that as it may, what it is essential for the English commentator to bear in mind is that in the Conseil d'Etat he meets not a court in the normal sense—that is to say, a tribunal in the ordinary hierarchy of tribunals—but a specially selected group of civil

servants belonging to and almost typifying the executive as such: whose activities, of whatever sort or kind they may prove to be, not only are to be distinguished from those of the judicial order but may in an important sense be contrasted or even opposed thereto.

#### AN EMPIRICAL INSTITUTION

The Conseil d'Etat as it exists today is a remarkable accident of history. The belief that French institutions have been excogitated *a priori* and present a neatly contrived logical pattern is a grossly exaggerated myth. There is nothing neat and little which is in that sense logical about the Conseil d'Etat. It is something a great deal more interesting and instructive: it is a body of men who, finding themselves in a central position of authority, have endeavoured to discharge the duties of their office in the complex variety of affairs which have come before them, and have sought, with a high degree of success, to adapt themselves to the circumstances of their business, and to the changing demands made upon them during the course of a century and a half.

The Conseil d'Etat is a highly empirical institution still in the process of development—indeed it appears to me to be in a state today of accelerated development. It is the response from time to time made to its environment by a group of men who bear not only a function but a tradition. Though all human institutions are made by men, and best by men exercising a deliberate and purposive selection, it may be said of

the Conseil d'Etat, as truthfully as it can be said of the English institutions which we tend to admire, that it has grown more than it has been made.<sup>4</sup> That is to say, we can observe in it a continuous reaction, an almost organic process of change, a change in which the past conditions the present and influences the future. It is this process which is of special interest to the English observer, because it bears a very strong analogy to the processes with which he is familiar in his own system.

It is no doubt very difficult for foreigners to understand the Conseil d'Etat, for we need to appreciate the momentary balance achieved by forces which we cannot wholly estimate; but this kind of appreciation comes more easily to the common law lawyer than to most others. He has at least some previous acquaintance with the operations which he observes. I do not think that it was merely accidental that as I studied the Conseil d'Etat I experienced a sense of recognition—almost the *déjà vu* reaction of the psychologists—and that it seemed to be possible to divine an origin and conjecture a consequence. The resemblances, or more properly the analogies, to what happened in England in a different context are not only striking but illuminating: especially in the significant differences revealed—for example, in the method adopted of constructing a system of law out of cases. The common law lawyer has little difficulty in appreciating the manner in which such a system will grow or in forecasting the kind of conflict which will arise, but he

<sup>4</sup> Dicey himself made this observation.

will equally learn much when in a process familiar enough he comes across a decisively different bias.

The Conseil d'Etat is a subject peculiarly appropriate to the common law lawyer—its methods are sufficiently similar to be understood when he has obtained some knowledge of the relevant balance of forces, and sufficiently different to shock him into a lively awareness of the real characteristics as much of the French process as of his own. And I believe that conversely the French conseiller d'Etat would take more kindly than the *civiliste* to some parts at least of the common law, and with more profit: though both the English observer and the French would do well to bear in mind the very wise remark of a well-known<sup>5</sup> member of the Conseil d'Etat—that if the common law and the law of the Conseil d'Etat are analogous, still the one has already endured more than seven, indeed more than eight, centuries, the other scarcely a century and a half; and the differences resulting from youth and age should induce neither impatience in the one nor too absolute a condemnation in the other.

#### ORIGINS OF THE CONSEIL D'ETAT

The relevant history<sup>6</sup> of the Conseil d'Etat formally starts from its inauguration<sup>7</sup> as such by Napoleon on

<sup>5</sup> Rouchon-Mazerat, who devoted almost the entirety of his life to the Section du Contentieux and was for eleven years its president. He died in office in 1952, as the result partly of gross overwork.

<sup>6</sup> Dicey's account of this history (Chap. XII of the *Law of the Constitution*) is still worth the reading if allowance is made for the error of emphasis.

<sup>7</sup> See Tony Sauvel, 1949, *Etudes et Documents*, p. 129.

4 Nivose An VIII—which was Christmas Day, 1799; but the institution which Napoleon was recreating was in this instance, as in many other instances, consciously based upon a pre-Revolutionary pattern. The Revolution, in fact, caused in many French institutions much smaller a break than is always appreciated, and indeed quite frequently the same individuals continued in the exercise of their existing functions. The Conseil d'Etat certainly is modelled upon the Conseil du Roi: its function, so to speak, was known before it came into existence. De Tocqueville,<sup>8</sup> who was singularly ill-informed about the Conseil d'Etat, may have been to some extent right in regarding it as *du pur ancien régime conservé* and liberal parliamentary reformers in France have shown some hostility to the Conseil d'Etat: indeed the French Parliament until recent times had an almost instinctive suspicion of what, as a Council of State,<sup>8a</sup> might become or even be a natural rival to itself.

The relations between the Conseil d'Etat and the French Parliament, the ebb and flow of the hostility of Parliament towards it, and the measures taken by the Conseil d'Etat so far to disarm that hostility as to make it possible that the Conseil d'Etat should, after the Liberation, have been acceptable to Parliament as the draftsman of, or the Government consultant on, all Government bills<sup>9</sup> submitted to Parliament—these

<sup>8</sup> Cited by Dicey, *op. cit.*

<sup>8a</sup> Mr. Wade suggests as a parallel the Privy Council in England after the Restoration.

<sup>9</sup> This, and more, was certainly one of the functions of the Napoleonic Conseil d'Etat.

matters together constitute a most important commentary both upon the nature of the Conseil d'Etat as a whole and upon one aspect of its activities which we cannot in these lectures examine as it deserves. It is, however, evident that the Conseil d'Etat was instituted by Napoleon to be, primarily, an organ of government; and an organ of government it has in some degree always remained though it is now recognised that it no longer constitutes a threat to the sovereignty of Parliament in its legislative capacity.

The Conseil d'Etat under Napoleon was marked by a high degree of informality—it is with some difficulty that the 4 Nivose can be recognised as its actual birthday. It is scarcely more than a group<sup>10</sup> of highly competent professionals whom the daemonic energy of Napoleon gathered together at a time of crisis<sup>11</sup> to enable him to execute the vast plans he had in mind and to bring effectively under his control the machinery of government. This mark of informality has always subsisted in the Conseil d'Etat—at least in the vital sense that the activity and duties of the Conseil have never been effectively described, and thus circumscribed, in any constitution. The present charter of the Conseil d'Etat—the Ordonnance et Décret of July 31, 1945 (which incidentally were drafted by the Conseil d'Etat itself)—is anything but limitative and in fact gives extremely little indication of the work and function of the Conseil d'Etat. But however

<sup>10</sup> At its inception there were 29 conseillers.

<sup>11</sup> Napoleon frequently consulted only a small group of the Conseil d'Etat, so much so that members of the Conseil d'Etat considered themselves passed over. See Reinach, 1950, *Etudes et Documents* 128.

informal the group gathered together by Napoleon, and whether by accident or design—and probably it was by the personal decision of Napoleon against the opinion of Sieyès—the Conseil d'Etat has already the characteristic which is finally determinative of its activities and of its future: it is a body parallel to and distinct from the Council of Ministers.

### CHIEF DUTIES

Though in Napoleon's time it may have had some attributes of the *administration active*—of the administration actually charged with the execution of business—its chief duties were from the beginning those of planning, of advising and in the very general words of the Constitution of An VIII <sup>12</sup> “of resolving the difficulties which arise in the administrative field.” It is in this fourfold character that we may find the essence of the Conseil d'Etat—first, though at the very centre of government business <sup>13</sup> and intimately concerned with it, it was not normally itself the actual executant; secondly, it advises and plans executive business before the event; thirdly, it is called upon to resolve the difficulties which occur in the course of administration, and fourthly, it has no specialised function. It is not attached to a particular ministry; as a group it is parallel to the Council of Ministers and

<sup>12</sup> Art. 53, *Résoudre les difficultés qui s'élèvent en matière administrative.*

<sup>13</sup> Perhaps the chief glory of the Conseil d'Etat under Napoleon was the final elaboration, under the direct supervision of Napoleon and Cambacérès, of the Napoleonic codes.

in a monarchy or empire it directly advises the Head of the State.<sup>14</sup>

### SECTIONS

From its inception the Conseil d'Etat was divided into sections for the purpose of dispatch of its business, and also met regularly in *assemblée générale*. This feature has persisted through its history, though one of the original five, the *Section de Legislation*,<sup>15</sup> has as such disappeared, and most have changed their province. These sections would today be identified as administrative sections. From the earliest days, however, a distinction was taken between the work of the Conseil d'Etat (whether *en assemblée générale* or *en sections*) dealing with the business which today would be regarded as the business of the administrative Sections or of the *Assemblée Générale*—the advisory business properly so called of the Conseil d'Etat—and its judicial business. The distinction was indeed not at all precise: formally in both cases at that date the Conseil d'Etat merely tendered advice to the Head of the State; and originally perhaps the real distinction was that in its judicial business Napoleon did not regard himself as qualified to interfere; in its other work he interfered to a great extent and indeed sometimes took direction of it. But on June 11, 1806, a step was taken which prefigured the future: there was

<sup>14</sup> For the relation between the Conseil d'Etat and Napoleon see Charles Durand in *Livre Jubilaire*, pp. 77-93.

<sup>15</sup> In the Ordonnance of 1945 its place is taken by the *commission permanente* of Art. 25.

established a *Commission du Contentieux*.<sup>16</sup> From the creation of this organ may be dated the consecration of that distinction *within* the *Conseil d'Etat* between the classes of business transacted by it which is the foundation of the French administrative law.

#### UNITY—INFORMAL CORPORATE ACTION

It is necessary to emphasise both the unity of and the distinction within the *Conseil d'Etat*. All business done by the *Conseil d'Etat* not only is done in its name as a group but really *is* the expression of opinion of a body of men who have in a high degree a corporate sense, though that opinion may be more the sense of the meeting, in the Quakers' meaning, than the majority vote on a formal resolution. And this unity is, in my view, marked even in the case of judicial business where the organ competent to render, and rendering, the decision is most sharply separated from the remainder of the body. While there is no doubt which is the organ making the decision—indeed its composition is strictly delimited and an actual vote is taken within it—still on any matter of major importance the members of the organ charged with the duty of making the decision on behalf of the *Conseil d'Etat* would be left in little doubt of what was the prevalent opinion of the body as a whole, if there were such an opinion.

It is very hard fairly to describe a process which depends more from a state of mind than from any

<sup>16</sup> But note that the *assemblée plénière du contentieux* came into existence as an entity distinct from the *Assemblée Générale* of the *Conseil d'Etat* as a whole only in 1831.

text or regulation. What in my view occurs is this. When *statuant au contentieux*—that is to say, when transacting judicial business—the members of the *Section*, or *sous-section*, must and will render that decision which in their personal conviction (and theirs alone) is correct and just. There is to my mind no doubt at all both of their recognition of this duty and of their discharge of it. Ample provision is made for bringing before them in a formal way, not only by the parties but by the rapporteur, the Commissaire du Gouvernement and the *sous-section* in charge of the *instruction* of a variety of widely differing views and solutions. But if the matter is at all difficult or delicate, there will be a number of persons—quite large if the *instruction* is done, as was the case with the *affaire de l'École Nationale*, in *Section* rather than *sous-section*—who in their diverse official capacities will in the course of the process be called upon to express a preliminary opinion: for example, the Commissaire du Gouvernement. He is not bound to consult anybody in order to form his own opinion; and formally he consults nobody. But the matter by hypothesis is very much on his mind and he is in daily and continuous contact with his colleagues, both for the transaction of business, and in the library where much of the preparatory work is done, and upon numerous social occasions. There is, moreover, amongst members of the Conseil d'Etat the excellent habit not only of discussion but of mutual though entirely informal assistance without regard to rank or age: if one person believes that another has special

knowledge or experience in a matter with which he is charged, he will ask that other for advice and will normally receive it without stint. The degree of informal co-operation between members of the Conseil d'Etat seemed to me remarkably high—higher for example than that existing between members even of a very united faculty at a University, if only because the contact between members of the Conseil d'Etat is more constant and the habit of working together much more developed.

In this set of circumstances, not only is it certain that the Commissaire du Gouvernement and the other persons preliminarily concerned will “try out” their opinion, even if only hypothetically, upon their colleagues, but the question itself, if important or difficult, tends to become a moot problem within the society itself and even beyond it among persons closely associated with it. And there is no mistaking the climate of opinion, if there is one, or the nature of the divergency of views. Nobody is bound by that opinion; and the Section du Contentieux has before now reached decisions of which members of the administrative sections have, within the precincts of the Conseil d'Etat, disapproved in remarkably vigorous terms. But there is, to my mind, no doubt of the value of this preliminary and informal discussion, or of the help which it gives in bringing into focus the real elements of the problem and illuminating the solution, and especially in providing for the decision a background of corporate experience and knowledge—even if the persons deciding reach a

decision which may be contrary to that of the arithmetical majority of the Conseil d'Etat as a whole.

For my part, I attribute the highest importance to this informal corporate action of the Conseil d'Etat—action wholly outside the work of the Assemblée Générale. I doubt if it is merely English prejudice to consider custom and habit more determinative than regulation or to treat as essential the apparently accidental fact that the members of the Conseil all physically inhabit one and the same physical building and use jointly a single library appropriated to themselves. Certainly the enemies of the Conseil d'Etat in France have as a matter of history aimed at splitting that physical unity and especially at distributing the administrative sections amongst those Ministries with which each of them is more particularly concerned<sup>17</sup>: a move which, if successful, would no doubt have reduced those sections to the position held in England by the legal advisers of the Departments. It is the unity of the Conseil d'Etat which greatly helps to make its strength; and a valuable expression of this unity is to be found in that informal interchange of views between members which is the common practice of the Conseil d'Etat.

#### UNITY—ESPRIT DE CORPS

The unity of the Conseil d'Etat is further secured by the existence between its members of an extremely strong *esprit de corps*. I doubt that the Conseil d'Etat

<sup>17</sup> For the relation between the four administrative sections and the various Ministries see Art. 11 of the 1945 Décret.

could, in fact, continue to discharge its functions without that spirit. It is due in part, no doubt, to the fact that every member of the Conseil d'Etat cannot but be aware that he belongs to an *élite*—to a rather special college or club. But in part also it depends from a tradition, enduring since the days of Napoleon, of work in common. This club, or college, to which it is a signal honour to belong, is constantly and continuously faced with work of such an amount and such an importance that it is wholly impossible to begin to discharge it unless there is, on the part at least of the great majority of its members, a high degree of devotion to it. The amount of business, often of great intricacy and complication, which is actually transacted by the Conseil d'Etat, is remarkable. It is undoubtedly much to the credit of the members of the Conseil d'Etat that that work is accomplished; but it seems to be a common historical and psychological phenomenon that even exorbitant demands made upon a body of men, constituted as is the Conseil d'Etat and placed in a similar position of responsibility, will meet with an adequate response. The pressure of work upon the Conseil d'Etat and its importance, the tradition of a common devotion to it, the habits arising from the need of meeting a deadline and especially that of mutual assistance given and taken with the highest degree of informality—these, I believe, to be factors of primary importance, though wholly without text or regulation, in forming the Conseil d'Etat into the body which it is today.

## UNITY—WEEKLY MEETINGS

The unity of the Conseil d'Etat is visibly expressed in the Assemblée Générale, held once a week, at which attend all conseillers, both of the administrative sections and of the Section du Contentieux, and at which is finally completed all the important business of the Conseil d'Etat except—and the exception is decisive—its judicial business. A Conseiller d'Etat, to whatever section he belongs, cannot but help having a comprehensive and detailed view of all the problems of administration and indeed of government, as much of projects and plans for future action as of difficulties arising in the course of execution of an accepted scheme. The knowledge thus corporately possessed by the Conseil d'Etat is formidable, and it is increased by the fact, first, that members of the Conseil d'Etat both move from section to section within the Conseil d'Etat and often are seconded from the Conseil d'Etat for periods up to seven years to occupy highly responsible positions in the *administration active* outside, and secondly, that the Conseil d'Etat, as already noted, is in part recruited from persons who have previously distinguished themselves in the active administration and bring with them to the Conseil d'Etat the experience of successful office.

UNITY—KNOWLEDGE OF ADMINISTRATIVE  
DIFFICULTIES

This unity of the Conseil d'Etat is evidently of great importance in that it makes it possible for the administrative judge—the members of the Section du Contentieux—to have an unrivalled, indeed unquestionable

knowledge of the circumstances and difficulties of administration. No administrator can in France rationally adopt the attitude in respect of the Conseil d'Etat that the judge has reached a decision without appreciating the context in which the decision has to operate: he cannot claim, as the civil servant may, and does, in respect of the High Court in England, that he, the civil servant, knows, and the judge does not know, the necessities of administration. This administrative judge has a higher technical competence than any of the administrators whose act he is judging: so far as there may be a technique or expert skill in the matter of administration, as a member of the Conseil d'Etat he has an indubitable supereminence. The "needs of the service" or "reasons of State" are poor arguments to urge upon this judge who has grown old in a daily consideration of these reasons and those needs, and who is entitled to answer, as the great Hengham C.J. did,<sup>18</sup> that he knows the statute because he made it. Indeed, the active administrator in France, so far from being able to rely upon his superior skill and knowledge when he disagrees with the Conseil d'Etat, is driven to the attitude that the Conseil d'Etat is so expert that it moves in an empyrean of perfection and forgets the common sense of the matter. But on the common sense of the matter, the subject, *l'administré*, finds himself on a level with the active administrator and can conduct his own argument.

<sup>18</sup> Y.B. 33 & 35 Edw. I (Rolls Series) 82; cited *e.g.* in Plucknett's *Concise History*.

## UNITY—LOYALTY TO DECISIONS

The power thus accruing to the administrative judge from the unity of the Conseil d'Etat is fairly evident. But this unity has also another aspect which is not so widely appreciated. It requires, or presupposes, the loyalty of the administrative sections of the Conseil d'Etat to the judicial decisions of the Section du Contentieux. It is, in my view, this loyalty which is critical. The administrative sections recognise, and must recognise, not only that the Section du Contentieux is an organ of the Conseil d'Etat as a whole but that in matters in which there is dispute *within* the Conseil d'Etat it is the final and in the last resort sovereign arbiter of the dispute, though it is a part only of the Conseil d'Etat and numerically when sitting as a court a very small part. Little <sup>19</sup> has been said about the tension thus resulting *within* the Conseil d'Etat. The extreme example of this tension arises when the Section du Contentieux acting as a court annuls for illegality, as it can, and has, a *règlement d'administration publique*—which we may translate as an Order in Council: that is to say, an important set of administrative regulations which have been proposed to a Minister by the Conseil d'Etat after deliberation in Assemblée Générale and have been enacted by him by and with the advice of the Conseil d'Etat itself. Such an annulment evidently constitutes what might be regarded as a serious rebuff by the administrative sections. If ever the administrative

<sup>19</sup> The best account is by Puget, *Livre Jubilaire*, p. 108, "Tradition et progrès au sein du Conseil d'Etat."

sections chose so to regard it and allied themselves with the Minister against the Section du Contentieux, that, in my opinion, would mark the death of administrative justice in France. The Section du Contentieux, ousted from its central position within the administrative system, would become a merely external control, a merely judicial tribunal opposed to and interfering with executive business. The administrative sections allied with the Ministers would in France find ways of circumventing such an external tribunal as effective as those devised by Ministers and civil servants in England to by-pass the High Court.

It is not, I think, sufficiently appreciated how steadfast and constant an intention to justice is exhibited by the *administrative* Sections of the Conseil d'Etat. Whatever displeasure may internally be caused by a decision of the Section du Contentieux, externally at least, and especially in relation to the Minister (which is the capital relation), the administrative Sections accept that decision as the authentic voice of the Conseil d'Etat, that is to say, as theirs also. The appeal by the litigant—for that is what it amounts to—from the Assemblée Générale of the Conseil d'Etat to the numerically inferior Section du Contentieux is by the whole Conseil d'Etat regarded as an appeal from the Conseil d'Etat to the Conseil d'Etat *mieux informé*. And it is indeed true that, subjected to a contradictory process *inter partes*, the relevant point even in the *règlement d'administration publique* does receive at the Section du Contentieux a more exact scrutiny than it probably received in the course of its draft and debate. Nevertheless it is essential that

it should continue *possible* for the administrative Sections to accept as their own the decision of the Section du Contentieux, or at least to regard it as a decision which *could* have been reached by a group of persons who, however aberrant, remain, notwithstanding the momentary aberrancy, colleagues as concerned as themselves with the due and proper administration of the affairs of the State. So long as the unity of the Conseil d'Etat is maintained the administrative Sections, who are the expert technical advisers of the Minister and of the active administration, act as the auxiliaries of the administrative judge: they join their authority to his to maintain at the heart of the administrative process that rule of law which they themselves recognise. While that unity remains, it is unthinkable that an administrative Section should propose to, or accept from, a Minister a draft which aims to oust their own jurisdiction, that is the jurisdiction of the Section du Contentieux, in the manner in which the jurisdiction of the High Court has repeatedly been ousted in England upon the proposal of the Minister's advisers.

#### DICEY'S VIEWS EXAMINED

I have emphasised my sense of the unity of the Conseil d'Etat and of the importance of that unity—to an extent indeed which would be suspect to some competent French commentators—for two reasons: first, because in this matter I take a view diametrically opposed to that of Dicey, and secondly, because such a view, which appears to argue the desirability of a

fusion of the advisory and the judicial functions, might be regarded as an unintended paradox.

Dicey, who found some good in the French *droit administratif*, believed<sup>20</sup> that, by analogy from the coming into being of the common law courts in England out of the undifferentiated King's Council and the later growth of the Court of Equity, it might reasonably be expected that "ultimately" *droit administratif* would become law "in its very strictest sense" if the organ declaring and enforcing it became finally judicialised—by which I understand him to mean became as separated from the remainder of the Conseil d'Etat (which might continue to be concerned with executive business) as was the Court of Common Pleas from the King's Council. It is the "final judicialisation" in this precise sense of *complete separation*<sup>21</sup> from the executive organ, which so far from considering hopeful or desirable I would regard as probably heralding the decline of the contentieux administratif.

Nevertheless I am conscious that I adopt this view because I am persuaded that the Section du Contentieux (and with it its law—the contentieux administratif) has in fact attained an authority and a solidity which Dicey even at the end of his career was unwilling or unable to recognise. He found it "difficult . . . to

<sup>20</sup> See especially his "3rd point", *op. cit.*, pp. 375–384.

<sup>21</sup> It is of historical interest to note that for a while in 1848 Cormenin, then Vice-President of the Conseil d'Etat, favoured the establishment of a separate administrative tribunal outside the Conseil d'Etat. Thiers fortunately opposed this view. See Delépine, *Le Conseil d'Etat et la Révolution de 1848. Etudes et Documents*, 1948, p. 17.

believe that, at any rate where politics are concerned, the administrative courts can from their very nature give that amount of protection to individual freedom which is secured to every English citizen." It appears to me today certain that in a cardinal particular the French administrative courts give to a French citizen better protection than the High Court affords to his English counterpart.

Dicey was also persuaded that the French system, in protecting the fonctionnaire, sacrificed to him the liberties of the ordinary subject. The answer to this proposition cannot be so categorical. It is true that the French system does as a matter of principle protect the fonctionnaire from civil liability<sup>22</sup> in respect of acts done by him in the course of duty and that no doubt is shocking to us, who are accustomed to having our liberties protected, when they are, by this direct action in tort against the offending official. The efficacy of the direct action in tort is great, especially against the police in case of false imprisonment. Moreover, it is clear that the French remedy against the police (*la police judiciaire*) is singularly defective—though it is defective precisely because the *police judiciaire* is in the French system regarded as belonging to the judicial order and therefore *not* subject to the administrative courts. A comparison between the English system and the French, so far as the promptitude and efficacy of a remedy for false imprisonment

<sup>22</sup> The fonctionnaire is personally liable (and can be sued in front of the ordinary tribunals) only in principle for *faute personnelle détachable du service* and it is clear that the scope of such *faute personnelle* is, especially for founding the jurisdiction of the ordinary tribunal, increasingly narrowed.

against the police is concerned, is *very* greatly to the advantage of the English; and since Dicey very properly gave a good deal of his attention to remedies of this sort, it is excusable that he should have retained a suspicion of the French system. But in my view he improperly attached that suspicion to the administrative courts as such. Indeed the promptest manner in which the *police judiciaire* could today be brought effectively under "judicial" supervision would be, in despite of the separation of powers as it at present exists in France, to give jurisdiction over them to the administrative courts.

Dicey seems also to have been mistaken regarding the degree of *criminal* exemption which the fonctionnaire can claim: he was quite unreasonably obsessed by Art. 114 of the Penal Code, which provides that, upon proof by an inferior that he acted upon the order of a superior, the punishment will be remitted to him (but not his conviction quashed) and exacted from his superior. The criminal liability of the fonctionnaire, who is triable by the ordinary courts, is clearly enough established in French law.<sup>23</sup>

But, what is no doubt much more fundamental, the French citizen does not seem attached to his remedy

<sup>23</sup> See, e.g., Art. 198 of the Penal Code which provides for more rigorous penalties in case of offences committed by "fonctionnaires" in the course of duty; or the particularly categorical Art. 112 of the Code d'Instruction Criminelle. For crimes by fonctionnaires generally, see the standard work Rousselet & Patin, *Droit Penal Spécial* (6th ed. of Goyet, 1950) Part II, Tit. 1, "Crimes et Délits commis par les fonctionnaires publics", pp. 40-81, or the most recent work R. Vouin, *Droit Penal Spécial* (1953), paras. 198 *et seq.*, 204 *et seq.*, and generally 406 *et seq.*

*personally* against the official, whether civilly or criminally, in the same manner as we are. So far as his civil remedy goes, he is content enough to sue the State or the public authority concerned; and the Conseil d'Etat has made the scope of the State's liability very ample. The criminal liability of the official would in the normal way be left to the procureur or the parquet. Even if there is something to be said for the direct action by the individual wronged against the individual official<sup>24</sup> wronging him—and this action has in England where available a high degree of efficacy—the absence of this personal action certainly does not mean that the French citizen is without remedy in the administrative courts. He indubitably has an effective remedy in damages, though against the State, in all cases in which the administrative courts are competent.

#### RIGHT TO CHALLENGE OFFICIAL DECISION

But quite apart from the action in tort for reparation, and whether or not the action for reparation is as effective in France as it is in England, the French citizen has in front of the Conseil d'Etat an unparalleled ability to call into question the official decision and to require its justification as against him

<sup>24</sup> The absence of personal liability (for all practical purposes) in the French official is giving rise increasingly to comment in France—see, *e.g.*, Waline, "De l'irresponsabilité des fonctionnaires . . ." 1948, *Rev.Droit public* 5. And the Conseil d'Etat is ready to give the State itself a remedy over against the offending official—see, *e.g.*, C.E. July 28, 1951, *Laruelle*. D. 1951. J. 620; note Waline in 1951 *Rev.Droit public*, p. 1087.

upon pain of nullity. His ability in this matter is far greater and much more efficacious than that of the citizen in England. In the type of society in which now both live, it seems to me that this ability or right is of cardinal importance. Even in Dicey's lifetime it was plain enough that this right had been amply and in the "strictest" sense legally secured to the French citizen; not to recognise today the degree of legal security afforded to him in this field by the Conseil d'Etat would be simply misguided. I have the prejudice to believe, with Dicey, that *other* kinds of legal security are better provided for the English citizen. But not *this* kind. This security has been well provided for the French citizen by the Section du Contentieux within and as part of the Conseil d'Etat, and not otherwise. The observer, especially if foreign, should I think limit himself to the observed fact: it goes quite beyond the evidence to suggest that the security would be greater or better if the Section du Contentieux were separated out of the Conseil d'Etat and given an independent existence, whatever that may mean. Indeed, it seems to me evident that such a separation would break the very mechanism which has caused the right itself to come into existence.

#### CONFIDENCE IN SECTION DU CONTENTIEUX

This mechanism depends in part, as it has been suggested, from the enduring unity of the Conseil d'Etat and especially from the willingness and the ability of the administrative sections to continue to uphold and indeed to recognise as their own, the law

declared by the Section du Contentieux. But the mechanism would break upon the other side if the Section du Contentieux were unable or unwilling to maintain its own autonomy. Whatever knowledge it may properly have of executive or governmental business—and it is in my view essential that it should have the most intimate knowledge—it is equally essential that the Section du Contentieux should not only remain but should *to the subject* manifestly and plainly be seen to remain a just and impartial judge in the subject's cause. The Section du Contentieux cannot satisfactorily act as judge unless the subject has a solid confidence in its justice. Part of Dicey's difficulty was precisely that he found it hard to suppose that a French citizen could rationally have in the Conseil d'Etat the confidence which Dicey had in the English High Court. There undoubtedly is this confidence today in France in the Conseil d'Etat and the confidence appears to me today to be amply justified. The winning of that confidence and its maintenance is the other half of the mechanism of the Conseil d'Etat. It is only because that confidence has been fully won and maintained that it seems today much less important than it might have been fifty years ago to insist upon the judicial integrity of the Section du Contentieux. Yet it is no doubt odd and remarkable—an uncovenanted accident—that the Section du Contentieux should have attained such autonomy whilst remaining within the Conseil d'Etat; and it would be misleading in a commentator to fail to emphasise this autonomy simply because it was for him today self-evident. Nevertheless, it is in my

opinion true that the autonomy of the judicial part of the Conseil d'Etat is so well established that it is "chose acquise"; and the interest of the institution lies no longer in the attempt to secure that characteristic in one of its parts but rather in the means requisite to maintain the institution, with this evolved organ, in balance as a whole. But it is perhaps still the duty of a commentator before an English audience to sketch the evolution of that organ; the establishment of the judicial autonomy of the Section du Contentieux.

#### INDEPENDENCE

Even in the days of Napoleon the Conseil d'Etat showed a good deal of independence. Indeed, in the earliest "honeymoon" period, Napoleon no doubt expected from his counsellors the plain and direct expression of their opinion. But even when he grew more absolute the Conseil d'Etat was by no means subservient and, as we have seen, not only was judicial business, though not at all strictly defined, always regarded as specially within the autonomous province of the Conseil d'Etat but a specialised organ, the Commission du Contentieux, was devised to deal with it. At the Restoration, the Conseil d'Etat was suspect to the Bourbons, partly because of its close association with Napoleon, but partly also because of the persistence of its spirit of independence. Indeed, so great was its independence that the Bourbons sought to withdraw from the Conseil d'Etat the cognisance of that part of the contentieux administratif which was regarded as concerned with general

public policy. The judicial independence thus manifested stood the Conseil d'Etat in good stead upon the expulsion of Charles X in 1830: the Conseil d'Etat, with what had in the meantime become a Section du Contentieux, entered auspiciously upon the constitutional monarchy of Louis Philippe. Indeed, the new régime coincided with a capital development—the ordinances of February 2 and March 12, 1831, which reorganised the contentious proceedings.

#### BUSINESS IN PUBLIC

These ordinances should be regarded as finally recognising the judicial character of those proceedings and they are in themselves evidence of the progress which before 1831 had already been made by the custom or practice of the Conseil d'Etat. The ordinances provide first that contentious business must be taken at a public hearing of an adversary (*contradictoire*) sort at which parties may be represented by counsel. Already before 1831 there had in France been made provision, which is still lacking in England, that a reasoned judgment should in any event be published. We really must admire the courage of the Conseil d'Etat, which by 1831 had such a confidence in its ability justly to deal with complaints that it was willing to transact its contentious business in public; and our admiration is not decreased if we compare with this long-established publicity the manner in which our executive still confronts the subject in England with a decision and veils the process of that decision in a file not available to the court. The success of the

Conseil d'Etat is due, in my opinion, in no small part to this temper of mind which is not merely willing but anxious to transact contentious business in public. This temper of mind is what finally creates the tribunal in which the public can have confidence.

#### PHYSICAL CONSTITUTION

The same ordinances carry further the process of definition of an organ appropriated to contentious business which we observed in the formation of a commission and then of a Section du Contentieux. The ordinance of March 12 begins the crystallisation of a separate and special Assemblée Plénière du Contentieux, distinct from that of the Assemblée Générale of the Conseil d'Etat. By it were excluded from deliberations on contentious business first all members of the Conseil d'Etat *en service extraordinaire*—who at that period would have been connected with the “ active ” administration—and secondly any member of the Conseil d'Etat *en service ordinaire* who had been actually concerned with advising the executive act from which the contentious business arose. This formal distinction of contentious and advisory work no doubt merely recognises an already existing separation; but the formal distinction, at so comparatively early a date, is not without importance. From it stems the absolute separation which is now re-enacted in the *Ordonnance & Décret* of July 31, 1945, which excludes from the Assemblée Plénière du Contentieux all members of the administrative Sections, except

four<sup>25</sup> who are annually appointed to represent there their administrative colleagues. We thus see in 1831 an important step being taken in the physical constitution of the Tribunal as such.

So evident was it to contemporaries that an independent tribunal was in fact being constituted that the Government was anxious to provide for the safeguarding in front of that tribunal of the interests of government. To secure that protection they had recourse in the Ordonnance of March 12 to the traditional means of a *Ministère Public*: as the State was represented before the civil tribunals by the *Procureur* so it was to be represented before the *Conseil d'Etat au contentieux* by a *Commissaire du Gouvernement*.

#### THE COMMISSAIRE DU GOUVERNEMENT

The constitution of the *Commissaire du Gouvernement* may well mark the constitution of a court; but seldom has an institution evolved as rapidly and as diversely as that of the *Commissaire*. Perhaps because he was a *maître de requêtes* and therefore a member of the *Conseil d'Etat*, perhaps because, being thus a person of considerable standing, he was not subject to hierarchical direction from outside—whatever the reason, from an early date and for a long time now the *Commissaire du Gouvernement* has enjoyed an absolute independence. He is certainly not the

<sup>25</sup> Five other members of the administrative sections may be attached to the *sous-sections du "contentieux spécial"*—see Art. 33 of the Ordonnance and Art. 26 of the Décret of 1945, as by the Décret of Dec. 12, 1950, amended. This provision is criticised by Waline.

Government advocate—the Government Department if it desires to be represented before the Conseil d'Etat in contentious business must be represented by counsel or by a nominee, as is the claimant. The Commissaire has become the person whose primary duty it is to consider the issues impartially beforehand and individually to reach his own personal conclusion as to what should in law and justice be done in this instance. I have ventured to call him “the embodied conscience of the court.” After the advocates have made their final statements, he must orally at the public hearing set out the facts as he sees them, review the relevant case law, categorically state whether that case law ought or ought not to be followed, propose to the tribunal the principle or rule according to which in his opinion the tribunal should decide this issue, and expressly draw from that principle all the necessary particular conclusions. This statement, called *les conclusions* of the Commissaire du Gouvernement, is, in important cases, reported and printed; and it is from this series of *conclusions*, read with the Conseil d'Etat's exceedingly succinct judgments, that has been developed the law of the Conseil d'Etat. The Commissaire is neither the advocate of either party nor even a member of the tribunal rendering judgment: his purpose is to be entirely uncommitted; and the tribunal on its side is in no way bound by his conclusions. The Commissaire is in the heyday of his intellectual vigour—a maître de requêtes in his later thirties or earlier forties. He holds the position for a limited period and is bound to give it over when he

receives promotion to the rank of Conseiller d'Etat. There are today twelve Commissaires du Gouvernement at the Conseil d'Etat, and though one is called the Senior—by virtue of his standing within the Conseil d'Etat—he has no hierarchical authority over the others: each is wholly independent. As a group they are the persons within the Conseil d'Etat who have a special expert knowledge of the law—indeed their knowledge of the case law is really quite remarkable; and they are likely subsequently to hold high judicial office within the Conseil d'Etat as presidents of *sous-sections* or of the Section du Contentieux. Whatever may have been the original intention of the creators of the office, the Commissaire du Gouvernement, transformed in the atmosphere of the Conseil d'Etat, was and remains a powerful instrument for establishing and manifesting the impartiality and independence of the Conseil d'Etat *statuant au contentieux*. And moreover, the office<sup>26</sup> induces in its holder, at a critical age, a habit of personal judgment and an aptitude publicly to take individual responsibility for forming and expressing a decisive opinion.

#### EXECUTIVE FORCE TO JUDGMENTS

These ordinances re-enacted by statute in 1845, both confirmed the existing tendencies of the Conseil d'Etat and in my opinion decisively determined its future development. There remained much to be done by way of consolidation: the strength of the Conseil

<sup>26</sup> The holding of the office neither advances nor retards the holder's promotion to conseiller.

d'Etat derives in no small part from the continuity of its tradition and practice, and from the extension of its powers of judicial control. Important steps were taken, for example, in 1864, when access to the Conseil d'Etat was permitted in certain cases by simple plaint, *dispensé du ministère d'avocat* and when (as again in 1900) the silence<sup>27</sup> of the active administration was declared equivalent to a negative decision from which appeal lay to the Conseil d'Etat. And the Conseil d'Etat no doubt passed through difficult periods in 1848 and 1851. But the ordinances of 1831 seem to me more significant than the more publicised events of 1870 and 1872 when the Third Republic was established upon the downfall of Napoleon III.

French commentators attach importance to the law of May 24, 1872, under which executory force was given to the judgments of the Conseil d'Etat. Until that time, except for a period between 1848-52, even when *statuant au contentieux* the Conseil d'Etat merely tendered advice to the Head of the State: the *justice was retenue* and not *déléguée*. It required the concurrence of the Government to put into operation the decision of the Conseil d'Etat, which until that concurrence was in the form merely of a recommendation. And no doubt there could be delay in putting into effect the Conseil d'Etat's decision. But execution is always likely to be awkward against the State or the Crown—the French court will not even today issue an injunction in such a case, any more than does the English court. The real sanction resides in the

<sup>27</sup> See now Art. 51 of the 1945 Ordonnance.

public determination of the right by the court; and that was as effective before 1872 as it was thereafter. Nobody in this country is particularly alarmed by the fact, for example, that in form the Judicial Committee of the Privy Council continues to tender only advice to Her Majesty. Nevertheless the giving of executory force to the decision as such of the Conseil d'Etat *statuant au contentieux* is not without significance, especially in those cases most concerning us where the Conseil d'Etat annuls the executive act: for if the act from which executive action depends is *ipso facto* annulled, the executive is likely to find itself involved in all manner of illegality unless it promptly retraces its steps. Moreover, the granting of a *justice déléguée* is a formal and manifest recognition of a fully constituted tribunal—though the existence of the Conseil d'Etat as a tribunal should have been capable of being readily perceived before 1872.

#### TRIBUNAL DES CONFLITS

The formal recognition of the Conseil d'Etat as an independent tribunal is held by French commentators necessarily to have required the setting up of a separate tribunal to determine conflicts of jurisdiction between this independent tribunal and the ordinary judicial tribunals of the land. While the *justice* was *retenue*—while theoretically, it was the Head of the State who, as the final repository of justice, decided whether or not the matter was administrative—that is to say whether or not the judicial tribunal was competent—it was regarded as not wholly improper

that he should act upon the advice of the Conseil d'Etat. But when power was even in theory formally delegated to the Conseil d'Etat, it was considered a violation of principle to permit this administrative tribunal to be judge in the cause of its own jurisdiction. Accordingly by the same law of May 24, 1872, a Tribunal des Conflits was established, composed, in the result, of four conseillers from the Cour de Cassation, the highest civil tribunal, and four from the Conseil d'Etat, to whom was to be added, in case of deadlock,<sup>28</sup> the Minister of Justice for the time being, and to this court was entrusted the question of determining to which jurisdiction might belong a debated instance.

The case law<sup>29</sup> of the Tribunal des Conflits is extremely perplexed and difficult; but fortunately it need not detain us. For it would be a mistake to see in the Tribunal des Conflits the critical cause of the development of French administrative law. The Tribunal des Conflits merited Dicey's praise because, in his view, it "came near to an absolutely judicial body"; and if the salvation of the French system is to be found in its "absolute judicialisation" then no doubt the constitution of this court is an important landmark. But if, as seems to me evident, the development of French administrative law, the undoubted creature of the Conseil d'Etat, is to be

<sup>28</sup> It is to the credit of the court that such deadlock has occurred in five instances only since 1872. For a note on the latest case (*Gavillet T.C.*, March 31, 1950; S. 1950, 3, 85; D. 1950, J. 331), see 67 L.Q.R. 44 (1951).

<sup>29</sup> One aspect of it is described by Odent (*op. cit.*, *infra*), as *d'un byzantinisme excessif*.

found in the development of that law within the Conseil d'Etat itself—in the development, that is, of and within the administrative jurisdiction—then the activity of this new tribunal on the periphery is of comparatively minor interest. True, it could have destroyed or seriously impaired the administrative jurisdiction by giving an undue preponderance to the judicial tribunals, but that danger was certainly avoided. Indeed, as the Conseil d'Etat consolidated and developed its law<sup>30</sup> the tendency of the Tribunal des Conflits, especially so far as actions in tort for damages were concerned, was increasingly to recognise the exclusive jurisdiction of the Conseil d'Etat. The Tribunal des Conflits in particular accepted the criterion that, in principle, the judicial courts had jurisdiction in the case of wrongful acts by officials only if there was *faute personnelle détachable du service*.

I am inclined to doubt that the French system would today have been very different if the Tribunal des Conflits had never been instituted at all and the Conseil d'Etat had been allowed to continue its jurisdiction over cases of conflict. Moreover, however the debatable case might be decided, the centre of administrative law is evidently the administrative act as such, the act which is unquestionably administrative—for example, the decision of a Minister, as Minister. To such an act, because evidently it is administrative,

<sup>30</sup> But note that sometimes the Tribunal des Conflits appears to have led the way, *e.g.*, in the celebrated *arrêt Blanco* (T.C., Feb. 8, 1873; D. 73.3.17; S. 73.2.153) which recognised the extended jurisdiction of the Conseil d'Etat in tort actions.

the law of the Tribunal des Conflits is irrelevant. The *recours en annulation pour excès de pouvoir*—the matter we have selected as our principal matter—is concerned exclusively with acts of that kind. To our inquiry the law of the Tribunal des Conflits<sup>31</sup> may therefore be regarded as peripheral.

### BURDEN UPON LITIGANT

But though it is peripheral, I may be allowed to call attention, especially as I am inclined to praise the French system, to the enormous burden which the existence of the Tribunal des Conflits and its very complicated law place upon the litigant. Not only are these two parallel jurisdictions, but it is extremely difficult to know before which the litigant should start what may be a very commonplace action, *e.g.*, a

<sup>31</sup> The conflict is normally of the kind called by French commentators "positive": an administrative official (usually the prefect) objects to the jurisdiction of a judicial tribunal which has been seised of a case by a plaintiff-citizen. The prefect may "raise the conflict," whether or not the defendant is a public authority, provided that the matter is an administrative one. Unless the judicial tribunal accepts the objection and disseises itself, the prefect brings the matter before the Tribunal des Conflits: which in this instance settles the jurisdiction only and not the merits. There is no provision for raising a conflict if the citizen-plaintiff starts his action in the administrative court. There can, however, be a "negative" conflict: either if both the judicial and the administrative courts have declared themselves incompetent or if having examined the substance they have reached opposite conclusions amounting to a denial of justice (*e.g.*, where a pedestrian is injured by a collision between an administrative vehicle and a private car and each tribunal decides that the vehicle over which it has no jurisdiction is solely responsible for the accident). It is only in the last situation that the Tribunal des Conflits deals with the merits (see law of April 20, 1932).

claim by a parent on behalf of his child who has suffered injury while attending at an elementary school. It is not perhaps for a foreign observer to criticise and it is certainly not for him to suggest a remedy; but it may appear to him, as it does to me, that the complexity of the law concerning the province of each jurisdiction in an action in tort amounts to a serious obstacle to, if not a denial of, justice.

The complexity, which is extreme and of an accidental or irrational kind, has the further demerit of appearing to him wholly unnecessary. When, for all practical purposes, it is admitted that the plaintiff has a remedy in tort—and it is the tort actions which mainly cause the trouble—is it really subversive of the French system that the judicial tribunal, *if preferred by the plaintiff*, should be permitted to assess the damages, exclusively against the State if necessary? Would it not be sufficient to provide that a *recours en cassation* could be brought to some specially constituted court in these cases in which it is really alleged that the judicial tribunal has misapplied the rules of administrative law? Those rules are sometimes at least reasonably clear. To the foreigner it would seem that the process of conflict is sometimes actuated either by a fantastic spirit of legal refinement or by the mere obstinacy and caste-sense of the French fonctionnaire. While nothing must be done to diminish the authority and impede the development of the Conseil d'Etat's jurisdiction, now that that jurisdiction is firmly established it might reasonably be judged to be unnecessary to show the degree of jealous exclusivity which characterises the rules

of conflict, more specially since as a result of its popularity the Conseil d'Etat is overwhelmed by the amount of its contentious business. There remains in any event so much business which is so evidently exclusively administrative that there would seem to be nothing but advantage in giving a plaintiff the option of pursuing, preliminarily at least, in front of the judicial tribunal any business which might seem to fall, if only partially, within its province. No price, in my opinion, is too high to pay for the existence in a country of an administrative jurisdiction such as that exercised by the Conseil d'Etat; and if that jurisdiction can exist only at the price of a Tribunal des Conflits, as it at present functions, the cost must no doubt cheerfully be borne. But it remains my impression that insufficient consideration has in France been given to the question whether today the solution offered by the Tribunal des Conflits is the best which can be devised. But again the criticism here made can be made only by a person who is as fully persuaded as I am not only of the existence of a judicial organ within the Conseil d'Etat but of its solidity and power.

#### OFFICIALS BEFORE THE COURTS

Dicey attached importance, so far as the development of the rule of law in France was concerned, to the repeal on September 19, 1870, of Art. 75 of the Constitution of An VIII. To do so seems to me to amount to a misapprehension of the French system. If it is believed, as Dicey believed, that there can be a rule of law only if the ordinary judicial courts have jurisdiction over officials, then the repeal of an enactment

which provided, as did Art. 75, that an official cannot be proceeded against in the ordinary courts except with the previous sanction of the Conseil d'Etat is no doubt a step forward in the establishment of a rule of law. But if the rule of law depends, as it quite certainly does in France, in the control which the Conseil d'Etat, as itself a court, exercises over the official's act, the repeal of such an enactment, if not irrelevant, is of comparatively little interest. In point of fact, the repeal of Art. 75 had, as Dicey himself noted, little consequence<sup>32</sup> of any kind, and none at all upon the development of the jurisdiction and the case law of the Conseil d'Etat.

Whatever may have been the relative importance of the events in 1831 and in the early 1870s, what is indubitable is that since 1875 the Conseil d'Etat *statuant au contentieux* not only greatly extended the ambit and severity of its control but became increasingly recognised by the ordinary citizen as a tribunal in the strictest sense, from which he could, and did, obtain justice against the administration. The true cause of the standing in France of the Conseil d'Etat as a tribunal is the persistent conduct and demeanour of the Conseil d'Etat itself. An

<sup>32</sup> Mainly because the Tribunal des Conflits necessarily and promptly re-established the differentiation between the provinces of the judicial and the administrative tribunals, not to the disadvantage of the administrative. The notion that things administrative belong to the administration, and therefore to the Conseil d'Etat, is so ingrained in the French system that even the apparently quite unambiguous terms of Art. 112 of the Code Instr. Crim. have not made it possible to sue the *public authority* for damages before the *judicial* tribunal for the offences there enumerated. See T.C. March 27, 1952, *Dame de la Murette*.

examination of that conduct would involve a history of its case law. That is here impossible. But the position which it attained was well expressed in Art. 32<sup>33</sup> of the Ordonnance of 1945.

“ Le Conseil d’Etat statuant au contentieux est le juge de droit commun<sup>34</sup> en matière administrative; il statue souverainement sur les recours en annulation pour excès de pouvoir formé contre les actes des diverses autorités administratives; il est juge d’appel<sup>35</sup> des décisions rendues par les juridictions administratives de premier ressort; il connaît des recours en cassation<sup>35</sup> dirigés contre les décisions des juridictions administratives rendues en dernier ressort.”

This plenitude of jurisdiction is worthy of further consideration.

<sup>33</sup> The reforms introduced by the Decret-loi of Sept. 30, 1953, are referred to at p. 96, *infra*.

<sup>34</sup> See *infra*, p. 101.

<sup>35</sup> For the distinction between *appel* and *cassation*, see *infra*, p. 123.

## **FUNCTIONING AND CHARACTERISTICS**



### 3

## FUNCTIONING AND CHARACTERISTICS

### RECAPITULATION

I ENDEAVOURED in my last lecture to give some account of the development of the Conseil d'Etat. It is a body which from its inception was distinct from, and in a sense parallel to, the Conseil des Ministres who today as the Government have the responsibility of policy decisions and are the hierarchical heads of the active administration. It is of the essence of the Conseil d'Etat that it is *not immediately* responsible either for policy or for the actual execution thereof. Its primary business is to plan and prepare, to act as adviser and consultant to those responsible both for policy and for its execution. It is in my view vital that it has been, and that it should remain, at once to this degree removed from the passions and animosities which arise in the active administration, and nevertheless immersed in the actual business of government. Its removal from those passions begins already to give it a power of detached judgment, its intimate connection with government affords it the necessary expert knowledge and information. This same body, also from its inception, considered complaints from individuals aggrieved by administrative acts and generally the difficulties arising in the course of administration. Although by its constitution already to some degree detached from the active

administration, from a very early date it created a special organ, now the Section du Contentieux, to deal with the business of complaints. This organ, though remaining part of the Conseil d'Etat, began to develop a similar detachment even from the other, the advisory organs of the Conseil d'Etat, and had the remarkable courage of deciding to hold public session and to adopt an adversary procedure in the despatch of its work. It is by reason of this double detachment and of its willingness to transact its business in the light of day that the Section du Contentieux not only has as a matter of fact attained autonomy and judicial independence as a tribunal but, what is even more important, is recognised by the public as having manifestly and indubitably attained them.

Nevertheless it seemed to me essential that the Section du Contentieux should remain as it now is, a part, a section, of the Conseil d'Etat and not become a wholly separated and merely judicial body: if only to make it possible for the advisory organs to continue to recognise the judgments of the Section du Contentieux as finally their own also—as the authentic voice of the Conseil d'Etat, the one whole of which they also are part. Critical as may have been the constitution of a judicial autonomy within the Conseil d'Etat and the earning of public confidence in that autonomy, it seems to me now critical to maintain the unity over the established diversity, for I believe that if ever the judges and the advisers finally separate and come to loggerheads, the continuance of French administrative justice would be gravely imperilled.

The tension *within* the Conseil d'Etat, and the maintenance of the equilibrium there, is thus today the main interest, and the fascination, of this institution. The equilibrium, as it at present stands resolved, gives the final decision to the judicial part; but some interpenetration subsists. In principle the members of the advisory sections are excluded from the judicial organs, except that five<sup>1</sup> may be attached to the more specialised sous-sections of the Section du Contentieux and four must be attached to the Assemblée Plénière, the most solemn of the judicial tribunals. On the other hand all conseillers of the Section du Contentieux, though excluded from the advisory Sections—the *sections administratives*—take part in the Assemblée Générale where all important business, *except* judicial business, is finally transacted. But more importantly a real interpenetration exists from the precept of the Conseil d'Etat, which also is its practice, that members of the Section du Contentieux shall have had experience of work at least in the advisory sections if not in the active administration also—that they should be really conversant with the business of government. And most importantly perhaps the Conseil d'Etat long has had, and today has, an extremely strong corporate sense: its members recognise that they belong to what they call *la maison*, that they are truly of one household, which does indeed grant them great benefits but sets upon them the burden and the privilege of an immense and vital business which can begin to be discharged only

<sup>1</sup> Art. 26 of Decree of July 31, 1945, as amended by Art. 2 of Decree of Dec. 12, 1950.

by their best cooperative effort. While this spirit survives within the Conseil d'Etat, it will no doubt continue to perform its work, and to maintain its essential unity.

#### DEVOLUTION—A RECENT EXPERIMENT

I ended my last lecture by calling attention to Article 32 of the Décret of July 31, 1945, which indicated rather than defined the jurisdiction of the Conseil d'Etat *statuant au contentieux*. I wish now to consider the constitution and functioning of the Conseil d'Etat as a court.<sup>2</sup>

I shall treat the matter as it stood on or before December 31, 1953. It should however be noted that an important reform<sup>3</sup> came into operation on January 1, 1954, a main feature of which was the transfer to local administrative courts of a good deal of first instance work up to then transacted by the Conseil d'Etat. These local courts are the old Conseils de Prefecture reconstituted as Tribunaux Administratifs. It is yet to be seen how the reform will work: it will no doubt raise difficulties of its own, but it is devoutly to be hoped that it will succeed in its main purpose—which is to provide some relief to the enormous

<sup>2</sup> See Chap. II, V and VI of B. Schwartz, "French Administrative Law and the Common Law World," N.Y.U.P. 1954; and 68 L.Q.R. 60 (Jan. 1952).

<sup>3</sup> An authoritative account of it is to be found in Monsieur R. Cassin's article in 1953 *Revue Internationale des Sciences administratives* 833. The texts (Décret-loi of Sept. 30, 1953, and Règlement d'Administration Publique of Nov. 28, 1953) may perhaps most conveniently be consulted in 1953 *Revue du Droit Public*, or in 1953 *Etudes et Documents*, 166 et seq.

accumulation <sup>4</sup> of contentious business before the Conseil d'Etat. The devolution of much first instance work to inferior courts is a most significant development, but it is not believed that the character of the Conseil d'Etat as a court will in the immediate future be basically altered, especially as it will continue to retain even at first instance the most important cases. It is in any event too soon yet to judge the real consequences of this new reform.

#### COMPOSITION OF THE CONSEIL D'ETAT

Though the Section du Contentieux, the judicial organ, is one only of the five <sup>5</sup> Sections into which the Conseil d'Etat divides itself for the purpose of conducting its business, it in fact comprises more members of the Conseil d'Etat than the other four put together. In 1953 the Conseil d'Etat consisted of a Vice-President (the actual head of the body), five presidents of the five Sections, 46 conseillers d'Etat, 49 maîtres des requêtes and 48 auditeurs divided into two classes: that is to say, 149 persons in addition to 12 conseillers *en service extraordinaire* who tend to be honorary members and are in any event excluded from the transaction of judicial business. Of these 149, more than 80 <sup>6</sup> are members of the Section du Contentieux, so that the preponderance

<sup>4</sup> See *infra*, p. 137.

<sup>5</sup> The other four are the "administrative"—*i.e.*, the advisory—Sections already noted.

<sup>6</sup> This includes, in addition to the President, 22 Conseillers d'Etat, without reckoning the five who are additionally attached to the sous-sections du contentieux spécial and the four who join the Assemblée Plénière.

of the judicial business of the Conseil d'Etat is reflected in its numerical distribution.

Alone of the Sections, the Section du Contentieux is sub-divided into sous-sections, each consisting of three conseillers d'Etat (of whom one acts as president of the sous-section) and a varying number of maîtres des requêtes and auditeurs. This fragmentation of the Section du Contentieux had been in the past its response to the increasing volume of business. The ninth sous-section was created as lately as January 1951.

#### NORMAL ORGAN

The "normal" organ of judgment at the Conseil d'Etat today is two sous-sections acting together (*deux sous-sections réunies*). The sous-sections which usually so pair are the first four: No. 1 with No. 3, and No. 2 with No. 4. Though No. 7 occasionally pairs with No. 8, the last five sous-sections (No. 5 to No. 9) usually act alone. The business allotted to them is regarded as being both technical and of lesser importance. It is known as *le petit contentieux*, or, more properly, *le contentieux spécial*. It is believed that a single sous-section is adequate to deal with the points arising. The *contentieux spécial* includes disputed elections<sup>7</sup> which go to sous-section No. 5, pensions<sup>8</sup> *emplois réservés*, etc., which go to No. 6; and, what sounds strange to English ears, income tax matters (*contributions directes, impôt cédulaire* and

<sup>7</sup> The decision of all questions touching parliamentary elections is left to Parliament, both according to the traditional separation of powers and to the express provisions of the Constitution.

<sup>8</sup> Such as remain within the competence of the Conseil d'Etat.

*impôt général sur le revenu*) which go to Nos. 7 and 8. The recently created No. 9 deals with accidents involving administrative vehicles, with requisitions (whose number and importance is now fortunately diminishing) and with the troublesome questions of *remembrement*—the *regroupement* of scattered small land holdings, which necessarily provoke the most acrimonious of disputes. I do not propose further to concern myself with the *contentieux spécial*, except to note that if the difficulty or importance of any case appears to warrant it, the sous-section<sup>9</sup> concerned has power to cause the case to be transferred to another organ of judgment.

More august than the “normal” tribunal of deux sous-sections réunies is the Section du Contentieux as a unity, which for this purpose means the president of the Section, the nine presidents of the nine sous-sections, the remaining two conseillers of the sous-section which conducted the instruction, the rapporteur and the Commissaire du Gouvernement (who does not, however, vote at the délibéré). The most august tribunal is the Assemblée Plénière du Contentieux<sup>10</sup> which consists of the Section du Contentieux

<sup>9</sup> Other persons having this power are the Vice-President, the president of the Section de Contentieux and the Commissaire du Gouvernement concerned. It is *not* within the power of the parties to determine what is the organ of judgment appropriate to the decision of their case.

<sup>10</sup> The Assemblée Plénière must be distinguished from the Assemblée Générale. The Assemblée Plénière, constituted as above, is exclusively a judicial body. The Assemblée Générale, which is attended by *all* Conseillers d'Etat, transacts all important business of the Conseil d'Etat *except* its judicial business.

(less the two conseillers of the sous-section) together with one representative from each of the four administrative Sections. It is usually presided over by the Vice-President himself.

### THE WEIGHT OF NUMBERS

The latest available <sup>11</sup> statistics, those for the year 1951-52, show that contentious business was transacted at the Conseil d'Etat as follows: judgment was delivered in 4,035 cases.<sup>12</sup> Of these 42 were determined in Assemblée Plénière and 192 in the Section du Contentieux. The 1st and 3rd sous-sections sitting together determined 919, the 2nd and 4th together 938—that is to say, 1,857 <sup>13</sup> out of 4,035 were decided in these pairs of sous-sections réunies. Sitting alone, the 5th sous-section dealt with 129, the 6th with 652, the 7th with 394, the 8th with 320, the 9th with 439—that is to say, the *petit contentieux* or the *contentieux spécial* accounted for 1,934 cases. It will thus appear that the *grand contentieux* or the *contentieux général*, including therein the ten cases decided by the 7th and 8th subsections sitting together, amounted to 2,101 cases out of 4,035—which is only very slightly more than half (about 52 per cent.) of the judicial work.

These figures seem large to the Conseil d'Etat, who

<sup>11</sup> *Etudes et Documents* 1953, p. 116.

<sup>12</sup> What is ominous is that though 4,035 cases were determined, 5,542 new cases were entered in the same period. A similar or larger surplus has occurred in every year since the liberation.

<sup>13</sup> Ten more were decided by the 7th and 8th sous-sections sitting together.

greatly complain of the overwhelming burden.<sup>14</sup> My own reaction is diametrically the opposite—I cannot understand how it happens that the contentious administrative business which includes not only tax cases but road accidents as well as personal claims by civil servants against the State or other public authorities in respect, *e.g.*, of their careers, could possibly have been kept to so low a figure in 1951–52 when the Conseil d’Etat was at once the final<sup>15</sup> administrative tribunal, the normal court of appeal and also the *tribunal de première instance de droit commun*<sup>16</sup> *en matière administrative*. I must on this matter simply confess ignorance—there would be required for an adequate explanation an over-all picture of the French administrative machine which I do not possess. I claim only some knowledge of the judicial work *au grand contentieux* of the Conseil d’Etat, and that in itself is an over-bold claim.

<sup>14</sup> The contentious work is undoubtedly increasing. The first 100,000 cases were spread over 94 years (1806–1900), the second over 27 (1900–1927), the third over 21 (1927–1948). The fourth (current) series, begun on Nov. 12, 1948, had attained 30,000 in less than five years.

<sup>15</sup> The jealousy with which the Conseil d’Etat guards the right of hearing final proceedings *en cassation* is extreme. See *infra*, pp. 157–160. The only administrative courts exempt from this process are the Commission Spéciale de Cassation des Pensions (set up by Decree of Aug. 1935), the Commission Supérieure de Cassation des Dommages de Guerre (set up by the law of Oct. 28, 1946) and the Cour Supérieure d’Arbitrage des Conflits collectifs du Travail (set up by law of Feb. 11, 1950); and that only because these courts may be regarded as emanations of the Conseil d’Etat itself.

<sup>16</sup> That is to say, the court having jurisdiction in first instance unless there be an enactment expressly conferring first instance jurisdiction on another body.

## PROCEDURE

In spite of the numerical importance of the *contentieux spécial*, it is no doubt right to accept the established view that the "real" judicial work of the Conseil d'Etat is the *contentieux général* which normally is transacted by deux sous-sections réunies—the Section du Contentieux and the Assemblée Plénière being regarded simply as deux sous-sections réunies writ larger and dealing with cases considered to be specially difficult. I wish to consider briefly the procedure<sup>17</sup> adopted by this normal organ.

It was already noted, when we were considering *l'affaire de l'Ecole Nationale*, that the procedure was in the French sense *contradictoire*. The essential meaning of this term is that neither party can communicate to the court any argument or information which is not open to the inspection and the reply of the other.<sup>18</sup> It is adversary and *contradictoire* also in the full sense that after the exchange<sup>19</sup> of contentions and documents at the final session before judgment the parties may appear by counsel if they will and publicly put and commend their contentions by word of mouth to the court. Nevertheless we noted that it would be a mistake to seek any parallel to the English

<sup>17</sup> For an extremely valuable account of administrative procedure see Odent, *Contentieux Administratif* (Paris, Cours de Droit, 1950), pp. 187 *et seq.* M. Odent, now a Conseiller d'Etat, was then a Commissaire du Gouvernement.

<sup>18</sup> See, e.g., C. E., January 28, 1937, *Disch-Vitus*; C. E., March 13, 1937, *Société de Transbordement du Port de Strasbourg*.

<sup>19</sup> Exchange is not strictly perhaps the correct term: the parties are normally bound to consult the "dossier" at the "greffe" of the court.

“ day in court ” or to the English hearing where evidence is orally produced in proof of an issue.

### SECRET

The procedure is basically a written one. Wishing perhaps to shock, M. Odent, then a Commissaire du Gouvernement, in his excellent work on the *Contentieux Administratif*,<sup>20</sup> went further and termed it not only written but inquisitorial and secret. This adjective—secret—may perhaps be misleading: what is intended, and is correct, is that the documents produced in the cause are available only to the parties and to the court—not to the public. Strictly what is available to the public is that which occurs in the final public session—the colourless statement of the rapporteur which is scarcely more than an opening of the pleadings, the *ex-parte* statements (if any be made) of counsel on each side, the most important “ conclusions ” of the Commissaire du Gouvernement (which furnish in an obligatorily oral form<sup>21</sup> a review of the facts and of the law as they appear to the Commissaire) and of course the judgment of the court, which need not accord with the view which commended itself to the Commissaire. All the remainder of the procedure—and in particular all the instruction—is conducted outside the presence of the public, but with the participation of the parties.

<sup>20</sup> *Supra*, note 17.

<sup>21</sup> Though the Commissaire must speak his conclusions, they are normally in any important case previously prepared in writing and frequently printed as an appendage to the judgment in Sirey, Dalloz or the *Revue du Droit Public*.

## INQUISITORIAL

Secret the procedure may be, in this rather Pickwickian sense. Inquisitorial it certainly is in the sense we have already noted when dealing with the question of the burden of proof. The complainant having made out a prima facie case, it is the court's duty to satisfy itself as to the truth of the matter. The court has power to order an *enquête*—that is to say, an examination of witnesses—or an *expertise*—a report by named persons on a question of fact or opinion; but it rarely does either. The defendant is, in the typical case of a request for annulment the Minister or a public authority; the question at issue then is on what grounds an official act was done and whether the grounds were sufficient to warrant the act. Where the primary duty is upon the tribunal to take such steps as it may regard as relevant (subject of course to the comments and observations of the contending parties) to throw upon the matter in issue a light sufficient to enable the tribunal to reach an answer satisfactory to itself, it must always be a matter of the individual case, of the conduct of the parties, of the relevant circumstances, of the particularity of the allegations and of the denials, and of the final balance of the probabilities, what production of what material and by whom the tribunal will regard as sufficient or necessary. In the judgment the phrases now generally used are that “ il résulte de l'instruction ” or “ il résulte de l'examen du dossier ” or “ il ressort des pièces versées au dossier ” that the plaintiff's or the Minister's allegation is or is not

“établi.” In *l'affaire de l'Ecole Nationale*, the phrases used in judgment are “qu'ils [the plaintiffs] se prévalent à l'appui de leur allégations de circonstances et de faits précis constituant des présomptions sérieuses” and after a succinct account of the conduct of the defendant “qu'il ressort de l'ensemble des circonstances sus-relatées de l'affaire que le motif allégué par les auteurs des pourvois doit être regardé comme établi.”

#### ADVANTAGES OVER ENGLISH SYSTEM

Shocking as the suggestion may seem to an English lawyer accustomed to the traditional “day in court,” there is much value and utility, at any rate so far as administrative actions are concerned, in this method of *not* pre-determining an issue upon the original pleadings of the parties, but allowing the discussion between the parties to proceed by exchange of documents until the tribunal itself forms an estimate of the balance of probabilities from a review of all the circumstances of the case as they appear from that exchange. I doubt if the Conseil d'Etat is in fact more often or more readily induced into error than the English High Court. The process has the advantage of avoiding the surprises of a witness action—cases have not been unknown in England where the decision has at any rate appeared to turn on a minor point to which deservedly little attention was given before the event and which even after the event appears trivial and even irrelevant. The process has moreover the very great advantage that it makes it

more reasonable and more feasible to require a Ministry appropriately to answer. The spectacular publicity of the day in court—and especially the character of an oral cross-examination—is a thing to which it is perhaps not entirely unreasonable that a Government Department should oppose itself. If a Government Department is to be required to answer in that manner or not at all, it is more likely that steps will be taken to enable it wholly to avoid making any answer at all.

The Conseil d'Etat's process is such that it enables a Government Department easily and readily to answer when in fact it has a real justification for its action and also to answer without necessarily disclosing its confidential sources of information, whereas if a Government Department were made to answer as a normal litigant in an English court, even when it has a real justification for its action, not only would it have to submit to a public cross-examination on its files, but it would be required to produce in court the person having first-hand knowledge of a particular fact (if the justification is based upon the existence of that fact). But it may really <sup>22</sup> be contrary to public policy to produce that person. In France if a Government Department makes a categorical and precise statement of fact, I suspect that, though the final conclusion will depend from all the circumstances of the case, the Conseil d'Etat would almost certainly

<sup>22</sup> By "really" here I mean in the estimation of an independent judge and not merely in the estimation of the Head of the Department, who today makes the affidavit claiming privilege from discovery of documents on grounds of public policy.

first turn to see in what manner the plaintiff denies that fact and what kind of corroboration (*commencement de preuve*) he offers for his denial before compelling the department to a proof—or better perhaps, to a corroboration—of its fact. The French process is therefore reasonably accommodating to a Government Department; but I doubt that it is more accommodating than is appropriate: it is accommodating to a Government Department which answers and answers with precision, with a precision which makes possible a proof by the plaintiff of the falsity of the alleged fact. And, as we saw in the *affaire de l'Ecole Nationale*, the French process is not at all accommodating to a Government Department against which, in the estimation of the tribunal, a presumption has been established and which refuses to answer.

Whether or not the French process is secret and inquisitorial—and those adjectives may have been used by M. Odent more to point a difference than to warrant an inference—it seems both useful and appropriate in administrative proceedings. I must confess I see no disadvantage and much advantage in the powers of an inquisitor,<sup>23</sup> if directed against a Government Department and wielded by a tribunal such as the Conseil d'Etat. Cross-examination, properly and competently used, is a marvellous instrument for the discovery of truth and the English

<sup>23</sup> Note that Sir Andrew Clark was in the Crichel Down inquiry an inquisitor within the meaning of the term as here used: in particular in that he had access to the files of a Department which would have been denied to a judge in a High Court action.

trial and rules of evidence, which alone make cross-examination possible, are therefore much to be commended, especially in criminal cases. But if the English rules of evidence serve—as I believe they do—as an added reason why a Government Department can claim a total immunity from effective judicial control in England, then it would be better if, however admirable in themselves, they were abandoned in administrative proceedings. For clearly it is better to have an efficient process which results in a real control of the administrative act (as the French does) than a more perfect process, even if admittedly more perfect, which is precluded from having any operation at all (as seems to be the case in England).

#### COUNSEL

In a process of this kind the role assigned to counsel is necessarily much humbler than that which he holds in the gladiatorial process favoured by the common law. He remains not without importance. The manner of drafting a requête, and especially the formulation of the *moyens d'annulation*, may be vital: for the tribunal is required to advert to all the *moyens* raised, if it is minded to reject the requête; and on the other hand it is beyond the competence of the Conseil d'Etat to act *ultra petita*—that is to say, to give a remedy which has not been requested. The art of drawing an effective requête is similar to that needed for settling a *pourvoi* before the Court of Cassation. The same body of men practises before

both the Court of Cassation and the Conseil d'Etat.<sup>24</sup> It is a very small body, limited by law<sup>25</sup> to sixty. The office of "avocat aux conseils" as it is familiarly known is, moreover, a "charge"<sup>26</sup>: it is procurable only by purchase, by inheritance or by gift, though the person entering upon the office must fulfil some professional qualifications which are not unduly arduous. Such an office is not in English eyes likely to increase the stature of its holder. And the rules of the order further limit competition *inter se* even of the sixty—especially in that a person who was once a client of one avocat cannot become a client of another unless a case of professional misconduct is made out to the satisfaction of the order. The avocat aux conseils, though he may be a very learned and very able man, certainly cannot claim the standing of a "leader" at the English bar. The mere fact that the French process does not include the critical "day in court" would in any event necessarily diminish his position. And indeed though in principle the ministère d'avocat is required at the Conseil d'Etat, in practice the exceptions to the rule are numerous. In particular the intervention of an advocate is not required in the case which concerns us—the *recours en annulation*. The requête in such an instance may be drafted with extreme informality

<sup>24</sup> The historical reason for this is that the functions now discharged both by the Cour de Cassation and by the Conseil d'Etat belonged previously to the Conseil du Roi; and the persons entitled to appear before the Conseil du Roi formed one corps.

<sup>25</sup> Ordonnance royale of September 10, 1817.

<sup>26</sup> Compare the situation in France of the "notaire."

and the inquisitorial process of the court will see to it that a substantially good case is not unduly prejudiced by the absence of an advocate. Many important cases have in fact proceeded very satisfactorily in front of the Conseil d'Etat without the intervention of any person in the role either of solicitor or of counsel for the plaintiff.

### NEW BUSINESS

The machinery of the court is relatively simple. When received the requête is numbered<sup>27</sup> and allocated to a sous-section. The distribution of the requêtes received takes place once a week, in circumstances of some informality, by the Secrétaire du Contentieux, but subject to any directions of the president of the Section, in the presence of representatives of the sous-sections. The requêtes which belong to the *contentieux spécial* are fairly easily identified. As regards those belonging to the *contentieux général*, which will in the normal course be allocated to one of the first four sous-sections for its "instruction," there may be some discussion—on the basis, for example, that the particular requête appears to resemble one allocated the previous month to sous-section X, which therefore ought to have the present one also. It is no doubt the duty of the sous-section's representative not to accept more than the sous-section's fair share of the new work, but it is not unheard of that a requête should be voluntarily taken because it appears to raise an interesting point.

<sup>27</sup> For the various series see *supra*, p. 101, note 14.

## THE RAPPORTEUR

The requête having been allocated to a sous-section it is the duty of the president of that sous-section to assign it to a rapporteur. Any member, senior or junior, of the sous-section may be the rapporteur: he does not hold an office as does the Commissaire du Gouvernement; but usually it is the more junior members of the sous-section—the maîtres des requêtes or the auditeurs—who act as rapporteurs. The rapporteur will follow to the end the case assigned to him. In consultation with the president of the sous-section and subject to the directions of the sous-section, it is his duty to get the case *en état*—that is to say, ready for judgment. When the requête is *en annulation*, it is his business, for example, to notify the department responsible and to enable it usefully to present its observations. It is his business also to propose the *mesures d'instruction* which appear to him from time to time necessary. Orders as such, including the setting of time limits, issue from the sous-section and are executed in the name of its president. It is however not possible here to deal with these interlocutory matters.

When the instruction is completed <sup>28</sup>—that is to say, when the material deemed requisite by the sous-section on the proposal of the rapporteur has been gathered together (or the time for its production gone past) and when the comments by the parties on that

<sup>28</sup> There is power (see Art. 52 of the Ordonnance of July 31, 1945) if the answer to the requête appears self-evident to transmit it direct to the Commissaire for it to come for judgment without an instruction; but this power seems rarely to be exercised.

material and on the other side's allegations have been made—it is the duty of the rapporteur to take into consideration the whole dossier and to prepare his rapport. The rapport is divided into three main parts. The first sets out what we may term the pleadings of the parties, the demand, the *moyens* (which may be translated as the grounds in law), the defence, a statement of the principal *pièces* (evidential documents) in the dossier and a list of the relevant statutes and regulations. It is this first part only of the rapport which is read out by him at the final public session. The second part sets out the order which the rapporteur proposes, drafted in the form in which judgments of the Conseil d'Etat are normally cast. The third part<sup>29</sup> is an account by the rapporteur of the questions of fact and law in his opinion arising, of the possible solutions, of the opposing arguments, of the Conseil d'Etat's case law and finally of the reasons which have led the rapporteur to prefer the order which he proposes. The dossier with the rapport then is studied by the president of the sous-section or his assessor and comes before the sous-section for discussion.

#### DRAFT ORDER

This discussion at the end of the instruction is of importance and is attended by the Commissaire du Gouvernement. The purpose of the discussion is primarily to see whether the sous-section will concur in the rapporteur's draft order and also to inform the

<sup>29</sup> It is to this part that Odent (p. 232) gives the name "rapport" as such.

Commissaire of the matters in issue. In a difficult matter, there is likely to be a difference of opinion at the sous-section: the rapporteur's draft order may be amended with his concurrence or a new order substituted or there may be a majority only in favour of the finally accepted draft. The result of the sous-section's discussion is that a draft order is prepared which now goes forward as the sous-section's draft but which as yet binds nobody, the dissident parties in particular retaining a right further to express their dissent.

At this meeting the Commissaire du Gouvernement is not bound to express an opinion though he will no doubt take part in the discussion. It is his business, after the discussion, when the dossier with the rapport and the sous-section's draft order has been remitted to him, to come to a conclusion by himself whether he will or will not support that draft. I have already <sup>30</sup> stressed the nature and the personal character of the duty incumbent upon him. But custom enjoins, if he proposes to dissent from the sous-section's draft, that he should again meet the sous-section before the hearing and inform them of the grounds of his dissent; and it has happened that as a result of this further discussion one side or the other changes its opinion.

#### TRIBUNAL OF JUDGMENT

The sous-section having (whether or not by a majority) settled its draft and the Commissaire having decided what opinion he will express, the case is set down for

<sup>30</sup> *Supra*, pp. 79-81.

judgment. It is the duty of the Commissaire to set down the case and he includes it in a list which is called his "role." The Commissaire is likely to have a "role" once a fortnight and it may include as many as twenty-five cases in a normal session in front of deux sous-sections réunies. That is to say, that at any one session all the cases will normally "belong" to one Commissaire, though each case may have a different rapporteur.

The tribunal of judgment presided over by the president<sup>31</sup> of the Section du Contentieux consists of the sous-section which has conducted the instruction together with a sous-section which, formally at least, for the first time encounter at this session a question which may have provoked much discussion and dissension among their colleagues. That, it seems to me, is the essence of the Conseil d'Etat's process: that a difficult matter should before the event have received a careful examination not only as a result of the adversary proceedings between the parties but by the preliminary inquiry and the tentative draft orders of members of the Conseil d'Etat; and that at the hearing a new group of the judicial section should bring to bear upon the problem a fresh consideration, with a view to resolving, if necessary, a conflict of opinion between colleagues who now sit with them. At any

<sup>31</sup> The burden of work upon the president is great. He is really responsible for keeping the various organs of judgment in step with each other. In addition to presiding the Section du Contentieux itself, he is present at the Assemblée Plénière and habitually presides over all meetings of deux sous-sections réunies, besides being regularly consulted on any question of difficulty, especially perhaps by the Commissaire.

rate the result of the process is that the tribunal of judgment, composed partly of persons who have already discussed the matter and partly of persons who have not formally been concerned with it, is faced in a difficult matter with a variety of possible solutions which have already been subjected to examination. The variety of solutions offered to the tribunal may be very wide. First there would be the opposite solutions offered by the parties; secondly, the draft order proposed by the sous-section d'instruction; thirdly, the rapporteur's original draft (if it differs and he adhere to it); fourthly, any other proposal which may have commended itself to a dissident minority of the sous-section; and lastly the proposal made by the Commissaire du Gouvernement after a consideration of the sous-section's views.

At the hearing, the order of procedure is that the rapporteur reads the first part only of his rapport—the part setting out the contentions of the parties, the points of fact and of law involved and the relevant statutes and regulations. Since he is a member of the tribunal it would be contrary to all French principles that he should go on publicly to indicate his own opinion. The advocates of the parties may then orally make to the tribunal such observations on the case, being points which they have already urged in writing, as may seem to them proper. It is unusual for counsel orally to address the court at any length. It is moreover customary for the Commissaire du Gouvernement to give notice to the advocates of the view he intends himself to express; and the advocate of the party in whose favour the

Commissaire proposes to conclude is no doubt best advised to leave well alone. The advocates having had their say, the Commissaire addresses the court. The moment at which he rises is the final and formal joinder of the issue between the parties on the material as it then stands in the dossier. The Commissaire as we have seen<sup>32</sup> reviews the facts of the case and the relevant law (including the Conseil d'Etat case law) and goes on to propose the solution together with his reasons for it. The tribunal then proceeds to the next case on the role, and so to the end of it, before retiring into *délibéré* to consider its judgment.

The public hearing would no doubt be a disappointment to a common law lawyer accustomed to the excitement and the extreme orality of an English trial. The rapidity of proceedings makes it difficult to follow what is happening. Even the Commissaire's statement is more easily appreciated upon a reading than at the hearing—indeed though oral in form it is customarily read. But the public hearing is more than a mere formality: it is the sanction of the real contradictory nature of the process between the plaintiff and the Minister and the necessary condition of that most salutary and essential publicity which comes from the reporting of the cases. I also regard it as of importance in that it emphasises the entire independence of the Commissaire du Gouvernement. He is neither an advocate nor a judge. Because he is not an advocate he sits at the table round the three sides of which are grouped the members of the court, whereas

<sup>32</sup> *Supra*, pp. 79–81.

the advocate, of the Minister as much as of the plaintiff, sits on a cross bench. Because he is not a judge, he declares in public his personal opinion, which a judge in France cannot do. And the court may or may not concur in his opinion—though the report will normally note whether the judgment follows the Commissaire's conclusions (which are then mentioned as *conformes*) or diverges from them (when they are termed *contraires*).

#### JUDGMENT

The *délibéré* is secret. The secrecy is upon pain of nullity and *d'ordre public*—that is to say, cannot be waived by the agreement of the parties. It is, however, believed that discussion at the *délibéré* may on occasion be vehement. The Commissaire is normally present but he has no vote (*voix délibérative*). In fact it is a question whether strictly he has even *voix consultative*: he has had his say in court and perhaps should only answer questions if asked. The persons having a vote<sup>33</sup> are the president of the Section, the six conseillers of the two sous-sections and the rapporteur who always has *voix délibérative* however junior he may be. To make the necessary unequal number the senior maître des requêtes present is added to the court. There are normally present more than the nine persons<sup>34</sup> indicated—for example the rapporteurs of the other cases on the same role and such maîtres

<sup>33</sup> Note that but for the rapporteur they necessarily belong to the older age group of the Conseil d'Etat.

<sup>34</sup> The law (Art. 36 of the ordonnance of July 31, 1945) requires a quorum of at least five persons having *voix délibérative* for a valid judgment of deux sous-sections réunies.

des requêtes or auditeurs who are attached to the sous-sections as are not otherwise engaged. All persons present have *voix consultative*—that is to say, may take part in the debate; and it is believed that on occasion they do. As is the practice of all the French courts, and of the Privy Council, one judgment only is delivered; and it does not appear whether it is unanimous or by a majority. Judgment is usually delivered fifteen days after the hearing.

The judgment is exceedingly succinct. Its form is traditional and some of its expressions slightly archaic. Grammatically it forms one sentence, the subject of which, at the beginning is “ Le Conseil d’Etat statuant au contentieux ” and the verb “ décide ” towards the end immediately precedes “ articles ”<sup>35</sup> which set out the result in the barest particulars. For example, in *l’affaire de l’Ecole Nationale*, the operative article (No. 2) states merely “ Les décisions du Secrétaire d’Etat à la Présidence du Conseil [specifying them] sont annulées.” In between the subject and the verb the recitals and the *motifs* of the judgment are set out in subordinate clauses : the recitals are introduced by *vu* or *oui* in the older fashioned ablative absolute construction, the *motifs* by a *considérant que*. The result (which pleases the Conseil d’Etat and does produce a satisfactory sense of dogmatic absoluteness) is that a capital pronouncement would appear in a mere

<sup>35</sup> These “ articles ” are a relic of the time when the opinion of the Conseil d’Etat required promulgation in the form of a decree by the Head of the State to have effect. The articles would be articles of the decree.

adjectival phrase. For example, in the same *affaire de l'Ecole Nationale*, there is no apparent claim or decision as regards the vital matter, the right of the court to the production of the files; there is merely an added clause in the present participle, which an uninstructed reader might pass over: "usant du pouvoir qui appartient au Conseil d'Etat d'exiger de l'administration compétente la production de tous documents susceptibles d'établir la conviction du juge et de permettre la vérification des allégations des requérants." In fact this clause constitutes as peremptory a declaration of absolute authority as can well be made, and the subordinate nature of the clause serves but to emphasise the absolute character of the declaration.

It is no doubt a great art to draft judgments in this form, and members of the Conseil d'Etat pride themselves on the clarity and precision of their style—a style which recalls the quite admirable style of the Code Napoléon, also drafted by the Conseil d'Etat. It is a real intellectual pleasure to come to judgments of this brevity and accuracy after the meanderings of some of the pronouncements of the English courts. But it also requires a considerable art intelligently<sup>36</sup> to read such judgments: they are almost a concatenation of formulas. Indeed the actual phrasing of the formula from time to time is perhaps the notable matter. Even a slight variation should be observed—it is probably not accidental and the departure may

<sup>36</sup> It would on occasion be virtually impossible to grasp the real point of a decision without collating the Commissaire du Gouvernement's "conclusions."

signify a change as important as the introduction of the *cum* clause in the writ of trespass: an introduction which marked the coming into being of the action upon the case, with all its ramifying consequences.

#### COLLEGIATE CHARACTER OF COURT

It is difficult to decide to what features of such a court, in addition to those already noted, the attention of an English observer should be specially directed. It is evidently a collegiate court, but all French courts are collegiate. Nevertheless the collegiate character of this administrative court (and not merely of the Conseil d'Etat as a whole) is marked and important. The normal French civil tribunal is collegiate mainly in the sense that one decision is rendered by a more or less chance (or at any rate not long enduring) collectivity, the individual view of whose members is a jealously guarded secret. But in this sense the Judicial Committee of the Privy Council is also a collegiate court. It does not seem that any very important principle<sup>37</sup> is involved in the use of a court collegiate merely in this sense—the process of decision whether in the House of Lords or in the Privy Council would by most persons be regarded as substantially identical. The French administrative court is, however, also collegiate not only in the sense that it is a group of men who know each other very well and will probably continue to

<sup>37</sup> The French do attach importance to the anonymity of the decision, which they regard as a protection of the independence of the judges. But the names of the judges forming the "college" must be stated.

belong to the same body—the Conseil d’Etat if not the Section du Contentieux—for the remainder of their working life, but also in the sense that the purpose of its process is to cause a proposed order to be discussed even before the hearing at different levels and progressively by members of the court, additionally to any discussion which may be initiated by the parties. Within the court itself we see the desire, and the need felt, to attempt to bring to bear upon the decision of an issue the collective learning and wisdom of the group as a whole. I strongly suspect that an administrative court, to be successful, may *require* to be collegiate in this sense, to have this feeling of group responsibility for attaining the right solution. The inquisitorial power (if so it may be termed) of the French court is probably no more than a reflex of this group responsibility. Whether or not it be a *necessary* requirement of an administrative court to be collegiate in this sense, it should be noted that the French administrative court is in this sense collegiate.

#### MEN OF ALL AGES

The French administrative court is also remarkable in being the only supreme court of which I know which includes within its membership age groups varying from seventy or more to twenty-five or less. The voting power at the end of the *délibéré*—if it comes to a vote—is concentrated predominantly in the hands of the senior age group, the conseillers, though the rapporteur who quite frequently would belong to the youngest age group, the auditeurs, always has a

vote also. But the whole process is designed to associate all the classes in the formation of the view of the court: the younger men do express and maintain their opinions without ambiguity. In discussion there are no rules of hierarchical precedence: indeed the only rules are the rules of good manners. I was impressed by the extent to which the seniors will attend to the argument of their juniors at least as much as by the respect which the juniors show (and very deservedly) to the experience of their seniors. Even more striking is the fact that the person who occupies in my estimation a critical position in the court's process—the Commissaire du Gouvernement—necessarily belongs to the middle age group, the maître des requêtes. Perhaps he may be regarded as the mediator between youth and age: he is certainly young enough to be the spokesman for the new idea or doctrine; and he has an unexampled opportunity to commend it to the court. He is old enough to have learned prudence and the art of making that synthesis which will win the approval of the conseillers whose ranks he will himself comparatively soon be joining. It is I am sure no accident that the great formative influence on the development of the Conseil d'Etat's case law is by all admitted to be those conclusions du Commissaire du Gouvernement which form the basis of the leading cases. Nevertheless it is only in so far as they are accepted by the court that they pass into law; and this acceptance is the act of the seniors, the voting conseillers, and principally of the president of the Section du Contentieux whose moral authority may be very great

indeed, as it was in the case of Rouchon-Mazerat who recently died in office. There is truly a quite singular co-operation of youth and age at the Section du Contentieux. It is in my estimation from this co-operation that spring many of the good qualities of this court, and not least the exceptionally sensible and enlightened doctrine of precedent which there prevails—a doctrine which is sufficiently firm to provide the structure necessary to a case law system and sufficiently living to permit the law to cope with its actual changing circumstances to an extent which in England would be judged merely utopian. Again, it may not be a necessity that a successful administrative court should be so constituted, but it is a fact that the French court is.

#### WIDE RANGE OF JUDICIAL ACTIVITIES

The Conseil d'Etat is, by French standards at least, singular also in that quite apart from its numerous other functions, and considered only as a *court*, it combines an extraordinary range of judicial activities. It is at once a final court—the necessary court of cassation<sup>38</sup> or last resort—a usual court of appeal<sup>38</sup> and until January 1, 1954, the “normal” court of first instance in administrative matters. No other court

<sup>38</sup> The distinction between cassation and appeal in France is that appeal is a rehearing as much on the facts as on the law and that a court hearing an appeal may substitute its judgment for that of the inferior court, whereas cassation is a proceeding in error theoretically confined to points of law and though a court reviewing a judgment in cassation may quash (*casser*) that judgment for error it cannot substitute its own judgment but must remit the case to the competent jurisdiction. And see *supra*, p. 101.

in France could be imagined as combining such activities. What is even more striking is that the process which it uses for dealing with this very various business is really undifferentiated—so much so that the distinction between the *recours en cassation* (when the courts sits as the tribunal of last resort from the *judgment* of an administrative tribunal not otherwise subject to appeal) and the *recours pour excès de pouvoir* (when the court is the first tribunal to consider the matter judicially), though observed by Laferrière the great commentator on the Conseil d'Etat towards the end of the nineteenth century, had for a long time been passed over. The point of resemblance between the two *recours*—in that both seek the annulment of an administrative decision (whether or not judicial)—is commonly regarded as much more important, and even today the distinction<sup>39</sup> between them is considered to be one of some nicety and not usually of much moment. An enormous power accrues to the court as the result of the undifferentiated nature of its process: the equivalent in England would be if the High Court could require any Minister to state a case or if certiorari could be used without discussion against an administrative act which was admitted to be in no sense judicial.

#### UNIVERSAL JURISDICTION

The Conseil d'Etat has a truly universal jurisdiction over administrative matters, of whatever sort or kind,

<sup>39</sup> For a valuable and short account of the distinction see Josse, *Livre Jubilaire*, at pp. 171-4.

a jurisdiction of first and last instance, a jurisdiction not limited to the control of inferior jurisdictions but extending to purely executive acts, and moreover a jurisdiction which uses one and the same instrument—the *recours en annulation*—without much regard to the nature of the administrative act called in question. The Conseil d'Etat's jurisdiction as a court of appeal and a court of first instance is also universal—a phenomenon otherwise unknown in the French judicial system—in the sense that it extends territorially over the whole of metropolitan France and France beyond the Seas: every other French court, of appeal or of first instance, is territorially limited. The only other French court having a similar territorial extension is the Cour de Cassation, but its work is limited to proceedings in error against inferior civil or criminal judicial tribunals. The jurisdiction of the Conseil d'Etat is concentrated and centralised to an extent unparalleled in France. We must come to England to find a similar centralisation and concentration—in the High Court itself. The High Court has indeed in principle a jurisdiction which is unitary—that is to say, which does not observe the distinction between administrative matters and civil or criminal matters: the concentration in England is therefore theoretically greater. But the Conseil d'Etat's powers over the administration are certainly wider and more searching than the powers in such matters of the High Court today; and though the Conseil d'Etat's jurisdiction is not in the English sense unitary, it is in the English High Court rather than in any other French

court that we find a similar vesting of a highly concentrated, centralised and universal judicial authority.

#### SIMILARITY OF HIGH COURT AND CONSEIL

It is the similar relative condition of the High Court (especially perhaps of its predecessor the Court of King's Bench) and of the Conseil d'Etat which in my opinion explains the remarkable similarity of some of their behaviour as courts. It is not so much that both have developed elaborate systems of case law—though that is striking enough. The law of the Conseil d'Etat is much more purely and exclusively case law than is the common law today in England—we would have to go back a long way in our legal history to find a similar predominance of the case in our system. The Conseil d'Etat has constructed its system entirely on its own initiative, almost unobserved by the legislature and without much concern with what the civil tribunals might be doing. Indeed the principal interest of the administration in the civil tribunals was to see that they did not interfere with the administration. The Conseil d'Etat's law may be described as a set of rules strictly internal to the civil service—almost a series of Treasury circulars. They are, however, rules which have come into being, not a priori, but as the result of a long series of concrete instances litigated and judicially decided in public: they have been elaborated by the Conseil d'Etat to secure a proper and decent standard of behaviour in the French administration—as much no doubt in the interests of that administration as in

the interests of the individual. And this standard is by the Conseil d'Etat's authority imposed upon and required from the French administrator. The greatest originality of the Conseil d'Etat was that it did not keep this standard as a secret within the service—as one of the *arcana imperii* which it appears to be in this country—but permitted the aggrieved individual to appeal to this standard by a public and litigious process in front of a body which acted judicially, which enforced the standard in the particular instance by nullifying the act done in contravention of it, and which by that enforcement both elaborated the standard itself and gave the public a confidence as much in its existence as in its justice.

The process whereby this standard has been and is being developed by the Conseil d'Etat seems to me very much to resemble the process whereby the *communis consuetudo regni* was elaborated into the common law of England. The main characteristic of the *communis consuetudo regni* was, I suspect, its entire indeterminateness—a standard in course of being imagined by the judges and most likely to become specific by being contrasted to those merely local customs (that is to say, to those only really existing customs) which were regarded by the judges as irrational or bad. The Conseil d'Etat's law is a judge-made law in the same sense as the common law originally was. It is matter for argument in what sense the common law continues to be made by judges; it is certain that the process of making law is vigorously continued at the Conseil d'Etat.

## ATTITUDE TO THE LAW

That both the French administrative law and the English common law are systems of case law is no doubt a fact interesting in itself; but the fact signifies, as it seems to me, more importantly an attitude to the law itself which is common to the modern French administrative lawyer and the older English common law lawyer, and is on the whole little shared by the French civil lawyer. For the French administrative lawyer the law really is the practice for the time being of the court itself and nothing else. Behind that practice there are no doubt general maxims; but general maxims are in their generality inchoate. These maxims are the product of a very real and powerful sense of justice—it is the enduring sense of justice which makes and informs the practice of the court; but except as embodied and declared by that practice it is more an aspiration and a distant goal than that concrete and existing reality which most men believe law to be. Whereas the French civil lawyer, whatever place he may make today for the jurisprudence of the tribunals, does still seem to regard the law as in some sense given and declared by the code, the case is but an illustration (though possibly also to some extent a restriction or an extension) of a fairly determinate <sup>40</sup> rule established by the code and existing independently of the case. At any rate, asked what the law is on a matter, the civilian is apt to answer by the citation of one or more articles

<sup>40</sup> This is no doubt not entirely true of civil liability in what we would call tort—which is the branch in which case law has been most developed by the civil tribunals.

of the Code—often themselves tolerably precise—and, if necessary, to argue deductively therefrom to a more precise particularity. The administrative lawyer answers quite differently—he is most unlikely to quote a maxim, for by its generality that is not calculated to be helpful. If he has an instance, he will cite that instance and its decision, inquiring if the instance cited matches the question put. If it does not, then most probably he will give a case which fixes a limit upon one side, and another fixing some limit upon the opposite side, and will indicate with varying refinements the intermediate solutions and their relative probability and stability, often expressing a serious doubt as to the result if the precise situation had not recently come up for determination.

The Conseil d'Etat has at least as much horror as has an English court of determining the result of any situation except the one presently demanding its determination. It will not formulate today a rule of a particularity which may cause difficulty tomorrow. It will decide how the balance stands today; but to reach <sup>41</sup> its decision it will rely partly on the unrepeatable peculiarities of the case before it and partly upon principles of an extreme generality—*les droits de la*

<sup>41</sup> The process is well illustrated in *l'affaire de l'Ecole Nationale* itself: on the one hand the Conseil d'Etat claims in the largest terms the *power* to demand from the administration the production of any document which it *may see fit* to require and proclaims what is almost a truism—that the Minister “ne saurait, sans méconnaître le principe de l'égalité de l'accès de tous les Français aux emplois et fonctions publics, écarter de la dite liste un candidat en se fondant exclusivement sur ses opinions politiques”; on the other it appeals to “*l'ensemble des circonstances sus-relatées de l'affaire*” to conclude in favour of the plaintiffs.

*défense* (what we call natural justice), or even, what is an increasingly favourite phrase today, *les principes généraux du droit* (which I would not venture here to translate). The resulting amalgam is of a sort calculated to afford the Conseil d'Etat the utmost liberty of manoeuvre in the future. No doubt there is in some matters a *jurisprudence constante*—a fixed and settled practice or habit of action on the part of the Conseil d'Etat—and within its area the Conseil d'Etat law may be taken as relatively settled. But even here the settlement is relative; for the Conseil d'Etat claims and exercises the right to depart, quite openly and expressly, from a practice which in the past had been almost a matter of course: though respecting precedent and believing that precedent should be followed unless there is grave cause to the contrary the Conseil d'Etat has not yet lapsed into a doctrine of precedent which precludes it from developing, and if necessary changing, its law in whatever way may appear to the Conseil d'Etat desirable for the purpose of keeping that law effective and appropriate to its actual circumstances.

#### CIVIL AND ADMINISTRATIVE LAW

The sense that the law is nothing but the practice for the time being of the court and that it is impossible and even misguided to attempt to state rules (though maxims may be stated) as if they had an existence independent of that practice is a sense which is in some degree common to the English lawyer and the French administrative lawyer. It is foreign I think

to the French civilian. Indeed taking into account the highly empirical character, and the relative imprecision even of the practice of the Conseil d'Etat, the French civilian can readily be provoked into saying quite categorically that the Conseil d'Etat has no law at all. What it is correct to say is that the nature of the Conseil d'Etat's law differs profoundly from that embodied in the Code Civil. It is the nature of this difference which is important to us for an understanding of the Conseil d'Etat, and which it is easier for the common law lawyer than for most others to appreciate.

It may well be that the two kinds of law differ because the purpose of the Code Civil differs from the purpose which the law of the Conseil d'Etat proposes to itself. The main purpose of the Code Civil is no doubt to set out rules which will enable the private citizen, in the relative stable circumstances of private life, validly and effectively to produce legal results in the future and to tell him what are his legal duties and rights in situations which can be foretold and which are of fairly frequent occurrence. In such a case the clear pre-formulation of precise rules is a primary object. An important purpose of the Conseil d'Etat's law is to enable the Conseil d'Etat to keep control of the administration of a modern State—and that seems to me rather like riding a most unruly horse: it may be a matter of the nicest, and most momentary, judgment whether it is better to allow him to have his head or whether he can prudently be pulled up short—not an easy decision, especially if

the purpose of the rider is not to daunt the animal but to get it to do its work with the minimum of damage to pedestrians. The rules to be devised and the manner in which they are to be applied, will be markedly different in the two cases.

#### A DYNAMIC COURT

But apart from the different purposes of civil and administrative law, French administrative law is what it is primarily, I think, because it is the law of the court which I have attempted to describe. It is the law of a court which has created its own jurisdiction and is in the process of extending and consolidating and perfecting that jurisdiction: it is the law of a court which as a court is still young. It is the law of a court which subsists, which in some degree has inserted itself, in the heart of administrative business, which is faced with continuous and profound changes in the purposes as well as the techniques of a modern administration, which has a lively appreciation of the paramount necessity of the continuity of the public service and of the need of making it possible for public authorities efficiently to discharge their essential duties, but which, whatever those necessities, remains persuaded that efficient administration is compatible with a due regard for the rights and liberties of the subject and indeed that that regard is itself a prime necessity of a civilised social system. The equilibrium which it is seeking to maintain between complex and rapidly shifting forces is evidently exceedingly delicate. It quite simply proposes to maintain that equilibrium

and to use for that purpose whatever methods may from time to time seem to itself appropriate. As Béquet has said, it is not only a court which is conscious of a duty to attempt to do justice; it is a court which has, and which is accustomed to exercise, a sovereign authority over the subject-matter of its jurisdiction—the executive act in its most purely executive character.

Moreover, because it is highly centralised and concentrated, the Conseil d'Etat has comparatively little difficulty in reaching an agreement, or at any rate a common opinion, among its members as to the desirability of a change in its practice and as to the nature or at least the direction of that change: it is relatively easy for the Section du Contentieux rapidly to develop a "sense of the meeting" as to what should be done, or at least what kind of policy should be followed, in a novel situation or in a situation which has become novel by the emergence of a previously unsuspected factor. And because it is compact it is sufficient for the Section du Contentieux to have merely this "sense"—it is not necessary for the policy to be formulated so as to be capable of being precisely communicated to persons outside the *ambiance* of the Conseil d'Etat, to strangers who do not share the state of mind and the unexpressed assumptions of the household. It is enough if the administrative sections should understand and accept what is occurring and if the decisions reached by the sous-sections of the Contentieux on concrete instances are mutually concordant, are in line with the prevailing policy. Though publicly enforced the law of the

Conseil d'Etat is in some sense an esoteric law—it is the understanding and the practice of this small group of men whose work is highly integrated. Like the common law itself, or at least some branches of it, the law of the Conseil d'Etat is to some degree strictly speaking incommunicable; and that no doubt is odd in a country whose civil law, as witness its spread, is in the highest degree capable of being communicated.

The Conseil d'Etat is evidently exercised by this question of the communication of its law. Since the Liberation the Conseil d'Etat, under the guidance of its Vice-President, M. René Cassin, who previously held a chair of law at the University of Paris, has consciously itself been labouring to make its law known—by the publication especially of the *Livre Jubilaire* and of the annual *Etudes et Documents*, a most valuable source of information. And more recently it has caused all its decisions to be immediately duplicated and made available generally throughout France and in the overseas territories. It is here that the law of September 30, 1953, which to relieve the pressure on the Conseil d'Etat, sets up local administrative tribunals with a general first instance jurisdiction, may have the most profound and perhaps least anticipated results. The need for the effective communication of the law of the Conseil d'Etat will be greatly increased; it will have now to be communicated to persons not coming daily to the Palais Royal in Paris and not permanently in touch

with the movement of opinion there, to persons who have not the pre-eminent knowledge and the outstanding ability of the present group of judges. This need may well lead to a hardening of the Conseil d'Etat's law and even possibly to a debasing of it. At any rate the dispersing of the jurisdiction of the tribunal entails a critical change in the mode of the Conseil d'Etat's activities; and if I am right in supposing that the nature of its law is a function of those activities, it is impossible not to expect, with some degree of anxiety, a change in that law.

#### DYNAMIC BUT NOT UNSTABLE

I have described the law of the Conseil d'Etat as the practice for the time being of a particular court. I do not by that description intend to suggest that its law is therefore unstable. Indeed quite the contrary. Any student of the Conseil d'Etat's law cannot fail to be impressed by the continuity of its development, though that development has been and remains rapid and is of a kind which, perhaps for sufficient historical reasons, has long been unknown to the common law. What I do suggest is that there is no guarantee of the subsistence of this law to be looked for elsewhere than in the continuance of a certain temper of mind among that body of persons who for the time being constitute the court. That to an English lawyer seems neither unusual nor unduly perilous, for we have never attributed much importance to an intangible Constitution or a supra-legal Declaration.

It may seem both perilous and unusual to a Frenchman who normally is anxious to attempt to take a written bond of fate. It is my prejudice to believe that the continuance of a temper of mind, though necessarily always relative, is a surer basis of stability than any formulation of rules and principles—indeed it is what alone can hope to continue in a society of men effectively discharging the business of the Conseil d'Etat. The corporate nature of the Conseil d'Etat tends of itself to secure that continuance. And it has continued over what is already a sensible period of time.

This temper of mind is quite peculiar and characteristic. There is much which is traditional within the Conseil d'Etat, and there is a real respect for tradition; but I doubt that the institution can be called conservative. It does preserve strongly liberal ideas about the rights of the individual, and these today would by some be called old-fashioned. Nevertheless the Conseil d'Etat for all its love of tradition remains very much the incarnation of the republican and revolutionary spirit—a spirit which is intransigent and even fierce but which sets much store upon legality and even more upon reason, and which especially hated organised injustice. It is a spirit which has unpleasing and even dangerous qualities more particularly when it is profoundly “*laïque*.”<sup>43</sup> As

<sup>43</sup> A foreigner cannot hope always to be able to distinguish between “*l'esprit laïque*” (which continues to be regarded in some French circles as respectable or even necessary) and a militant agnosticism or atheism combined with a more or less passionate anti-clericalism (which in general would today be judged somewhat excessive).

qualified and interpreted by the Conseil d'Etat it has rendered the country most valuable service, and the administrative law which the Conseil d'Etat has created is a monument likely to endure. Indeed in the extraordinary instability of the French political scene, the Conseil d'Etat has long been the pre-eminent element of stability—as it sometimes seems, almost the only element—and I doubt that it will suddenly change its character.

#### THE WHEELS GRIND SLOWLY

Something I suppose can legitimately be said by way of criticism of the Conseil d'Etat; but that does not seem to me the business of the foreign observer. The main criticism made in France is based upon the slowness of its justice—the delays are truly shocking and threatened to become cumulative. In every year since the Liberation more requêtes were received than were during that year determined; with the result that in October 1953, the beginning of the judicial year, the back-log was of the order of 24,000 cases—a monstrous accumulation, whatever proportion of them might be unreal or moribund, when it is borne in mind that the largest number of cases disposed of by the Conseil d'Etat in any year <sup>44</sup> since the war was 4,874. But this accumulation is scarcely the Conseil d'Etat's fault. Indeed it is the measure of the confidence it has inspired—the Conseil d'Etat is in serious danger of being overwhelmed by its own success. It had repeatedly called the attention of the legislature to

<sup>44</sup> 1949-50.

the necessity of reform,<sup>45</sup> for action required the co-operation of the legislature. It is to be expected that the action at last taken on September 30, 1953—the setting up of local administrative tribunals with a general jurisdiction—will substantially relieve the congestion at the Conseil d'Etat—at any rate for a time.<sup>46</sup> But it may well be doubted if a permanent solution is to be found along such lines. Though it may be but an indication of my failure to appreciate the essence of the French system, I have ventured to suppose that it might be possible more effectively to relieve the Conseil d'Etat by permitting the civil tribunal, at the option of the plaintiff, to have cognisance of many or most of the actions in tort for damages against the State or public authorities which now fall within the exclusive jurisdiction of the Conseil d'Etat. In that context I also made bold to suggest that the complexity of the law elaborated by the Tribunal des Conflits of itself constituted a real obstacle to the administration of justice.

No doubt a more substantial criticism of the Conseil d'Etat may be that in its anxiety to do justice as between the subject and the State it is using a care and a process which are too meticulous and elaborate. I trust that that criticism is unfounded, for it would imply that in the Welfare State justice has become a commodity which is too expensive.

<sup>45</sup> Representations were made by the Head of the Conseil d'Etat, M. René Cassin, as long ago as August 1947; and a proposal for reforms was already drafted by the Conseil d'Etat by the beginning of 1948.

<sup>46</sup> About half the accumulated back-log has been distributed.

## PERSONAL ACTION AGAINST OFFICIAL

Again it must seem a defect in the eyes of the English observer that the Conseil d'Etat normally claims power to award damages only against the State or the public authority and not personally also against the official at fault. The decision in *Laruelle*,<sup>47</sup> where the State, which had satisfied the claim of the citizen injured by the personal fault of an official, was allowed to recover from the official personally marks an important change in the Conseil d'Etat's law in this matter; and it is one which it is hoped may be extended to permit the *aggrieved citizen* to recover before the Conseil d'Etat<sup>48</sup> damages personally against the official where the official's act amounts to *faute personnelle*. There is much virtue in the English conception of the personal action in tort—though in England, when the action is open, it is not limited to *faute personnelle*. And the personal action in tort may be of value also to the Conseil d'Etat in cases of contumacy—where an official deliberately neglects to do the administrative act necessary to give effect to the judgment of the Conseil d'Etat. The substitution of an award of damages<sup>49</sup> against the State is scarcely an adequate equivalent. No doubt the Conseil d'Etat rightly refuses to sanction any judgment by way of injunction—it never directly orders

<sup>47</sup> C.E., July 28, 1951, D.1951. J.620; R.D.P., 1951. p. 1087.

<sup>48</sup> Such damages can be recovered before the civil tribunal, in those cases in which it has jurisdiction.

<sup>49</sup> More especially as it is generally admitted that the damages awarded by the Conseil d'Etat are very conservatively estimated.

the State or a public authority positively to do anything except pay damages. It annuls the decision of which it disapproves: it does not substitute its own decision. There is criticism in France of the insufficiency of the powers of the Conseil d'Etat to enforce its judgments. In so far as there is substance in it—and it should be noted that the court in England is expressly<sup>50</sup> prohibited from issuing an injunction or an order for recovery or delivery against the Crown—it may be that the personal action against the official<sup>51</sup> may be found a useful instrument here also.

#### SKILL AND JUDGMENT

The one criticism I have heard which is devastating is this: that the Conseil d'Etat by the exercise of a truly remarkable skill and judgment has managed, at a tremendous expense of intellectual ability, to keep in approximately tolerable operation an administrative machine which is obsolete and sometimes corrupt. But for the Conseil d'Etat the French administrative machine would long ago have broken down. And this criticism suggests that it is a detriment to the French nation, directly arising from the Conseil d'Etat's activity, that it has not been faced with the necessity of making a clean sweep and instituting an administration appropriate to a modern State. I am wholly unable to pass judgment on a criticism of this

<sup>50</sup> Crown Proceedings Act, 1947, s. 21.

<sup>51</sup> But note that the same s. 21 of the Crown Proceedings Act, 1947, prohibits the issue of an injunction, etc., against an officer of the Crown if its effect would be to give against the Crown relief which could not be directly obtained against it.

sort. It is well founded in that particular which is within my knowledge—the skill and judgment of the Conseil d'Etat. And it is to a consideration of this skill and judgment as appearing in the law it has evolved and is evolving that I now propose to turn.<sup>52</sup>

<sup>52</sup> Some commentators spend time “proving” that neither political nor executive influence is exercised upon the Section du Contentieux. The undertaking appears to me as unnecessary as it is impertinent. I would think it as reasonable to attempt to prove the political impartiality of the High Court. And in any case the only proof of the pudding is in the eating of it. By this test the independence of the Section du Contentieux is self-evident.

So far as rules go, the Section du Contentieux seems to me amply protected against packing. Entry into the most junior class (the auditeurs at the Conseil d'Etat) is by competitive examination and is subject to a two years probationary period. Promotion to maitre des requêtes is (Ordonnance, Art. 9) by decree upon proposition of the Minister of Justice; but out of every four appointments three must be made of persons already auditeurs, and the names of auditeurs to be promoted are submitted by the Vice-President of the Conseil d'Etat after consultation with the presidents of the Sections. In fact it is the inflexible rule of practice that auditeurs are presented strictly in order of seniority; and this rule has been devised to prevent any suggestion that promotion may be accelerated by any kind of intrigue. In operation it has been found to be a good rule. Its cost—the possible carrying of a passenger—is at the Conseil d'Etat negligible. Every fourth appointment only may be of a person aged 30 or more who has already been engaged for more than ten years in the public service outside the Conseil d'Etat. Again as a matter of practice the Conseil d'Etat insists that every fourth place be filled by an “outsider.”

Appointment to the next higher rank—Conseiller d'Etat—is (Ordonnance, Art. 7) by decree “pris en Conseil des Ministres sur la proposition du Garde des Sceaux.” Here again two out of every three appointments are reserved to persons already maitres des requêtes; and the selection of maitres des requêtes to be promoted must be made from a list of three names similarly submitted by the Vice-President of the Conseil d'Etat. Again the same rule of seniority

applies. The third place is again by custom reserved for an outsider, who must be at least forty years old.

The Vice-President and the presidents of Sections are nominated by similar decree but must already be *Conseillers d'Etat en service ordinaire* (Ordonnance, Arts. 4 and 5).

The distribution of *Conseillers d'Etat* to the various Sections is made (Decree, Art. 14) by *arrêté* of the President of the Republic on the proposition of the *Garde des Sceaux* after consultation with the Vice-President of the *Conseil d'Etat*. *Maitres des requêtes* and *auditeurs* are assigned directly by the Vice-President (Decree, Art. 17).

Strictly, members of the *Conseil d'Etat* do not hold for life. Provision is made (Ordonnance, Arts. 17 and 18) though negatively that *Conseillers d'Etat* cannot be revoked or compulsorily retired except by decree "*rendu en conseil des ministres sur la proposition du Garde des Sceaux.*" In case of *maitres des requêtes* and *auditeurs* the decree is made "*sur la proposition du Garde des Sceaux*" after consultation with the Vice-President. It would be profoundly shocking for any person to be removed from the *Conseil d'Etat* because of any act done by him in course of duty at the *Conseil d'Etat*; and no person has been so removed since 1875. Some members of the *Conseil d'Etat* were revoked at the Liberation in 1944, as they were at the Restoration in 1814. It would today seem to require a similar revolution to produce a similar result. It is not unusual for a member of the *Conseil d'Etat* to elect to go over permanently to the active administration or to the foreign service; and he is encouraged to go "*en mission*" whilst retaining his right to return to the *Conseil d'Etat* without loss or gain of seniority.

# THE LAW OF THE COURT



## THE LAW OF THE COURT

HAVING considered, however imperfectly, the history and constitution of the Conseil d'Etat and some of its characteristics as a court, we must now attempt, however inadequately, to consider the principles of law which it has developed and applies in the case of a *recours en annulation*.

## ACTE OF AN ADMINISTRATIVE AUTHORITY

The first essential of its jurisdiction is that there should be an *acte* of an administrative authority: it is the *acte* and only the *acte*<sup>1</sup> of such authority which is "d'été à la censure de la Haute Assemblée." This principle is carried so far that even in an action for damages in tort it is strictly from the refusal of the public authority to make any, or any adequate, reparation of the harm inflicted that the victim "appeals" to the Conseil d'Etat. Where the action is in tort, this appears to be archaism: but in a *recours en annulation* clearly there is need of a previous

<sup>1</sup> It was long ago realised that the requirement of a "decision" made it possible for a Government Department to paralyse the plaintiff's action in certain cases by simple inaction or silence. Accordingly it was provided (see now Art. 51 of Ordonnance of July 31, 1945) that silence or inaction for four months after demand made amounts to a rejection of the demand—i.e., a negative decision—and the plaintiff can proceed upon proof (usually of the posting of a registered letter) of the demand and the lapse of time.

administrative decision.<sup>2</sup> The archaism is more apparent than real. The court requires the subject to have his case, whatever it may be, first dealt with by the administration—on the presumption that the administration will deal reasonably with it, and a reference to the court avoided.

#### DOCTRINE OF MINISTER JUDGE DISCARDED

French commentators find in this need of a preliminary decision a relic of what seems to them “the bad old days” when the Minister was himself a judge. It was possible to think of the jurisdiction of the Conseil d’Etat as in some sense superimposed upon the normal jurisdiction of the “minister judge,” and thus to regard all the Conseil d’Etat’s work as truly appellate. The contrary doctrine was to see in the Conseil d’Etat alone the proper administrative judge. This contrary doctrine won the day long before its formal consecration in the *arrêt Cadot* of 1889<sup>3</sup>: it is the basis of the principle that the Conseil d’Etat is in administrative matters “le juge de droit commun,” the tribunal which is not only open but compulsory to the litigant except only if another tribunal is by law specified.

More than that: in the doctrine as developed there is an incompatibility between the function of the active administrator and that of a judge—the department has not got power to act as judge and especially not in its own cause. The Conseil d’Etat has very firmly set

<sup>2</sup> The *acte* must be one which affects the “interest” of the plaintiff; it must be “de nature à faire grief.” This “interest” is, however, very largely construed.

<sup>3</sup> C.E., Dec. 13, 1889; S. 1892.3.17, note Hauriou.

itself against the type of tribunal which is attached to and a satellite of a Ministry. To the Conseil d'Etat such a tribunal does not present sufficient guarantee of a real judicial independence.<sup>4</sup> If the legislature has set up a specialised administrative tribunal—and there are many such in France—the Conseil d'Etat will of course accept and even welcome the legislative creation; and it will then proceed to control the constitution and functioning of that tribunal either by hearing appeals from it or in any event by process of the *recours en cassation*. It will require that tribunal to be, and to behave as, a tribunal. But it will not tolerate an intermediary hybrid. So, for example, in the case of *Sieur Gingold*,<sup>5</sup> where regional commissions had been set up by law to consider the qualification of doctors to be ranked as specialists, an interdepartmental decree purported to set up a national commission at the Ministry of Health to hear what in the Conseil d'Etat's opinion amounted to appeals. The Conseil d'Etat annulled the order made by the national commission in *Gingold's* case on the ground “qu'en l'absence en la matière d'une telle disposition législative, il ne pouvait appartenir aux ministres de créer comme ils l'ont fait, un organisme juridictionnel”; and it remitted the case to the Minister for his decision

<sup>4</sup> The Conseil d'Etat is evidently right. The proceedings of the Agricultural Land Tribunal, as revealed in *Woollett v. Ministry of Agriculture* [1954] 1 W.L.R. 1149, are certainly not such as to inspire confidence. It is particularly unfortunate that the impression should be given that nominated members are informally called to sit as judges as may appear suitable to the chairman in consultation with the secretary of the Tribunal who is also an official in the Ministry.

<sup>5</sup> C.E. (Section), July 25, 1952. *Sieur Fournier* is an identical case of same date.

as such. Perhaps one of the reasons of this attitude by the Conseil d'Etat is that a judicial decision may act as a protection to the Minister: the State may be liable in damages for a wrongful administrative act, it is not thus liable for the error of a court<sup>6</sup>; and it is no doubt proper that ministerial responsibility should be directly engaged in what is an administrative act. The over-riding principle is, however, that an administrative jurisdiction shall not be created huggemugger under circumstances calculated to cast doubts upon its entire impartiality.

#### ANY MINISTERIAL ACT

It is therefore quite clear that the doctrine of the *ministre-juge* has long been discarded. It is certainly no longer necessary,<sup>7</sup> if there is an administrative decision, that the plaintiff should make use of the *recours hiérarchique* or the *recours gracieux*—i.e., appeal from the subordinate official to the superior, before seizing the Conseil d'Etat: though, of course, the plaintiff may do so if he will. But the old doctrine has contributed to at least one very important result: it not being clear whether the ministerial decision was or was not in a judicial capacity, and it being quite clear that the Conseil d'Etat was competent to inquire into that decision, the Conseil d'Etat, so far as its jurisdiction was concerned, treated as indifferent the problem which so much vexes our courts—namely, whether the executive act was of a judicial or quasi-judicial sort (in which

<sup>6</sup> See, e.g., *Sieur Pourcelet* C.E. (Ass.), Jan. 4, 1952.

<sup>7</sup> It is however necessary that the decision should be a final decision and not merely a step towards a decision.

case certiorari is applicable) or whether it was purely administrative (in which case certiorari does not lie). So far as the *Contentieux Administratif* is concerned, the *recours en annulation* is evidently competent whatever the nature of the administrative act—judicial, executive, legislative or quasi any of them. Indeed, I suspect that it is impossible to translate into French the term “quasi-judicial”: which may be some evidence that (as contended by some in England) it is a term merely of confusion. The *Conseil d’Etat* is, of course, faced with the question whether the *procedure appropriate* to the act done was in the particular instance followed; and the procedure will differ as the act is executive merely or judicial. But by asking the question in the terms of *procedure appropriate* it gives itself the possibility of finding a reasonable answer (which we shall examine) without in any way compromising its jurisdiction: a possibility which is scarcely open to the English court.

#### LIMIT OF JURISDICTION

I must be excused from attempting here to inquire into the question as to what constitutes an administrative authority, however important that question is in French administrative law. It is indeed a much litigated question, and its final solution is the province of the *Tribunal des Conflits*. But the point at issue in that question is not whether the authority will escape judicial control but whether that control will be exercised by the *Conseil d’Etat* or by the civil tribunals. For example, a nationalised industry, even

though nationalised, will, at any rate for most purposes, be regarded as not an administrative authority and will therefore be capable of being sued before the civil tribunal. However difficult and (as has already been suggested) unnecessarily complicated the distinction may on occasion become, it is abundantly certain that a Government Department or a local authority acting as such—exercising, if I may use an old-fashioned phrase, its *puissance publique*—are administrative authorities subject to the jurisdiction of the Conseil d'Etat. Similarly, there may be a question (though that in fact does not frequently arise) whether a tribunal is or is not administrative; but again a tribunal not subject to the supervision of the civil-court system and established for the solution of complaints directed against an administrative authority in respect of the exercise by it of its *puissance publique* is quite certainly an administrative tribunal. The case with which we are concerned is a case where the defendant is admittedly outside the province of the civil tribunal—where, if any jurisdiction is to be exercised at all it must be exercised by the Conseil d'Etat, directly, or on appeal from another administrative tribunal, or *en cassation*. How will this defendant, who has made a decision of which the plaintiff complains, be treated by the Conseil d'Etat?

The first question logically is whether this defendant—who is admittedly not subject to any other jurisdiction—can successfully object to the jurisdiction of the Conseil d'Etat. Obviously he can on grounds which for our purposes are of no interest: for example, if the plaint is out of time. In the case of the *recours en*

*annulation*, which results if successful in the quashing for all purposes of an administrative order possibly of great ambit, the time limit is, properly, extremely short: being normally of two months from the promulgation or notification of the order. The *recours en annulation* if rejected does not validate an act which is illegal and the plaintiff may still have his remedy in damages—the *recours de pleine juridiction*—for harm wrongfully inflicted on him; but he will not have recreated for him—as he would if the *recours en annulation* were successful—the legal situation as it existed before the making of the act which he is seeking to have annulled. In the case put of undue delay, the plaintiff fails in his *recours en annulation* by reason of his own default. This case, and every other where the cause of failure is the plaintiff's default or mistake, does not essentially touch our problem as to the limits if any of the jurisdiction of the Conseil d'Etat in administrative matters. Can the defendant we have described successfully object to the jurisdiction of the Conseil d'Etat upon a ground not depending from a default in the plaintiff?

In 1872 it was believed or supposed that such a defendant, who typically would be a Minister, *could* successfully object. Provision was expressly made by the law<sup>7a</sup> of May 24, 1872, Art. 26 (reproducing Art. 47 of the law of March 3, 1849) that a Minister may appear before the Tribunal des Conflits to claim for himself (*revendiquer*) cognisance of matters brought before the Section du Contentieux which did not fall within the province of the Contentieux Administratif.

<sup>7a</sup> Now repealed. See Ordonnance 1945, Art. 88.

The provision clearly indicated that there may be a class of administrative act which though not cognisable by a civil tribunal is also not cognisable by the Conseil d'Etat. But no Minister has in fact ever presented such a claim—if only because in all probability the Tribunal des Conflits would show itself more hostile to the Minister than the Conseil d'Etat. It would have been more prudent in a Minister to seek a declaration by the Conseil d'Etat itself that it is not competent to inquire into an administrative matter than to attempt to have it declared incompetent by the Tribunal des Conflits.

#### ADMINISTRATIVE ACTS OUTSIDE THE JURISDICTION

Nevertheless the provision of the law of May 24, 1872, is evidence that, under the system of the *justice retenue* up to 1872, before the institution of the Tribunal des Conflits, there was a class of administrative acts outside the jurisdiction of the Conseil d'Etat in respect of which, to use the technical term, a *recours* was *non-recevable*. The class in fact was constituted by *actes de gouvernement* with which Dicey made great play. If such a class exists, and particularly if the class is indefinite, the protection afforded by the Conseil d'Etat would become defective and even highly defective. It is, therefore, critical to determine the nature of this class and its present validity.

#### HIGH REASONS OF STATE

Undoubtedly there were cases which, probably for prudential reasons, the Conseil d'Etat refused to entertain upon the ground that it did not wish to intromit

itself into high affairs of State. An early instance is *l'affaire Laffitte*.<sup>8</sup> All gratuitous settlements made by Napoleon I upon his family were revoked at the Restoration by the law of January 12, 1816. The plaintiff, Laffitte, was the assignee of an annuity settled by Napoleon upon la princesse Borghèse. He claimed payment from the Ministre des Finances of amounts accrued due before January 12, 1816. Though it is generally admitted that the claim was good in law, the Conseil d'Etat refused to entertain it, upon ground that the claim was involved in a "question politique" the decision of which rested entirely with the Government. Similarly in the case of the *Prince d'Orléans*<sup>9</sup> where the Conseil d'Etat, sitting to hear an *arrêté de conflit*, showed less resolution than the tribunal civil de la Seine and held that the decree of January 22, 1852, under which Louis-Napoléon confiscated the property of the exiled Orléans family was "un acte de gouvernement dont l'exécution et les effets ne peuvent être soumis à l'appréciation de l'autorité judiciaire."<sup>10</sup> And similarly in the case of the *duc d'Aumale*<sup>11</sup> where the civil tribunal held itself precluded by the decree of the préfet de police Boittelle of January 19, 1863, from giving a remedy for the undoubtedly illegal seizure of the exiled duke's *Histoire des Princes de la Maison de Condé*, the

<sup>8</sup> C.E., May 1, 1822.

<sup>9</sup> C.E., June 18, 1852. S 1852.2.307—the Commissaire du Gouvernement's conclusions there printed review the previous cases. The case became known as "le premier vol de l'Aigle".

<sup>10</sup> The *Duchesse de Berry's* case to which Dicey refers (*op. cit.*, p. 354) does not concern the jurisdiction of the Conseil d'Etat.

<sup>11</sup> C.E., May 9, 1867; S. 1867.2.124.

Conseil d'Etat not only, and quite properly, declined to order restitution (which was within the province of the civil tribunal) but refused to inquire into the validity of the decree, which it declared not to be susceptible of discussion before the Conseil d'Etat du Contentieux on the ground of its being an *acte de gouvernement*.

*Acte de gouvernement* limited to cases involving the rights of the families of former heads of State is clearly a matter of little importance. It becomes of importance only in so far as these cases suggest the principle that if an executive act is done in pursuance of some alleged high reason of State it thereupon falls outside the control of the Conseil d'Etat. How far such a doctrine (termed *la théorie du mobile politique*) was ever generally acceptable to the Conseil d'Etat is disputable; what is certain is that it was decisively rejected from the beginning of the Third Republic<sup>12</sup> and has never since been revived. The doctrine of *acte de gouvernement* in the sense that a reason of State can remove from the control of the Conseil d'Etat an act which but for that alleged reason would fall within its jurisdiction is no part of French administrative law today, nor has been for the last seventy-five years. In this sense M. Donnedieu de Vabres's statement<sup>13</sup> is as correct as it is succinct: "La théorie des actes de Gouvernement est fort simple: il n'y en a pas."

<sup>12</sup> C.E., Feb. 19, 1875, *Prince Napoléon* S. 1875.2.95.

<sup>13</sup> *Etudes et Documents*, 1949, at p. 44. For a general discussion see P. Duez, *Actes de Gouvernement*, 1935. And see the excellent short account in Waline's treatise.

MATTERS NOT CONSIDERED ADMINISTRATIVE

Nevertheless there are certain fields which the Conseil d'Etat considers as outside its province and in respect of which it will not entertain a *recours*. The modern French view is that these cases can only be listed, that it is impossible to construct a general principle of exclusion, and that the list is continuously diminishing. Despite that view, it appears to me that the fields excluded may reasonably be regarded as those which, on a fair estimation of what constitutes an administrative act, fall outside its definition—there is in all of them an element which either generally<sup>14</sup> or on the accepted French notion of the separation of powers takes them outside the sphere of the normal internal executive administration of the State. Thus, the Conseil d'Etat will not intervene, as we have seen, in matters which appertain to the legislature and the judiciary—and, to the great disadvantage of the French people, the *police judiciaire*<sup>15</sup> is by the Conseil d'Etat treated as part of the judicial system. It will not intervene in the exercise of the prerogative of mercy—on the modern view<sup>16</sup> because that is concerned with the administration of justice. It will not intervene in the case of minor sanctions imposed within the army or in the administration of prisons. Above all, and this is today the main class, it will not concern itself with

<sup>14</sup> For the relation of the provinces excluded from judicial review in France and in the U.S.A., see Schwartz, *op. cit.*, p. 162, who gives the advantage to the French system.

<sup>15</sup> See *supra*, p. 71.

<sup>16</sup> C.E., March 28, 1947, *Gombert*, S. 1947.3.89.

business which affects directly or indirectly the international relations<sup>17</sup> of France with other countries<sup>18</sup>—in particular it will not pass upon the validity or meaning of a treaty,<sup>19</sup> it will not deal with the protection of a French citizen abroad or with the acts of, or instructions given to, diplomats and consuls. Under this heading also may be put *faits de guerre*—the annexation of territories, military requisitions in foreign countries and generally the direct result of the waging of battle: looting, destruction of property, reprisals, etc. A convenient list will be found in Waline's Treatise.

The precise limit of these exceptions is no doubt difficult to settle; but as Waline well says, "Il est incontestable que, telle la peau de chagrin, la liste des actes de gouvernement<sup>20</sup> se rétrécit." For our purposes it is sufficient to observe first that the exclusion depends from the judgment of the Conseil d'Etat itself, and secondly, that the matters excluded really fall outside the general province of the internal administration of the State as it would fairly be understood in France. Within that province it appears clear that today no act can be excepted from the jurisdiction of the Conseil d'Etat upon plea of "reason

<sup>17</sup> For a recent and possibly questionable instance, see *Radio-diffusion Française v. Société Radio Andore T.C.*, Feb. 2, 1950, S. 1950.3.73.

<sup>18</sup> But it will inquire into refusals in France to deliver a passport to a Frenchman which falls within the province of the Ministry of the Interior. See, e.g., *Imbach C.E.* (Section) May 14, 1948; D. 1949.226, *infra*, p. 192.

<sup>19</sup> But see *Dame Kirkwood C.E.* (Ass.), May 30, 1952: extradition.

<sup>20</sup> In this very special sense, but only in this sense, can "actes de gouvernement" be said to exist at all.

of State.” And it should be noted that no such plea was raised in *l'affaire de l'Ecole Nationale*: where it was evident that the Government was intent upon paralysing that jurisdiction.

#### JURISDICTION RETAINED IN FACE OF LEGISLATION

What has happened in France is, on the contrary, that the Conseil d'Etat is so much part and parcel of the administrative thing as such that it is practically impossible to divorce an administrative act from the province of the Conseil d'Etat. There is a natural repugnance between being administrative and not pertaining to the Conseil d'Etat—as if one tried to create a military unit while denying the principle of military organisation. This natural repugnance is illustrated by the fate of express provisions intended to remove from the cognisance of the Conseil d'Etat—especially during the period of the Vichy Government—an act which was of its nature administrative. A classical statement of the Conseil d'Etat's view is to be found in *Dame Lamotte*,<sup>21</sup> where it had been provided by the law of May 23, 1943, amending the law of February 19, 1942, that the prefect might for a limited period grant, for the purposes of increasing production, a concession of lands abandoned or uncultivated. Art. 4 enacted “L'octroi de la concession ne peut faire l'objet d'aucun recours administratif ni judiciaire.” The prefect having granted a concession of the plaintiff's land, the plaintiff (after divers other proceedings) appeared before the Conseil d'Etat. The

<sup>21</sup> C.E. (Sec.), Feb 17, 1950; S. 1950.3.65.

Minister of Agriculture in view of that provision objected to the court's power to give relief. The Conseil d'Etat returned an answer in quite absolute terms:

“ que si cette disposition a pour effet de supprimer le recours qui aurait été ouvert au propriétaire . . . devant le conseil de prefecture pour lui permettre de contester notamment la régularité de la concession, elle n'a pas exclu le recours pour excès de pouvoir devant le Conseil d'Etat contre l'acte de concession: recours qui est ouvert même sans texte contre tout acte administratif et qui a pour effet d'assurer, conformément aux principes généraux du droit, le respect de la légalité ”

and accordingly annulled the prefect's decision.

Many other such decisions may be cited. Perhaps specially striking, though the language used is not so categorical, is *D'Aillières*,<sup>22</sup> where a jury d'honneur, which had been established *after* the Liberation to decide whether the individual members of Parliament who had voted the law of July 10, 1940, were to be eligible for office under the Fourth Republic, was held to be an administrative tribunal and notwithstanding the express provision “ La décision du jury d'honneur n'est susceptible d'aucun recours ” it was further held that *recours en cassation* lay to the Conseil d'Etat. Moreover, the decision against which cassation was brought was quashed as contravening the rules of natural justice—*i.e.*, a *procédure contradictoire* had

<sup>22</sup> C.E. (Ass.), Feb. 7, 1947; S. 1947.3.62.

not been followed—notwithstanding that the president of this jury of three was the Head of the Conseil d'Etat himself.

The Conseil d'Etat admits, it would seem, the theoretical<sup>23</sup> possibility that the legislature might by appropriate words oust the court's jurisdiction. But the link between the administrative act and the Conseil d'Etat's jurisdiction is so intimate that it concerns *les principes généraux du droit*, which we may translate as the basic fabric of the constitutional system. The appropriate legislation would require to make clear a precise intention to subvert that basic fabric. I believe that it would not be possible to convey that intention to a reluctant Conseil d'Etat without destroying the administrative quality of the act to be exempted. If Parliament really determines to give to the personal whim of M. Dupont power to override all established law and the settled administration of justice, no doubt the Conseil d'Etat would defer to the sovereign legislative will *sufficiently* expressed; but M. Dupont so acting could not be acting as Minister: he would necessarily act outside the system which has been subverted. No power granted to the Minister

<sup>23</sup> The admission, if made, seems purely theoretical. De Laubadère (p. 265) cites *Dreyfus-Schmidt* (C.E., June 8, 1951, S. 1951.3.74) as a case where the jurisdiction was effectively ousted. The case cited does not carry the proposition. The matter there dealt with was a parliamentary election, a matter in which the Conseil d'Etat has *no* jurisdiction de droit commun. The Conseil d'Etat held that *in such a matter*, if a restricted jurisdiction is given to the conseil de préfecture "sans appel", nothing more than what was expressly granted should be presumed; and refused to entertain a recours en cassation. In a normal case the words "sans appel" could not possibly be construed to exclude the *recours en cassation*.

as Minister can be exercised by him except as Minister—that is to say, within the system which defines the nature of a ministerial act and which subjects it, as a matter of definition, to the control of the Conseil d'Etat. To take him outside that system would in France require words of a grossness which it is believed would not be tolerated by public opinion. The misfortune in England is that the courts have accepted as sufficient to remove the Minister beyond the control of the established legal system words which are of an *apparent* propriety: e.g., “If to the Minister it appears desirable in the public interest . . .” Such words in France would by the Conseil d'Etat be taken as a direct invitation to the Conseil d'Etat to satisfy itself that the Minister has acted as a Minister ought—especially if some conclusive or unusual effect is to be given to the ministerial decision.

#### FREEDOM OF THE ADMINISTRATOR

It really must be taken as certain that the jurisdiction of the Conseil d'Etat is all pervasive in the internal administrative field, and moreover that the connection between the two is of an intimacy which makes it extremely difficult even by express words to divorce them. The possibility that a Minister or public authority will successfully object to the jurisdiction of the Conseil d'Etat in respect of an act which may fairly be regarded as pertaining to the exercise of the *puissance publique* by the internal executive must be reckoned to be today non-existent. But once its jurisdiction has been accepted, once the defendant appears and offers to justify his act as properly done

in the reasonable execution of his duty, the Conseil d'Etat is prepared to show that it has a thorough understanding of the needs and necessities of the administrator, and in particular, to accord to the administrator that degree of freedom in action which *in the judgment of the Conseil d'Etat* is appropriate both to the nature of the power in question and to the circumstances in which it was exercised. It will, as it were, discuss with the administrator what is the proper manner in which this power should be exercised in those circumstances and whether the impugned act was done in a due course of administration.

In respect therefore of the residuary freedom allowed to, indeed positively required by, the administrator, every or almost every administrative act is discretionary.<sup>24</sup> It is seldom that an administrator is bound, upon proof of a fact, to do a pre-determined act. He may be so bound—for example, to issue a certificate or a licence<sup>25</sup> upon production of certain documents and a fee; but in this instance he acts more as a machine than as an administrator. The administrator as such interposes a *pouvoir d'appréciation*: several possible, and lawful, courses of action being open to him, he must intelligently and freely select one of them. This necessary freedom of the administrator the Conseil d'Etat necessarily

<sup>24</sup> There is a considerable literature in France on *Le pouvoir discrétionnaire*. See for a bibliography: de Laubadère, p. 221. De Laubadère's discussion of the topic would be misleading to an English lawyer and perhaps not entirely acceptable to all Frenchmen.

<sup>25</sup> e.g., *Létendart* C.E., Nov. 13, 1946—issue of a shooting licence.

respects: and especially it proclaims that it will not substitute for the administrators its own judgment of the *opportunité* of the act—though to the administrator it no doubt sometimes gives the appearance of doing precisely that. But this freedom, whatever it may be, is not absolute: the case law of the Conseil d'Etat is concerned mainly with the conditions and limits of this freedom. If therefore by discretionary power is intended a power into the conditions and limits of whose exercise a court cannot inquire, no administrative power is in France discretionary<sup>26</sup>: the Conseil d'Etat knows only of administrative powers which can be exercised to limits and upon conditions fixed by itself.

#### AMBIT OF LEGAL POWERS

These limits and conditions are infinitely varied, depending not only on the nature of the power but upon the circumstances of the case. It may be as well to note that, though in the cases we shall discuss the Conseil d'Etat appears as a court which restrains the administrator, the Conseil d'Etat is willing also, in circumstances of real emergency, to attribute to the administrator power lawfully to do acts which but for that emergency would be grossly illegal,<sup>27</sup> though sometimes upon condition of repairing the damage thereby specially suffered by an individual.<sup>28</sup> But the

<sup>26</sup> See *infra*. p. 190.

<sup>27</sup> See, *e.g.*, *Lecoq*: C.E., Jan. 7, 1943; R.D.P. 1944, p. 332.

<sup>28</sup> See, *e.g.*, C.E., Nov. 30, 1923, *Couitéas*, S. 1923.3.57.

essence of this extension of powers—far beyond anything which is done by way of “emergency” legislation—is that the Conseil d’Etat remains the judge *ex post facto* of the need of the act in relation to the emergency. The flexibility and elasticity of the Conseil d’Etat’s law is always great, but is perhaps specially remarkable in this instance.

Clearly a power cannot lawfully be exercised except in accordance with the express conditions upon which it was granted. If power is granted to the Minister of Agriculture to take a decision only after hearing the advice of a consultative body, then an exercise of that power by the Minister of Agriculture without that preliminary advice fails for *vice de forme*, and the purported exercise of such a power by the Minister of the Interior fails for *incompétence*. A control of the fulfilment of such express conditions is described in France as a control of the *légalité formelle* or the *légalité externe*. Such a control, though important in the sense that a plaintiff often<sup>29</sup> succeeds for failure of the *légalité formelle* of an order, is here of little interest to us: since in general an English court would still habitually exercise that degree of control over the executive in England—except perhaps in those cases where by express enactment the apparent or purported making of the order is declared to be “conclusive” of the formal validity of the order. But even the English Parliament is somewhat averse to enacting legislation in such terms and the English court is

<sup>29</sup> There has recently been, in the Conseil d’Etat’s opinion, a widespread misuse of the power of delegation, and orders have been frequently quashed for the resulting *incompétence*.

anxious to show a degree of skill in avoiding the grosser consequences of such legislation. It would be improper in England to decry the value of this control of the formal legality of executive orders: for it seems to be in England, normally, the only kind of judicial control which still survives. But it is not of much importance for our present inquiry which is concerned with the powers characteristic of the Conseil d'Etat. It should go without saying that the Conseil d'Etat will inquire into the formal or external validity of the orders brought before it.

#### VIOLATION DE LA LOI

It equally goes without saying that the Conseil d'Etat would, as a matter of course and without any difficulty, quash an executive order upon any other ground which an English court would recognise as rendering the act *ultra vires*. The ground, additional to *vice de forme* and *incompétence*, upon which it is still sometimes possible for an English court to quash an executive order as being *ultra vires* would, in the Conseil d'Etat's law, be known as *détournement de pouvoir*. What is meant by *détournement de pouvoir* is that though the public authority has respected the external legal formalities it has used the power granted to it to secure a purpose outside the intended scope of the power. I believe this to be the largest possible definition of *ultra vires* in English law: that is to say, that even *theoretically* it includes only those grounds of annulling an executive order which in France are or could be described as *vice de forme*, *incompétence* and *détournement de pouvoir*. But in

France there is a further addition to these grounds for annulment—*cas d'ouverture* as they are called—namely, the fourth and recently much developed *cas d'ouverture : la violation de la loi*. It is by an inquiry into this fourth ground of annulment, into that aspect of it which is different from and complementary to *détournement de pouvoir*, that in comparison with the English law we shall find the characteristic quality of the Conseil d'Etat's jurisdiction.

No doubt when a court is examining into a case of *détournement de pouvoir* it is concerned with something other than the formal or external legality of the act—it deals with what the French call *la légalité interne* of the act: which is also the province of *la violation de la loi*.<sup>30</sup> *Détournement de pouvoir* and *violation de la loi* may therefore, in opposition to those *cas d'ouverture* which are known as *vice de forme* and *incompétence*, be both regarded as concerned with the same province of *la légalité interne*. And it is sometimes not convenient or necessary to draw a precise line between a *cas d'ouverture* which depends upon the notion of *détournement de pouvoir*, and one which depends from *violation de la loi*. Perhaps it is in this matter as it was with trespass and “case”: in some instances the plaintiff may have his option and it is of little interest to determine whether only “case” was available to him. But that does not mean that there is no real difference between *détournement de pouvoir*

<sup>30</sup> It seems to me evident that many of the older instances of *violation de la loi* could more scientifically be classified under the heads of *vice de forme*, *incompétence* or *détournement de pouvoir*. The classification adopted by the Conseil d'Etat is entirely empirical.

and *violation de la loi*. They are clearly recognised in France as different heads; and I believe that that difference is fully warranted. That part of *violation de la loi* which falls outside any interpretation or extension of the other *cas d'ouverture* is, as a ground of annulment of an executive act, something which even in principle is outside the theoretically established doctrine of *ultra vires* in England, however largely construed.

#### ULTRA VIRES AND DÉTOURNEMENT

If theoretically the doctrine of *ultra vires* includes the *cas d'ouverture* known in France as *détournement de pouvoir*, in practice the doctrine as applied falls far short of the practical results attained in France even on that ground of annulment. It is true that in *Roberts v. Hopwood*<sup>31</sup> it was held that a local authority having power to pay "such wages as it may think fit" was bound to exercise its discretion reasonably and that a payment of £4 per week in 1921-22 to the lowest grade worker was so unreasonable as to be *ultra vires* in spite of the generality of the discretion. But that decision is regarded as singular. The Poplar Borough Council was held to be following a political or social purpose<sup>32</sup> (of which their Lordships evidently disapproved) and had so far been guided by that purpose that they had failed to fix a wage at all<sup>33</sup> within

<sup>31</sup> [1925] A.C. 578.

<sup>32</sup> See, e.g., the explanation of Goddard L.J. in *Re Decision of Walker* [1944] K.B. 644, 649-50.

<sup>33</sup> See, e.g., Lord Greene M.R. in *A. P. Picture Houses, Ltd. v. Wednesbury Corporation, Ltd.* [1948] 1 K.B. 223, 231-232, who goes on to add "that is no authority whatsoever to support

the meaning of that Act: they had merely indulged their sense of generosity or philanthropy at the ratepayer's expense. Indeed, *Roberts v. Hopwood* may fairly be regarded as so singular that it has never in fact been followed if it is taken as establishing anything beyond the proposition that a power given for one purpose upon the normal interpretation of a statute must not be used for another. By contrast, the French doctrine of *détournement de pouvoir* habitually makes use of the "principle underlying" *Roberts v. Hopwood* and indeed greatly extends it—in particular by reading into a statute, framed in general terms and apparently giving an unlimited discretion, a special and limited purpose (*but*) and quashing as a *détournement de pouvoir* the use of the power or discretion not clearly directed to the attainment of that purpose so read into the statute by the Conseil d'Etat—"conformément aux principes généraux du droit." A single instance must suffice<sup>34</sup>: I select *Tabouret et Laroche*<sup>35</sup> because it was a decision rendered during the German occupation when it might have been supposed that the Conseil d'Etat would for prudential reasons be tempted to abate its jurisdiction. The Vichy Government enacted a law<sup>36</sup> that no sale of land would be valid unless authorised by the prefect. No condition of any kind was

the proposition that the court has power, a sort of overriding power to decide what is reasonable and what is unreasonable. The court has nothing of the kind."

<sup>34</sup> Instances could be indefinitely multiplied: *Azoulay C.E.*, Dec. 17, 1948, is perhaps striking.

<sup>35</sup> *C.E. (Ass.)*, July 9, 1943; D.1945.J.163.

<sup>36</sup> Nov. 16, 1940.

attached to the prefect's right to refuse his authorisation. The plaintiffs agreed to buy some land which was agricultural. The prefect refused to authorise the sale. Required by the Conseil d'Etat to state the grounds of his refusal—and it can no longer be a cause of surprise that he should be required to state his reason—he alleged that the plaintiffs were industrialists and in effect<sup>37</sup> that it was not in his opinion in the public interest that such persons should buy agricultural land. The Conseil d'Etat held—

“qu'un tel motif, en raison de sa généralité et en l'absence de toute appréciation des inconvénients particuliers que pouvait présenter dans les circonstances de l'espèce pour l'intérêt général la réalisation de l'opération projetée par les sieurs Tabouret et Laroche, n'est pas au nombre de ceux qui peuvent justifier légalement le refus de l'autorisation envisagée par la loi précitée. . . .”

As appears from the later case on the same law, *Dame Constantin*,<sup>38</sup> also decided during the occupation, the process adopted by the Conseil d'Etat was to hold that the legislator “must have intended” to avoid undesirable speculation in or accumulations of property, and that the refusal by the prefect of his authorisation for any purpose other than this imported

<sup>37</sup> “qu'il ressort des pièces du dossier et notamment des observations présentées par le secrétaire d'Etat de l'Intérieur que . . .”

<sup>38</sup> C.E. (Ass.), July 28, 1944; reported with *Tabouret* in D.1945. J.163. See also, as very honourable to the Conseil d'Etat as a court during the occupation, *Piron* C.E. (Ass.), July 24, 1942, and *Duplat* C.E. (Ass.), Feb. 4, 1944, reported with note by Morange 1944 D.C.99.

purpose was *ultra vires*.<sup>39</sup> Thus even strictly on *détournement de pouvoir* the Conseil d'Etat will in point of fact exercise a much stricter control over the executive than would an English court on the doctrine of *ultra vires*. To take a recent example I believe that in a case such as *Earl Fitzwilliam's Wentworth Estates Co.* the Conseil d'Etat would not only have adopted Denning L.J.'s dissenting opinion<sup>40</sup> in preference to the House of Lords' conclusion,<sup>41</sup> but would have regarded such a preference as obvious and elementary, on the ground as much of *détournement de procédure* as of the more generic *détournement de pouvoir*.

#### PRINCIPES GÉNÉRAUX DU DROIT

*Violation de la loi* goes much further. It is indeed vastly multifarious. The Conseil d'Etat requires the administration to conform to the *principes généraux du droit*<sup>42</sup> and will quash an act which does not so conform. But the *principes généraux* are not to be

<sup>39</sup> *Dame Constantin* is also of interest to an English lawyer in that the suggestion that the Conseil d'Etat could interfere only upon affirmative proof by the plaintiff that the prefect had acted *mala fide* or maliciously or for personal gain was rejected. [See the conclusions of the Commissaire du Gouvernement, Leonard, mentioned in D.1945.J.163] on the ground that the Conseil d'Etat's control would thereby be reduced to a mere sham. *Mala fides* affirmatively proved appears to be the only ground upon which the exercise of a general power given to an executive officer would theoretically be controlled by an English court. [See, e.g., *Point of Ayr Collieries v. Lloyd-George* [1943] 2 All E.R. 546 (C.A.).]

<sup>40</sup> [1951] 2 K.B. 284, 300.

<sup>41</sup> [1952] A.C. 362.

<sup>42</sup> For an excellent and succinct account: see Letourneur, 1951, *Etudes des Documents* 19.

found in any existing text; and *loi* in French meaning a written enactment, it is already a bold step of the Conseil d'Etat to term *violation de la loi* what may be more precisely described as action appearing to the Conseil d'Etat not to be in accord with the spirit of the French legal system though not infringing any positive enactment. Perhaps in England, where we are accustomed to an unenacted system of law, the audacity of the Conseil d'Etat is not as striking as it is to Continental lawyers. But it is striking enough. The Conseil d'Etat imposes upon the administration conformity to a standard of conduct not enacted as obligatory by any recognised legislative authority. It imposes this standard of conduct upon the administration because it, representing the administration and being the judicial organ of the administration, is the authority competent to define and periodically to declare what standard of conduct is appropriate to the administration. Not only is this standard not something enacted: it is not even formulated. It is in some degree shifting, as the conditions of the administrative task themselves shift. It is a standard which the Conseil d'Etat is itself in the process of attempting to perfect. For help in its construction the Conseil d'Etat may look to any source which it considers relevant. Thus in *l'affaire de l'Ecole Nationale*, it appeals to the Declaration of the Rights of Man and to the Preamble of the Constitution—though neither text has the force of law in France—to discover not a text but a principle: “le principe de l'égalité de l'accès de tous les Français aux emplois et fonctions publics”; and having made this principle its own, it

declares illegal—contrary, that is, to the law which it itself proposes to enforce—and therefore null an act of the administration which contradicts that principle.

In the very remarkable case of the *Syndicat Régional des Quotidiens d'Algérie*,<sup>43</sup> it even called in aid “un principe traditionnel de droit public” which may be translated as “an unwritten convention of the Constitution”: under which an outgoing Ministry, though technically remaining in office, is entitled to transact only *des affaires courantes* during the period after the declaration in Parliament of its decision to resign and before the formal take-over by its successor. The Conseil d'Etat accordingly held null as contravening this convention a decree by an outgoing Ministry applying to Algeria a press law expressly providing that it might by decree be thus applied. Taking into account the existence of this convention, the general purpose of the press law and the absence of emergency or urgency, the Conseil d'Etat held that “cet acte réglementaire . . . ne peut être regardé comme une affaire courante, si extensive que puisse être cette notion dans l'intérêt de la continuité nécessaire des services publics.” There is no doubt that the law of the Conseil d'Etat is judge-made law and that the maker of this law is the Conseil d'Etat.<sup>44</sup> It is a violation by the administration of the law thus made that the Conseil d'Etat sanctions with nullity.

<sup>43</sup> C.E. (Ass.), April 4, 1952.

<sup>44</sup> See Rivero, 1951, D.Chr. 21, for a very clear account of the situation.

## RULES OF DUE ADMINISTRATION

So far as presently concerns us, *violation de la loi* may for an English audience be thus described. Just as the High Court, being a court, very properly assumes to know how a tribunal should transact its business in order to remain reasonably recognisable as a tribunal and having in this matter a plenitude of authority requires every inferior court to respect those principles which if not precisely formulated are reasonably well known as "the rules of natural justice," so the Conseil d'Etat, having the same plenitude of authority but over the executive act as such as well as over any administrative tribunal, devises similar rules not only to govern tribunals (to describe which we may perhaps use the somewhat inapt term "rules of natural justice," though the French rules are more extensive even in this sphere) but also to govern the transaction of administrative business by the executive: rules which we may describe, since we do not possess their equivalent, as "rules of due administration." It is the pre-eminent characteristic of the Conseil d'Etat<sup>45</sup> that it discovers, declares, and enforces such "rules of due administration" in addition to an extensive set of rules of natural justice. When the Conseil d'Etat speaks of *violation de la loi* it means non-conformity to all the rules which it recognises, including these principles of natural justice and due administration.

<sup>45</sup> As I understand it, it is the mark of a system of administrative law that there should be a court so making and enforcing such rules of due administration. It is because there is no such court in England that I consider it highly misleading, at any rate to a Frenchman, to suggest, as some authors do, that there exists in England a system of administrative law.

## CONTROL OVER ADMINISTRATIVE TRIBUNAL

So far as an administrative tribunal is concerned, the Conseil d'Etat's powers of control are ample. It may indeed be sitting as fully an appeal court: in which case it will rehear the case and may substitute its opinion for that of the inferior tribunal. If not acting as a court of appeal, the Conseil d'Etat will necessarily and always permit a *recours en cassation*,<sup>46</sup> as we have seen. On a *recours en cassation* every ground upon which an English court may on an order of certiorari quash a decision for infraction of the rules of natural justice is also available to the Conseil d'Etat. In particular, it will insist upon what it calls *une procédure contradictoire*<sup>47</sup> which we may succinctly translate as the affording of a full and fair opportunity to meet the case made. And it will deal with the bias or partiality of the judges.<sup>48</sup> The case law upon these matters is unfortunately highly developed as the result especially of *épuration* proceedings after the Liberation.

Granted that the trial has been fairly held, the Conseil d'Etat, even when *not* sitting as a court of appeal, has *en cassation* a power of control and review greatly exceeding that available to an English court on an order of certiorari. It is not concerned with difficulties about "speaking" or "unspeaking" orders.<sup>49</sup> According to the most elementary and basic

<sup>46</sup> See *d'Aillières et Robert*. C.E. (Ass.), Feb. 7, 1947. S. 1947. 3.62, *supra*, p. 158.

<sup>47</sup> See, *e.g.*, *Dame Neveu*, C.E., Dec. 6, 1933.

<sup>48</sup> See, *e.g.*, *Bourdeaux*, C.E., April 29, 1949.

<sup>49</sup> See, *e.g.*, *R. v. Northumberland, etc., Tribunal, ex p. Shaw* [1952] 1 K.B. 338.

notions of the French legal system a judicial decision *must* state its reasons. It would be a peremptory and absolute ground for cassation that a court, purporting to act as a court, had not set out in writing with its order its "motifs" for that order. A French lawyer would be shocked, and indeed profoundly scandalised, by the decision of the Privy Council<sup>50</sup> that it is optional for a subordinate tribunal to give reasons or not as it may choose. And it is evidently a good ground of cassation that the motifs as set out reveal an error or misapprehension of the law. But powers of cassation, as exercised by the Conseil d'Etat, have recently been much extended.<sup>51</sup> It will not, as it would on appeal, rehear the case nor will it by its "instruction" collect new evidence: it will in principle, the trial having been properly conducted, consider only the material<sup>52</sup> available to the inferior court.<sup>53</sup> To this extent its inquiry *en cassation* is more limited than in the *recours pour excès de pouvoir*. But originally having left a considerable latitude of "appréciation" of the facts to the judge of first instance, the Conseil d'Etat

"enfin se rendant compte que le pouvoir qu'il voulait se réserver était le plus souvent illusoire, a porté directement son examen sur les faits eux-mêmes, recherchant d'un point de vue objectif

<sup>50</sup> Practice Note of November 18, 1952: [1952] 2 T.L.R. 890: on rule 16 of the Judicial Committee Rules, 1925.

<sup>51</sup> *Quære* the analogy between the powers of the Conseil d'Etat *en cassation* and those of the Cour de Cassation.

<sup>52</sup> It is less difficult to do so than it would be in England as the procedure of the inferior court would normally be in writing.

<sup>53</sup> See, e.g., *Michel*, C.E., February 9, 1949.

s'ils justifiaient la solution de droit: ce qui a entraîné comme conséquence l'obligation faite au juge subordonné de motiver sa décision en relevant les faits servant de soutien à son appréciation."<sup>54</sup>

The above quotation is taken from an admirable article<sup>55</sup> by P. L. Josse, then president of the first sous-section, who states that the alteration of the scope of cassation was due not a little to the fact that the Conseil d'Etat was called upon to deal with *recours* from the novel judicial committees of the *ordres professionnels* (doctors and others) which were exercising great powers with too little regard for the personal rights of individual members. It should again be noticed how extremely rapidly the Conseil d'Etat adjusts the instruments at its disposal to the new demands made upon them.

#### DUTY IMPOSED UPON ADMINISTRATOR

Not vexed with any distinction between speaking and unspeaking orders, the Conseil d'Etat is equally unvexed as we have seen by the problem whether the executive act is purely administrative or judicial or

<sup>54</sup> P.-L. Josse, *Livre Jubilaire* 161, 173; citing, *inter alia*, *Rousset*, C.E., January 6, 1950, S. 1950.3.96 and *Dubois*, C.E., February 20, 1948.

<sup>55</sup> See also his very clear statement " Sous la seule réserve que l'examen des faits doit être limité à ceux contenus dans le dossier soumis au juge subordonné, les pouvoirs du Conseil d'Etat touchant un contrôle objectif des faits sont pratiquement les mêmes (en cassation) qu'au cas d'un recours pour excès de pouvoir. C'est selon la matière, pour laquelle il voudra laisser à l'auteur de la décision attaquée une part plus ou moins grande de libre décision et non selon la nature du recours porté devant lui que le Conseil d'Etat fait des distinctions dans l'étendue de ses pouvoirs."

quasi.<sup>56</sup> The Conseil d'Etat will have jurisdiction in any event. If it holds that the body from whom *recours* is brought was intended to be, and should have acted as, a tribunal, then it will insist that a *procédure contradictoire* should have been followed and a decision given with "motifs," etc., and will annul the decision if it does not comply with these requirements or is otherwise erroneous in law, as just indicated. If the executive act was administrative but not judicial, a *recours* of equal efficacy and indeed technically of slightly larger ambit is also available: the *recours pour excès de pouvoir*.

But though its jurisdiction is not affected by the distinction, judicial or administrative, which affects the English courts' jurisdiction, the Conseil d'Etat in some of its recent case law does deal with the problems which in England we consider as connected with the "quasi-judicial" controversy. Though in France, as much as in England, the administrator when taking a lawful administrative decision is *not normally* required to give notice of his intention and to hear objection from all persons who might eventually be affected by the decision—to impose such a duty upon the administrator would make administration impossible—still the Conseil d'Etat has for some time now begun to put upon the administrator (still acting as such and not upon the pretence that he has magically become a tribunal or quasi) a duty to hear persons specially and immediately to be affected by a decision *before* reaching his decision. The Conseil d'Etat is not

<sup>56</sup> For the kind of complexity arising in England see, e.g., *R. v. Manchester Legal Aid Committee* [1952] 2 Q.B. 413.

willing very strictly to define the class of case in which this duty will arise. The class includes proceedings which in England would be termed "quasi-judicial." It includes decisions which result in disciplinary action. It includes, as we have seen,<sup>57</sup> the case of the revocation of a licence, at any rate where the licence is revoked upon ground of alleged misconduct of the licensee.<sup>58</sup> I believe that it may include any case in which an important right or interest of the plaintiff will be infringed or hurt at least if the decision reflects adversely upon the character of the plaintiff. No doubt the notion of "natural justice" and *droits de la défense* underlies the requirement; but the question as framed by the Conseil d'Etat seems to me to be of a much more general order and indeed to become of this kind: granted that the administrator had not the character of a judge, should the administrator reasonably have appreciated that there was in this case a duty upon him to "hear" the plaintiff before taking this decision? If the answer is yes, then the Conseil d'Etat, as the person competent to determine the standard of behaviour required of the administrator, will quash the decision taken without hearing the plaintiff, even if there are, as there were in the *Trompier Gravier* case, strong prima facie grounds for supposing that the decision might have been correct.

<sup>57</sup> *Dame Veuve Trompier Gravier*, C.E., May 5, 1944; S. 1945.3.14. The conclusions in that case of the Commissaire du Gouvernement, M. Chenot, are instructive. See *supra*, p. 11.

<sup>58</sup> There is no question but that the duty would have been held applicable in a case such as *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, where the Privy Council refused a remedy by way of certiorari. On which case see H. W. R. Wade, 67 L.Q.R. 103.

## DUTY TO "HEAR"

The French law on the matter of this duty to "hear," is well illustrated by the Commissaire du Gouvernement's conclusions in *l'affaire de l'Ecole Nationale*. The plaintiffs claimed that the decision to exclude them from the competition should be annulled on the second and separate ground that they had neither been informed of the case against them nor been given an opportunity of answering it. The Commissaire seemed not unwilling to suppose that this ground might be good; but to accept it would in his opinion have involved *some* extension of the existing case law. In particular, such acceptance would require the Conseil d'Etat to recognise the "right to compete" in a more absolute manner than it had hitherto done, so that a decision to exclude could appear as *l'atteinte à un droit* and thus present the character of *une véritable sanction*. And though he recognised, in words<sup>59</sup> remarkable to English ears, the willingness of the Conseil d'Etat to adapt its law to the needs of the time, still, having already proposed two grounds either of which would result in the annulment of the decision, he submitted that it would be undesirable, in a case which had stirred the public interest, to appear to be in any way stretching the law to cover the special occasion<sup>60</sup>; and accordingly he suggested that the

<sup>59</sup> "Notamment chaque fois que vous décelez de la part de l'administration une pratique nouvelle d'abus graves que la jurisprudence ne permet pas de réprimer suffisamment, vous n'avez jamais hésité à modifier cette jurisprudence dans le sens d'une augmentation de votre contrôle."

<sup>60</sup> "De proposer . . . une solution d'espèce, une solution imaginée pour les besoins de la cause."

Conseil d'Etat should not in this instance pass upon<sup>61</sup> the plaintiffs' second ground. The Conseil d'Etat accepted the Commissaire's suggestion.

It is my belief that we are likely to see in this area a large extension of the Conseil d'Etat's case law. The Conseil d'Etat is evidently much attracted by some of the practices of the English administration, and in particular perhaps by the practice of holding public inquiries *before* the making of a decision. Having already determined that a reasonable administrator would—and therefore that the French administrator must—hear specific individuals in certain types of case, it is not at all unlikely that the Conseil d'Etat would determine that, in other types, a reasonable administrator *could not* believe that he had obtained the information needed for a proper decision by him without first having given public notice of his intention to act. No doubt the process would be a gradual one, extending the area of necessary previous consultation as occasion may suggest; but it is evident that a court which has devised the notion of "the reasonable administrator" is unlikely to have difficulty in finding its appropriate applications.

#### SUFFICIENT REASON

An area where similarly our "quasi-judicial" difficulties may find an analogy in the French system is that

<sup>61</sup> The Conseil d'Etat is bound to answer every point raised by the plaintiff only if it proposes to decide against the plaintiff. Thus the plaintiff will know that judgment is in his favour if it contains the words (as did this judgment) "sans qu'il soit besoin d'examiner les autres moyens de pourvois." [Note the slightly archaic "qu'il soit besoin."]

concerning the need of a decision to be “*motivé*”—that is to say to carry on the face of it its sufficient reasons. We must avoid here an elementary confusion: the question whether a decision must be *motivé at the time* of its making is entirely distinct from the power of the Conseil d’Etat *subsequently* to inquire into the grounds upon which the order was made. However sufficient those grounds, if the decision *should* have been *motivé* the Conseil d’Etat would annul the decision promulgated without motifs: there is here a simple “*vice de forme*.” But the fact that no motifs need be stated at the making of the order will in no way restrict the subsequent inquiry which the Conseil d’Etat may see fit to make. The principle in French law is that a judicial decision must be “*motivé*”; an administrative one need not be, in the absence of any positive enactment. But there are cases—which perhaps our courts would have treated as quasi-judicial—where the Conseil d’Etat has reached the conclusion<sup>62</sup> that, despite the general principle and the absence of a positive enactment, the *administrative* decision *ought* to be *motivé*. Here again, however, instead of supposing that the administrative authority should be deemed to have been acting as a tribunal, the reason<sup>63</sup> for requiring the motivation is refreshingly simple and direct: “*afin notamment de permettre au juge de l’excès de pouvoir d’apprécier si les prescriptions et les interdictions contenues dans la*

<sup>62</sup> See, e.g., *Billard*, C.E., January 27, 1950, S. 1950.3.41, concerning the orders of *commissions de remembrement*.

<sup>63</sup> The *process* whereby the conclusion is reached is that of importing into the legislation a hypothetical intention.

loi ont été respectées.” It is perhaps an overriding *principe général du droit* that any conduct rendering more difficult the Conseil d’Etat’s business must *ipso facto* be improper.

#### REASON MUST BE HONEST AND LAWFUL

An interesting and very important development of the law as regards motifs is this: if the administration *does* attach a motif to its decision, then even though no declaration of motif was required and even though the act was in the highly discretionary category, the Conseil d’Etat will annul the act if it finds that the attached motif was either mistaken in fact or erroneous in law. The original cases are, by the standard of the Conseil d’Etat, already old<sup>64</sup> but are constantly followed.<sup>65</sup> The commentators find difficulty in classifying scientifically this *moyen d’annulation*; and no doubt the Conseil d’Etat was moved by purely practical considerations. But there is an admirable reason why the Conseil d’Etat should act as it does: it is of cardinal importance that the administration should be induced to cultivate habits of intellectual honesty. If the administration has a discretionary power and proposes to use it discretionarily it should not be permitted to cloak the more

<sup>64</sup> Those cited by de Laubadère (*op. cit.*, p. 396) include *Gomel*, C.E., April 4, 1914, S. 1917.3.25; *Camino*, C.E., January 14, 1916, S. 1916.3.10; *Trépont*, C.E., January 20, 1922, 1922 R.D.P. 81. The “conclusions” of Cornille in the *Camino* case are especially valuable of the scope of the inquiry in a *recours en annulation*.

<sup>65</sup> For a recent instance see *Oeuvres de St. Nicolas*, C.E., July 7, 1950, S. 1951.3.25.

or less arbitrary character of its act by the pretence of an obvious and compelling reason: if it alleges a reason then by that reason it must stand or fall. Thus a prefect may lawfully be put *en congé* for all manner of causes and the Conseil d'Etat would allow considerable latitude to a Minister minded to vacate a particular prefect's office; but if to avoid unpleasantness or to conceal a disagreement the Minister states that the office was vacated at the prefect's request when no such request was in fact made, the Conseil d'Etat on the prefect's *recours* will annul the vacation, whatever other cause there may have been for a vacation.<sup>66</sup>

We cannot hope presently to import as such into our administrative system the admirable rule of law which the Conseil d'Etat has devised for the French system; but perhaps it is not too much to hope that we could adopt this very subsidiary rule now in question—namely, that if the executive, not being compellable thereto, attempts to give the appearance of having behaved reasonably (an appearance sedulously cultivated in these democratic days) by alleging for its act a cause which would be cogent if true, it should be bound to abide by the appearance which it has sought to create: the truth or falsity of the reason gratuitously pretended by the executive ought to be a matter into which if not the court at any rate some impartial body is empowered to inquire. If we cannot have an administrative rule of law, there would be much advantage in compelling the executive

<sup>66</sup> *Trépont*, C.E., January 20, 1922, *supra*, note 64.

manifestly to *appear* to be acting arbitrarily in every case in which in fact it is so acting. It is doing something much worse than *merely* acting arbitrarily when it offers for its action a reason which it does not propose to justify. This principle if adopted would have the further and great advantage that the public would begin to have some confidence in reasons given for an administrative decision, if and when any were given.

#### AN EXTREME INSTANCE

Having indicated the context of the Conseil d'Etat's law, I propose to conclude by considering the extreme and perhaps the critical instance: the exercise of a power which is admittedly not judicial nor quasi, which is not required to be motiv   at the time of its exercise, and in which there is very definitely a large discretionary element. An example of the relevant power is that exercised by the Minister in *l'affaire de l'Ecole Nationale*, the case which occupied our attention at the start. I propose to look at the question in the light of the admirable conclusions submitted to the court in that case by the Senior Commissaire du Gouvernement whose main proposal was in fact accepted by the Conseil d'Etat *en assembl  e pleni  re du contentieux*.

#### APPROACH TO DISCRETIONARY POWERS

It may be useful to repeat that the Conseil d'Etat is not a debating club attempting to define notions of

Utopian perfectibility for the conduct of some impossible human society: it is in the thick of the day-to-day administrative business of a complex and highly developed modern State which is very far from being perfect. Indeed, though that no doubt is a matter of prejudice, I personally very much prefer the condition of society in this country to that in France. The Conseil d'Etat has the strongest possible sense of the necessities of the administration: it is as well to remember that Dicey believed it to be so much identified with the administration that it could not really be supposed to be impartial. Whatever importance it may attach to any other principle its fundamental axiom is without doubt that the country's administration must be continued and preserved: its essential business is to make good administration possible. It does not seek to replace or act in lieu of the active administration: it never issues a direct order to the administration except for the payment of a sum of money. It never substitutes its opinion for the opinion of the administration, except when strictly sitting as a court of appeal from an administrative tribunal: even *en cassation*, if the *recours* is successful, it remits the plaintiff to the original court. Similarly in a successful *recours pour excès de pouvoir*, if it quashes the decision, it still requires the new decision to be taken by that administrative authority which is competent. In this sense it respects the autonomy of the active administration as thoroughly as it does that of the legislature or the judiciary. It proclaims that it never, *au contentieux*, judges the "opportunity"

of an administrative act: it passes only on the legality of the act done. When acting otherwise than as a tribunal, it does not issue directions to the administration: it tenders its advice at the request of the administration—an advice which, if often required by law to be asked, it is rarely by law bound to be followed. It is in no sense a rival or superior administration: the Conseil d'Etat and the active administration are jointly engaged in a common business, though the Conseil d'Etat acts at a remove. And the Conseil d'Etat, so far from being the antagonist of the administrator, is his natural protector—especially of the individual administrator. Yet, though to this degree sharing the anxieties and the purpose of the administration, the Conseil d'Etat nevertheless claims to act, and acts, as the judge of administration—in the best long term interests of the administration itself perhaps, but immediately affording to the subject redress against what the Conseil d'Etat considers to be a wrong. Though part of an administration the Conseil d'Etat does appear really to believe that the dominant interest of the administration, of the citizen, of the State and of itself is the doing of justice and the preservation of that highest good which is sometimes entitled *la légalité républicaine*; and it is prepared, within the measure of what is from time to time deemed possible, to use its authority to compel the plain and manifest obedience of the administration to those principles of justice and of republican legality which find their best expression in the law of the Conseil d'Etat itself.

## PRIMA FACIE CASE

It is with this mixture of knowledge, respect, common interest and a firm intention of doing justice—or at the least of condemning manifest injustice—that the Conseil d'Etat approaches the matter of discretionary powers. The respect is not feigned. The Conseil d'Etat will not lightly presume against a Minister entrusted with a wide discretionary power that he, or his department, has acted in direct contradiction of *les principes généraux du droit*. It will look with great care at the case presented by the plaintiff—as it did in *l'affaire de l'Ecole Nationale*. Unless that case appears to the Conseil d'Etat reasonably substantial, based upon the allegation of *faits précis* and of itself raising *des présomptions graves*, the Conseil d'Etat, though probably not dismissing the complaint out of hand, may be content with a direct and categorical denial by the Minister. The Conseil d'Etat does *not* proceed to the indictment of the Minister even if a prima facie case has been presented to it: it requests his observations on the matter without in any way indicating to him a method of reply which he is bound to follow. If those observations deal effectively with the plaintiff's allegation and constitute a reasonable reply then subject to the further comment of the plaintiff the Conseil d'Etat may well be satisfied by that reply. Indeed, it seems to me that the Conseil d'Etat may well give the benefit of the doubt to the Minister if a doubt remains,<sup>67</sup> though that is a matter of *l'appréciation de l'espèce* on which opinion may differ.

<sup>67</sup> For example in *Missir* (C.E., March 14, 1951, *infra*, p. 193) where the highly discretionary power of issuing expulsion

## MINISTER'S REFUSAL TO ANSWER

The Minister is, however, already in this difficulty when a *prima facie* case has appeared for the plaintiff. He is bound to provide a sufficient answer. If to give his reply cogency he alleges as the ground of his act a precise fact, the truth of that fact becomes an issue—for the Conseil d'Etat will annul an administrative act, however discretionary, if it is alleged to have been based upon a fact which is false. If he prudently abstains from an allegation of precise fact or a precise denial of the plaintiff's alleged facts, the Conseil d'Etat may judge his reply to lack in the circumstances the necessary cogency. It was no doubt an acute appreciation of this difficulty which induced the Minister in our case to take the course (highly unusual in France, however commonplace in England) of, in effect, claiming to be entitled not to reply. It is because the Minister took this most unusual course—which amounted to a denial of any but a sham jurisdiction in the court—that the Conseil d'Etat took the equally unusual, I believe unprecedented, step not merely of demanding a reply but of prescribing the only kind

orders against aliens was in question, the Conseil d'Etat put the burden of proof, as an English lawyer would understand it, upon the plaintiff. It rejected his *recours* on the ground "qu'il n'est pas établi que la mesure attaquée ait été motivée par des faits matériellement inexacts." On the other hand, if it is not impressed by the ministerial answer, it may regard the decision deferred to it as *presumptively* "entaché d'exces de pouvoir." (C.E., July 12, 1949, *Koenig*; C.E., January 25, 1950, *Oulié*.) For the terms used by the Conseil d'Etat when it is dissatisfied with the ministerial answer, see the cases cited by Letourneur in (1952) 11 C.L.J. at p. 279.

of reply which in the circumstances it would be prepared to regard as sufficient.

The unusual nature of the situation is reflected in the first solution proposed to the court, by M. Letourneur in his conclusions. He proposed that the court, without inquiring into the merits of the case, should proceed to quash the Minister's orders upon the naked ground that the Minister by his conduct had impeded the court in the exercise of its undoubted jurisdiction *effectively* to inquire into the legality of an administrative act duly brought to its attention. As M. Letourneur states—

“ Cette solution, qui est conforme à la jurisprudence,<sup>68</sup> présente l'avantage de censurer sévèrement l'attitude du Secrétaire d'Etat; en effet le refus de ce dernier de s'expliquer constitue par lui-même le motif d'annulation. Cette censure nous paraît parfaitement justifiée, d'ailleurs, dans les circonstances de l'affaire.”

The Conseil d'Etat did not retain this ground in its judgment : it preferred M. Letourneur's second <sup>68a</sup> proposed solution based upon the merits of the case. No doubt judgment upon the merits is a more manifest vindication of its jurisdiction. But the real cause of the trouble is the Minister's recalcitrance and his virtual denial of the Conseil d'Etat's jurisdiction: a reasonable Minister would have found the Conseil d'Etat much less intransigent.

<sup>68</sup> M. Letourneur cites in support: C.E., January 8, 1937, *Bury et autres*, July 12, 1949, *Koenig de Belliard*; February 22, 1950, *Prost.*, June 13, 1952, *Cochet*.

<sup>68a</sup> See *infra*, pp. 199-200.

## POUVOIR DISCRETIONNAIRE

The Minister's refusal to reply adequately does raise acutely the question of the extent of the Conseil d'Etat's *effective* control in the matter of highly discretionary powers. By making some kind of reply it is evident that the Minister is not pleading *acte de gouvernement*: which would totally deny the court's competence. As we have seen, such a plea is today impossible as regards an act which is evidently administrative. What is in issue is not the existence of a right of control but its extent. But in claiming that a discretionary power afforded him the degree of protection which he alleged, the Minister was in fact attempting to obtain almost all the advantages which would have accrued from a successful plea of *acte de gouvernement*. The residuary power<sup>69</sup> left to the court—which is the only power remaining, and that theoretically, in an English court when the discretion is given in unlimited terms—appeared to the Conseil d'Etat to be so negligible as to be merely unreal.

It is to this confusion<sup>70</sup> between *acte de gouvernement* and *pouvoir discretionnaire*, and to the ambiguities of the term *pouvoir discretionnaire* itself that M. Letourneur first directs his attention. Short of a successful plea to the competence of the court—that is to say, short of the *acte de gouvernement* itself—there is today, in his submission, no such *pouvoir*

<sup>69</sup> *i.e.*, upon plea of *detournement de pouvoir* to quash the act upon affirmative proof by the plaintiff of the Minister's *mala fides*, personal malice, or pursuit of his own private advantage. This would seem to involve proof of a personal, fraudulent intent in the Minister.

<sup>70</sup> See *supra*, p. 161.

*discrétionnaire* known to French administrative law as was claimed by the Minister. His submission is in very categorical terms—

“Un premier principe nous paraît certain: dès que le recours pour excès de pouvoir est recevable contre un acte administratif, cet acte ne peut plus être qualifié de *discrétionnaire*, car un contrôle existe sur sa légalité: contrôle qui implique par lui-même, une restriction des pouvoirs de l'administration active.”

However, the Commissaire admitted that in days gone past the Conseil d'Etat probably did recognise that there might exist in a Minister a *pouvoir discrétionnaire* which was practically the equivalent of an *acte de gouvernement*. He cited the case of *Rouget*<sup>71</sup> in 1851 where, precisely on the point of admission to a concours, the Conseil d'Etat had held that it would not inquire into the ministerial reasons, stating absolutely “l'appréciation de ces motifs n'était pas du domaine de la juridiction contentieuse.”

#### THE BOUTEYRE CASE

But *Rouget* is cited as being merely of *historical* interest. The Conseil d'Etat's case law since then has *quite certainly* taken a different course. Just as it defined *acte de gouvernement* in such a fashion as to eject it from the internal purely administrative act, so it has restricted *pouvoir discrétionnaire* to mean a power which, while allowing a great latitude to its holder, nevertheless does not grant him a right to

<sup>71</sup> C.E., July 5, 1851.

behave, or appear to behave, merely arbitrarily. In particular it is a power into the exercise of which the court will now inquire. For authority he cites *Abbé Bouteyre*,<sup>72</sup> a very important case decided in 1912, again on admission to a concours; and he relies very largely on the "conclusions" of his predecessor, the then Commissaire du Gouvernement, Helbronner.

That case is certainly good authority for the right of the Conseil d'Etat to examine into the exercise of a power to admit or exclude from a concours. The Abbé Bouteyre, a priest in Holy Orders, had presented himself for the *concours d'agrégation de l'enseignement secondaire*. The Minister had refused to admit him, expressly and simply on the ground that he was a priest. On a *recours en annulation*, the Conseil d'Etat inquired into the question whether an exclusion based upon such a reason was lawful. In his conclusions, Helbronner, taking into account that it was by law<sup>73</sup> provided that all persons employed in the *enseignement primaire* must be lay persons, that the *agrégation* was not a university degree to which all French citizens necessarily were admissible, and that this *agrégation* was an examination leading to a State employment as a secondary schoolteacher in a State civil service, submitted that, though the case was a borderline one (he suggested that it would be clearly an *abus de pouvoir* to exclude a priest as such from the *agrégation* leading to a University post) in his opinion the Conseil d'Etat was not bound to declare,

<sup>72</sup> C.E., May 10, 1912. Helbronner's conclusions will be found at p. 553 of the *Recueil Lebon*.

<sup>73</sup> Art. 17 of law of October 30, 1886.

in the actual circumstances of that period (the separation of Church and State had taken place in 1905), that the ministerial decision was unlawful, however illiberal it might be judged, even though there was not an express text providing for such exclusion in the case of the *enseignement secondaire*: the Minister's opinion that there appeared to him to be an incompatibility between the character of the priesthood as such and the character of an employee in the State secondary school service could not be condemned as in all the circumstances necessarily unreasonable.<sup>74</sup>

#### EXPULSION ORDER

Apart from the *Bouteyre* case, the degree to which the Conseil d'Etat has extended its right to inquire is indeed quite remarkable. It has, for instance, recently<sup>75</sup> entertained a *recours en annulation* against a decision refusing a passport to a Frenchman, the issuing of passports in France being within the competence of the Ministry of the Interior. The extension is striking, not only because such a power is evidently highly discretionary but because as recently as 1921<sup>76</sup>

<sup>74</sup> The Conseil d'Etat's judgment concurred with Helbronner's conclusions and rejected the *recours*. For my part I have little doubt that, if in *l'affaire de l'Ecole Nationale* the Minister had equally candidly answered that he had excluded the candidates because, by reason of some *special connection* with the Communist party, he judged them to lack the necessary "neutralité," the Conseil d'Etat, though requiring to be satisfied about the special connection, would probably have rejected the *recours*. But the Minister might then have had difficulty in Parliament.

<sup>75</sup> C.E. (Section), May 14, 1948, *Imbach*; D. 1949.226 followed in *Boimond*, C.E., March 16, 1949.

<sup>76</sup> C.E., April 22, 1921, *Leloutre* (S. 1923.3.25, note Haurion).

the Conseil d'Etat had appeared to regard such a matter as outside its competence, though the great commentator Hauriou had disapproved of that decision. Even more strikingly the Conseil d'Etat in 1949<sup>77</sup> entertained a *recours en annulation* by an alien against an expulsion order made upon him by the Minister of the Interior: it will be recollected that in England very recently it was made abundantly clear that the Home Secretary's power to issue an expulsion order was one in respect of which he was not bound to adduce any reason to anybody; and to questions in Parliament the answer he returned was in effect that he had satisfied himself that it was right<sup>78</sup> to order the expulsion, without stating any grounds for his conclusion. It was commonly believed before the *Persager* decision that in this matter a similarly unlimited power existed in France. The first submission which M. Letourneur is making seems to me established: there is no power vested in the executive with the exercise of which the Conseil d'Etat will today hold itself to be incompetent to inquire.<sup>79</sup>

<sup>77</sup> C.E., October 21, 1949, *Persager*, S. 1950.3.72; followed in *Missir*, C.E., March 14, 1951. Such expulsion orders must not be confused with extradition proceedings.

<sup>78</sup> I happen to believe that the issue of the expulsion order was probably not unreasonable—but that personal belief does not alter the entirely arbitrary character of the power claimed and exercised.

<sup>79</sup> In a note which M. Letourneur did me the service of preparing for me (see 11 C.L.J. 258 (1952), he called attention to *Galetzsky* (C.E., June 15, 1951) where the refusal by the Minister to issue a "carte de commerçant" to an alien was quashed though the power to refuse was in terms unlimited; and perhaps even more impressively to *Rosanvallon* (C.E., Jan. 29, 1947) and *de Gouttes* (C.E., Jan. 13, 1950) when a power given to the incoming Free French Government in quite

### GROUNDS FOR ANNULATION

Nevertheless, the Conseil d'Etat will apply to a power which is admitted to be, in one sense, *highly* discretionary a control which, in the Conseil d'Etat's estimation, is of a limited sort. In the estimation of an English lawyer the *minimum* is already extremely high. In M. Letourneur's words "Le contrôle minimum auquel *puisse*<sup>80</sup> se livrer le juge administratif . . . se réduit<sup>80</sup> à trois points":

*First*, the administrative judge—that is to say, the Conseil d'Etat—will have to satisfy himself that there has not been any *détournement de pouvoir* or that the act was done "dans l'intérêt du service."

*Secondly*, that the "motif" of the act was "matériellement exact": that is to say, that if a fact is alleged as the reason of the act, that fact must be true.

*Thirdly*, that the "motif" was "juridiquement correct."

"Le contrôle sur ces trois points," says M. Letourneur, "est le contrôle minimum que vous exercez sur les actes susceptibles de recours pour excès de pouvoir, même sur les actes jadis purement discrétionnaires, jadis réputés actes de gouvernement et assujettis au recours depuis une époque relativement récente."

absolute terms to retire on pension any public servant of fifteen years' service was held to be not exercisable "à des fins disciplinaires": such exercise amounting to a "détournement de procédure", since disciplinary action against such servants was subjected to many safeguards devised in their interest.

<sup>80</sup> "Puisse" and "réduit" are nice touches.

## DÉTOURNEMENT DE POUVOIR

The first ground for *annulation* in such cases is, as we have seen, considered to be relatively unreal by the Conseil d'Etat: it entails proof by the appellant of the Minister's personal *mala fides*, of his personal malice or the pursuit by him of his private interest. Though it is no doubt a necessary ground, and one which seems to be admitted (theoretically at least) even by the English court, it is not to be supposed that it is likely often to exist and still less that it will often satisfactorily be established.

## MATÉRIELLEMENT EXACT

The second ground is momentous, and its acceptance is perhaps the most important development which has in recent years taken place in the Conseil d'Etat's law. It does not need explanation, but it does merit emphasis: if the administration in France alleges that it has exercised a power even of the most discretionary sort on the ground of the existence of a particular fact, then the truth of that fact must be made out to the satisfaction of the tribunal, or at the least the plaintiff will succeed in having the decision annulled upon proof of the falsity of that fact. This is a most powerful instrument for the prevention of the worst form of official injustice: which consists in the giving of a quite spurious apparent justification, or colour of reasonableness, to an act in fact arbitrary by alleging for it, falsely, a ground which if true would generally be regarded as a sufficient reason. In England there does not appear to be any method available as a

matter of course of taking issue with a Ministry or Department on the *fact alleged by them* as the ground of their decision, and of having that issue determined by an impartial body after reasonable inquiry. It is the absence of this possibility of joining issue in such a case that probably causes—and justifiably—the greatest resentment and sense of injustice and which emphasises the extent to which there exists in England an arbitrary power in the Executive.

Though this right of joining issue on the fact alleged is recognised in France, the Conseil d'Etat will probably not further extend its control in the case of a highly discretionary power. If satisfied that the fact alleged is true—or at least not satisfied that it is false—it will *not* normally inquire whether the existence of that fact justified the ministerial decision or at least not under *this moyen d'annulation*. Thus, in the passport case, *Imbach*,<sup>81</sup> having satisfied itself of the truth in fact of grounds alleged for the refusal of a normal passport—namely, that the plaintiff had adhered to Nazi organisations during the occupation—the Conseil d'Etat entirely declined to go into the question, raised by the plaintiff, whether the administration could lawfully on such ground refuse a passport. It was, in the Conseil d'Etat's opinion, a matter of *appréciation* whether a passport should or should not be issued to a person in the plaintiff's case, and therefore—

“ l'appréciation à laquelle se livre ainsi le préfet ou le sous-préfet n'est pas susceptible d'être

<sup>81</sup> C.E. (Section), May 14, 1948, *supra*, p. 192.

discutée<sup>82</sup> devant le Conseil d'Etat statuant au contentieux."

Indeed, it is a mark of the *higher* degree of control, exercised by the Conseil d'Etat when the discretion appears to it to be much more limited, that the court will examine not only the truth of the ground alleged but the question whether that ground "entre dans le champ d'application de la loi" or is "de nature à justifier" the decision. Such a question definitely involves an *appréciation* by the Conseil d'Etat of the fact alleged and proved.

Nevertheless, the lower and the higher degree of control must not be regarded as logically distinct categories. I conceive it possible that, even in the case of the most highly discretionary power, the allegation and proof by the Minister of a fact *evidently irrelevant* would not be held sufficient to justify the order. But in that case the order would be better attacked on the ground that the "motif" was "erroné en droit." What seems to me to be intended is that when the Conseil d'Etat hold a power to be highly discretionary and the administration allege and prove a ground which might on *some rational view* possibly be supposed to be a justification for the exercise, the court will not further inquire into the matter: unless it can be shown that as a *generalised* proposition the exercise of the power upon that *kind* of ground would amount to a "motif erroné en droit" —which constitutes the third ground stated above. It

<sup>82</sup> This is a term of art which was *originally* used when the Conseil d'Etat was accepting a plea of *acte de gouvernement* or *pouvoir discrétionnaire* in the old sense.

should however be added that some powers<sup>83</sup> conferred in terms of a generality which would seem to a common law lawyer necessarily to imply an unlimited discretion have been held by the Conseil d'Etat to confer only a limited discretion and therefore to attract the higher degree of control.

#### JURIDIQUEMENT CORRECT

We have already<sup>84</sup> in part considered the third ground of annulment—that the “motif” was “erroné en droit.” For this motif necessarily invokes “les principes généraux du droit.” By supposition there is no express provision of any statute or regulation which prohibits the Minister from acting as he acts: if there were, his act would be illegal in an immediate sense. By the boldest piece of purely judge-made law, the Conseil d'Etat proclaims that, even if the discretion is of the widest possible sort, so long as it remains a discretion merely and is vested in a Minister acting within the framework of “republican legality,” the Minister's act must respect that framework. What that framework may be, what *are* the basic principles of the French legal system in so far as the administrative act is concerned—that is a matter exclusively

<sup>83</sup> M. Letourneur gave a remarkable list in the note already cited (1952, 11 C.L.J. 258). The list includes (a) power given, in time of war, to the préfet to intern “les individus dangereux pour la défense nationale ou la sécurité publique”; (b) emergency powers given to Ministers and prefects “de procéder à toutes les réquisitions nécessaires aux ‘besoins du pays’.” I believe that powers so given in England, so far from attracting a *stricter* degree of control, would have been held to confer a totally unexaminable discretion.

<sup>84</sup> See *supra*, pp. 169–171.

within the province of the Conseil d'Etat from time to time to determine. The Conseil d'Etat of course recognises the sovereign power of Parliament acting in a legislative capacity to alter any rule within that framework and indeed to destroy that framework and to substitute another if it is so minded. Parliament is no doubt also at least theoretically competent, without destroying that framework, to exempt an individual from its operation and perhaps to endow him with, in this sense, a sovereign power. But the Conseil d'Etat is quite clear that the mere grant to a Minister of any discretion, however wide, does neither destroy that framework nor exempt him from it.

#### LAWFUL POLITICAL OPINION

Accepting M. Letourneur's submission, in the instant case the Conseil d'Etat held that it was a basic principle of the French system as it at present existed, it was part of the framework of "republican legality," that the holding of a lawful political opinion was not of itself alone a ground which would justify any act of discrimination against a citizen presenting himself as a candidate for an examination leading to public employment. A Minister could not so discriminate against a candidate "sans méconnaître le principe de l'égalité de l'accès de tous les Français aux emplois et fonctions publics." The Conseil d'Etat of course recognised that the Minister had the largest power to exclude a candidate on the ground that the candidate had by some act of his "contraire à la réserve que doivent observer ces candidats" disabled himself from

being a civil servant; but the mere holding of a lawful political opinion could not amount to such a disability. A person might no doubt so identify himself with a particular political party that he could be judged to have lost the *neutralité* appropriate to a civil servant; but such a conclusion would require the proof of particular acts, especially in the case of a young man who is a candidate merely. It was on this ground of illegality that the Conseil d'Etat quashed the order excluding the five appellants.

The acceptance of M. Letourneur's submission involved the finding that, as a matter of fact, the Secrétaire d'Etat had excluded the appellants on the ground only that they held, or were believed to hold, a particular political opinion. The establishment of that fact required an examination of the allegations of the plaintiffs and of a complex series of events; and that examination cannot here be rehearsed. I have already noted that the "evidence" upon which the finding was based was not such as could have been produced in, or would even have been regarded as relevant by, an English court, though I have little doubt that the finding was well grounded. But it transcends the particular facts, and it is worthy of observation, that the failure of the Minister to answer was treated as a most cogent corroboration of the plaintiffs' allegations. Indeed it is perhaps on this point of the duty of the Minister to furnish his reasons<sup>85</sup> even in the case of the most discretionary

<sup>85</sup> It may be useful to repeat that, in case of administrative orders generally, the duty of the Minister is limited to the giving of such an explanation as may in the circumstances

of powers that *l'affaire de l'Ecole Nationale* will remain of the greatest importance.

#### DUTY OF MINISTER TO STATE GROUNDS OF ORDER

The manner in which M. Letourneur in his conclusions established this duty in the Minister is extremely simple. Having established that even in the case of the most discretionary powers the law of the Conseil d'Etat attributes to the Conseil d'Etat the right of exercising at least that minimum of control which we have described, he submits that without the duty of the Minister to state the grounds of his order the right of the Conseil d'Etat would be a mere vanity.

His language is vigorous—

“ Proclamer que le juge de l'excès de pouvoir est en droit de vérifier l'exactitude matérielle et juridique des motifs des actes à lui soumis serait un leurre, une hypocrisie, si l'administration pouvait à son gré refuser d'énoncer les motifs de ses actes. Une telle conséquence est impossible à concevoir, à imaginer sérieusement: dès lors qu'un contrôle existe, il doit pouvoir s'exercer d'une manière effective.”

The duty incumbent upon the Minister even in the case of a highly discretionary power is not merely to indicate his reasons but to satisfy the Conseil d'Etat, should the Conseil d'Etat require to be satisfied, that the reasons indicated are the actual reasons upon which

be required of him by the Conseil d'Etat *ex post facto*. The administrative order does *not* normally require to be “*motivé*,” in the sense that the reasons for it do *not* need to be stated on the face of the order or *at the time of its issue*. See *supra*, p. 180.

the act was founded. M. Letourneur's language is again very categorical:—

“L'existence d'un contrôle du juge implique nécessairement . . . l'obligation pour l'administration de faire connaître les motifs de sa décision *et d'établir par la production de tous documents utiles que les motifs qu'elle indique sont bien ceux-là mêmes qui l'ont inspirée réellement.*”<sup>86</sup>

And subsequently having made the point that the Conseil d'Etat is, as we have seen, in charge of its own “instruction” he says—

“Le Conseil d'Etat *peut* ne pas demander au dit ministre des explications ou des justifications, mais son abstention en pareil cas est motivée non par le fait que l'administration est libre de ne pas répondre utilement mais par le fait que, *lui, juge, estime qu'en l'espèce il n'y a pas lieu d'user de son pouvoir de contraindre l'auteur de l'acte attaqué à fournir ses motifs.*”<sup>87</sup>

In his conclusions the Commissaire du Gouvernement appears as the advocate of that view which he believes to be consistent with justice and with the law<sup>88</sup> of the

<sup>86</sup> At this point he cites C.E., May 1, 1936, *Coûspel du Mesnil*.

<sup>87</sup> M. Letourneur had already distinguished between the need of stating reasons at the time of making the decision—a need which normally does not exist in the case of a merely administrative (as distinguished from a judicial) decision; and the obligation *ex post facto* of stating reasons to the Conseil d'Etat justifying that decision, should the Conseil d'Etat require the justification.

<sup>88</sup> It would, I think, convey to the reader *some* impression of the extent of the Conseil d'Etat case law if I were to list the cases cited by M. Letourneur in this set of “conclusions”. They included (in addition to a considerable reference to treatises and articles) the following: C.E., May 1, 1936, *Coûspel du*

Conseil d'Etat; and he speaks with the vigour appropriate to an advocate. In accepting, as it did, M. Letourneur's submission the Conseil d'Etat speaks as a judge and as a judge accustomed to exercise an absolute authority over the executive. Accordingly the Conseil d'Etat merely recites—

. . . . .

que le Secrétaire d'Etat . . . s'est ainsi abstenu de faire connaître le motif de ses décisions qu'en cet état de la procédure, la Section du Contentieux, chargée de l'instruction des requêtes, *usant du pouvoir qui appartient au Conseil d'Etat d'exiger de l'administration compétente la production de tous documents susceptibles d'établir la conviction du juge et de permettre la vérification*<sup>89</sup> des allégations des requérants, a demandé au Secrétaire d'Etat la production des dossiers . . .

. . . . .

Mesnil; C.E., Jan. 8, 1937, *Bury*; C.E., Nov. 28, 1929, *Musard*; C.E., May 10, 1912, *Bouteyre*; C.E., Apr. 22, 1921, *Leloutre*; C.E., March 31, 1950, *Ségnac*; C.E., July 5, 1851, *Rouget*; C.E., Feb. 23, 1944, *Chauveau*; C.E., Feb. 24, 1954, *Delhomme*; C.E., Dec. 8, 1948, *D.lle Pasteau*; C.E., May 3, 1950, *D.lle Jamet*; C.E., July 29, 1953, *Lingois*; C.E., Aug. 5, 1905, *Lespinasse*; C.E., Nov. 25, 1925, *Pourcel*; C.E., July 12, 1932, *Eloy*; C.E., Nov. 29, 1933, *Marchadier*; C.E., Feb. 9, 1949, *Martin*; C.E., July 12, 1949, *Koenig de Belliard*; C.E., Feb. 22, 1950, *Prost*; C.E., June 13, 1952, *Cochet*; C.E., July 27, 1939, *D.lle Beis*; C.E., May 4, 1948, *Connet*; C.E., Feb. 25, 1948, *Laroubine*; C.E., March 9, 1949, *Darcy*; C.E., Nov. 9, 1949, *Couderc*; C.E., Feb. 3, 1950, *Joucelin*; C.E., May 9, 1951, *Cazanove*; C.E., June 8, 1951, *Pitault*; C.E., July 18, 1951, *Aquilo*; C.E., Feb. 23, 1953, *Rézoud*.

<sup>89</sup> This is no doubt a more benign way of framing M. Letourneur's submission but it in no way restricts its ambit.

qu'il n'a pas été satisfait à cette dernière demande . . .

qu'il ressort de l'ensemble des circonstances sus-relatées de l'affaire que le motif allégué par les auteurs des pourvois doit être regardé comme établi. . . .

and upon these recitals it proceeds to quash the ministerial orders.<sup>90</sup>

### JUDICIAL CONTROL

With that, we must leave this inquiry into the law of the Conseil d'Etat concerning the *recours en annulation*. But I think that it may fairly be deduced that if the Conseil d'Etat is willing and able to deal in this manner with the exercise of a highly discretionary power vested in a high officer of State, it is unlikely to find itself unduly cramped when asked to deal with the exercise of a lesser power vested in a less exalted official. By the authority thus exercised by the Conseil d'Etat there has been secured in France, to the great benefit of the French citizen and to the ultimate advantage of the administration itself, a rule of law which is at once enlightened and flexible and which requires the French executive at every level to respect, and manifestly to appear to respect, those principles of justice and fair dealing which are known at the Conseil d'Etat as "les principes généraux du droit."

<sup>90</sup> In a note published after the preparation of these lectures, Waline states (1954 *Revue du Droit Public* 509) that this judgment is "une des plus remarquables décisions qu'ait rendues depuis longtemps notre plus haute juridiction administrative" and that "M. Letourneur s'est affirmé comme un, très grand commissaire du Gouvernement".

## **SOME REFLECTIONS**



## SOME REFLECTIONS

THERE is so radical a difference between a country in which there exists a system of administrative law and one in which there does not that it is perhaps unwise to attempt to make any direct comparison. The study of the Conseil d'Etat's law does, however, seem to me to suggest the following reflections.

(1) The *recours en cassation* sufficiently resembles an order of certiorari (as applied to really judicial and *not* to "quasi-judicial" proceedings) to make it evident how great an advantage the Conseil d'Etat enjoys from the *wider* ambit of the *recours en cassation* and from its *universal* applicability to any inferior—that is to say, to any other—administrative tribunal. It would, however, be relatively easy to reform our certiorari proceedings, and there is some indication that the High Court is minded so to do. The distinction at present drawn between "speaking" and "unspeaking" orders is a mere obstacle to the administration of justice: the High Court should have the power either, as the Conseil d'Etat has, to quash without more ado an order which is "unspeaking" or at least to compel the inferior tribunal to make up and transmit a full record. It would be a very great advantage if the record to be made was as full as that available to the Conseil d'Etat so as to enable the High Court to exercise as effective a control. The

rules of "natural justice" are familiar enough in England: it would, however, seem desirable that the High Court should have the power to quash the decision of any administrative tribunal, under whatever authority that tribunal may be operating or have been constituted, if the operation or constitution of the tribunal appears to the High Court in the actual case to offend against the rules of natural justice.

(2) If it were possible to devise an effective remedy other than certiorari (so far as it is effective) for the control of the proceedings which now include those known as "quasi-judicial," it would be desirable to limit certiorari to the control of the work of *tribunals* as such. It is of great advantage to the French system that (a) the *recours en cassation* is limited to the control of the work of tribunals, and (b) that the *recours en annulation* is available against all other administrative decisions, whether or not "quasi-judicial" in character. The limitation of the *recours en cassation* to the proceedings of tribunals makes it possible to formulate with clarity a standard of conduct appropriate to administrative *tribunals* as such. The general availability of the *recours en annulation* avoids the confusion arising from the notion of "quasi-judicial." Its general availability also enables the Conseil d'Etat as the administrative court to require the administration to conform generally (and not only in those cases which can be brought within the quasi-judicial field) to that standard of conduct which the Conseil d'Etat judges appropriate to the powers to be exercised by the administration and to the circumstances of the case.

(3) The distinctive characteristic of the Conseil d'Etat, and of a system of administrative law as such, lies precisely in this requirement that the administration, as such and generally, in respect of its executive as much as of its quasi-judicial acts, shall conform to a standard of conduct declared and enforced by a court by way of a public and adversary procedure. For the purpose of securing such a standard of conduct, *ultra vires* proceedings in England are, in comparison with the *recours en annulation*, gravely defective. It looks as if, increasingly, *ultra vires* controls only the formal external legality of the act.

(4) It seems self-evident that at least that minimum standard of conduct should be *required* of the executive in England as is required of the executive in France. If not self-evident, it seems tolerably clear that such a standard cannot be attained in a manner likely to win the confidence of the public unless it is manifestly enforced by a court—that is to say, an impartial body—sitting in public and able to entertain complaints made by persons claiming to have been injured by the non-observance of that standard. It is so enforced in France by the Conseil d'Etat.

(5) The standard of conduct normally attained by the executive in England is in some respects at least very high and, as it may reasonably be believed, higher than that normally attained in France. Nevertheless in England the observance of that standard depends upon the good pleasure of the executive; it is a matter internal to the service, and secret, in the sense that it is unknown to the public. It is not a standard which a member of the public can effectively

claim to have observed in his case. If injured by its non-observance a member of the public cannot as of right or normally appeal to any court to secure the observance in *his* case of that standard. A citizen in France can thus appeal to the Conseil d'Etat.

(6) What is calculated most to shock the French administrative lawyer is the extent to which the Minister or Department in England still remains judge in his own cause. There are no doubt many particular provisions requiring the Minister in case of dispute to refer the matter for settlement to a person or body who may be regarded as impartial; but outside the area of such provisions and so far as the executive act proper is concerned he can effectively be called to account by nobody. He is, of course, responsible to Parliament, but Parliament, which may be well fitted to control policy, is singularly unfitted to conduct that examination of particulars which an inquiry into a particular complaint requires.

The Minister or Department is often and critically judge in his own cause by being judge of whether an inquiry will be permitted at all into a matter on which complaint has been made. Acting within the limits of his powers, which are extremely largely construed, he is judge in his own cause in that it is sufficient that he should answer, if he answers at all, that *he* is satisfied that *his* action was right, and that without the production of any reason. What is worse, he is judge in his own cause in that, if he purports to justify his action by the allegation of a reason for it, no person is empowered judicially to inquire into the *existence* (let alone the sufficiency) of the reason

alleged, not even if the reason offered is the existence of a *fact* which is capable of direct disproof. He is, in a most important particular, judge in his own cause even when subject to the compulsory process of a court in that *he* remains even then judge of what documents if any he will disclose to that court: on the ground of a public policy on which his own view is final. It is an indication of extent of his arbitrariness that even when by law compelled to hold a public inquiry before reaching a decision he is not normally bound by law to publish the report of the person appointed to conduct the inquiry and indeed in general does not publish it: he may proceed to his decision without that publication and irrespective of the relation between the report and his decision.

A French administrative lawyer would, I think, believe that it might be possible to cure in England the grosser instances of the "minister-judge" without bringing English public administration to a complete standstill. He would have to go back a long way in his own history to find a period when a French Minister was his own judge even to a remotely comparable extent.

It is no doubt possible to suppose—indeed it may be true—that the administration in England is conducted with a most scrupulous regard for those principles of fair dealing and justice of which, as the "*principes généraux du droit*" the Conseil d'Etat publicly requires and enforces the observance by the French administration. But it is the official profession that it is not possible in England to subject the executive

to what is described as the constraint of such principles; and the occasional revelation<sup>1</sup> of the manner in which Government business actually is conducted seems to warrant the belief that the observance of such principles would, on some occasions at least, have amounted to a considerable constraint.

(7) The gravest reflection, however, is this. Though the High Court is undoubtedly competent to control by way of certiorari, or proceedings in error or appeal on points of law or generally, all existing and any future administrative *tribunals*—and it is highly desirable that it should promptly extend and perfect its control over them—it is *most* doubtful that the High Court would be able, even if it were willing, to exercise over the executive as such (over the non-judicial functions of the executive) the supervision which the Conseil d'Etat has become accustomed to exercise over the French executive. The Conseil d'Etat *statuant au contentieux* is a very peculiar body, especially in that, though functioning purely judicially, it consists of a group of highly experienced

<sup>1</sup> The reader is no doubt familiar with Sir Andrew Clark's report on the Crichel Down Affair (Cmd. 9176, H.M.S.O., July, 1954). And there are occasionally more accidental revelations in legal proceedings. See Atkinson J.'s judgment (July 19, 1946) in *Odlum v. Stratton* where an incautious publication by the Chief Executive Officer of the Wiltshire War Agricultural Executive Committee enabled the plaintiff, a farmer, to bring an action for defamation and where, in spite of the considerable protection afforded by privilege against discovery, some part of the methods adopted by that organisation was disclosed: methods which it would be desirable to believe were *entirely* singular. A verbatim report of the proceedings was published by the Wiltshire Gazette Printing Works, Devizes, Wilts. I owe my copy to Sir C. K. Allen.

civil servants acting collegiately and enjoying the confidence as much of the service as of the public. It must be supposed *a priori* that to discharge the functions of the Conseil d'Etat a *body* is required of the Conseil d'Etat type. The High Court is of a type as different as can be imagined. And it must also be supposed that the High Court *process* is as ill adapted as could be to a Conseil d'Etat kind of inquiry.

Granted that it is possible that the work done by way of *recours en cassation* can be done by the High Court, and granted that it is of the utmost importance and urgency that the residuary function discharged by the Conseil d'Etat in France should be discharged in England, who is to discharge that residuary function and how? A special administrative tribunal? It seems to me that there would be great difficulty in constituting a special tribunal to discharge this residuary function. It would scarcely have the authority required unless it were independent; but a tribunal independent of and parallel to the High Court would introduce a duality into our jurisdiction which we could not easily tolerate.

And, on the analogy of the Conseil d'Etat, if an independent tribunal of this sort is created it should not be limited to the discharge of the residuary function only. And further, would a tribunal so created enjoy that confidence of the executive itself and that intimacy with the executive which certainly *seems* to be a necessary characteristic of the Conseil d'Etat?

A consideration of the history of the Conseil d'Etat suggests a different line of approach. In France it

was a part of the executive itself which developed a public conscience, which became concerned with the need of having a standard of behaviour binding upon the executive, which adopted the remarkable faith that an adequate administration must respect the rights of *l'administré* himself, which came to the astonishing conclusion that the only way to create that standard and to secure a public confidence in it was to deal with complaints publicly in the light of day and by means of an adversary procedure. Would it be possible to promote or to provoke a similar fit of conscience in the English executive? In such a matter the only effective gamekeeper is likely to be the really converted poacher. And would it be possible to secure the confidence of the public in the reality of the conversion?

The great advantage of seeking a development *within* the executive in that no legislation is required. The difficulty of legislation, if legislation were necessary, is itself a major obstacle. On the French analogy certainly, the development would be extra-legal. Allow the High Court all the jurisdiction which it presently has: indeed increase it and perfect it to the measure of the possible—to the measure, that is, of what is *capable* of being discharged by a body constituted as the High Court is constituted; there still remains the residuary function discharged by the Conseil d'Etat. The function is in one sense primarily the business of the executive itself; it is a business certainly best performed by the executive. Ought there not to be a standard of what may be called decent or appropriate executive behaviour, of and

within the executive? If yes, ought not that standard, in the case of a public administration, to be a public one—one, that is, to which appeal can be made publicly by the member of the public claiming to have been injured by failure of that standard? Irrespective of what legal remedies might or might not be available in a court of law, would it not be the reasonable business of an enlightened executive, in the interest as much of the due discharge of public duties as of the rights of the subject, to afford by whatever internal process it judged to be appropriate a public remedy calculated to enforce that standard, to give redress for what is judged by the public to be grave injury and to vindicate that interest in justice which belongs to the executive itself?

It is a development of this kind that the history of the Conseil d'Etat exemplifies in France. Of the need of a similar result in England I have no doubt. The business is to find in England that native growing-point from which may come this desired result. But for this business there is further required, more even than comparative legal study, a native intelligence and will.



## A SELECTIVE BIBLIOGRAPHY



## A SELECTIVE BIBLIOGRAPHY <sup>1</sup>

A. The primary source of information concerning the Conseil d'Etat is the reports of its decisions. The most complete series is the "semi-official" annual publication (now in its 133rd year) entitled *Recueil des Arrêts du Conseil d'Etat . . .* and commonly called *Recueil Lebon*. Multigraph copies of decisions are made as rendered and can be obtained from the Conseil d'Etat by persons making out some reasonable title to them.

The *Recueil Lebon* does not publish notes, and only rarely the *conclusions du Commissaire du Gouvernement*. In view of the difficulty of appreciating the extremely succinct judgments of the Conseil d'Etat, it may be advisable to start by reading cases in a general series of Reports (such as Sirey or Dalloz) which usually carry a note, though the reporting is much more selective.

A most useful publication is a three-volume book, *La Jurisprudence Administrative de 1892 à 1929*, in which are collected the cases annotated in Sirey during that period by the great commentator, Maurice Hauriou. It amounts to a survey of the Conseil d'Etat's case law during an important period of its development.

<sup>1</sup> There is a useful Bibliographical Note in Schwartz (*cit. infra*). Street (*cit. infra*) makes an abundant citation of literature but does not collect it with special reference to the Conseil d'Etat. Extensive bibliographies, both generally and on particular matters, will be found in Waline and de Laubadère (*cit. infra*).

B. There is published annually since 1947 under the direction of the Vice-Président du Conseil d'Etat, M. René Cassin, a series of *Etudes et Documents* giving invaluable information concerning the functioning of the Conseil d'Etat. This series should be regarded as almost a primary source. Of equal authority is *Le Livre Jubilaire* published under the same direction by the Recueil Sirey in 1952 to commemorate the 150th anniversary of the Conseil d'Etat.

C. The texts now governing the Constitution of the Conseil d'Etat are the Ordonnance du 31 Juillet 1945 sur le Conseil d'Etat and the Décret, of equal date, portant règlement intérieur du Conseil d'Etat. They may conveniently be consulted in *Etudes et Documents*, 1947, pp. 107 *et seq.* Amendments thereto, including the very important décret of September 30, 1953, and its derivative décret of November 28, 1953, are conveniently collected in *Etudes et Documents*, 1953, pp. 155 *et seq.*

D. The outstanding review of public law in France is the *Revue du Droit Public*, first published in 1894. In addition to valuable articles and notes, it periodically surveys the Conseil d'Etat's case law.

E. The number of treatises, both classical and contemporary, on the Conseil d'Etat is very great. A selection here is particularly invidious. It must suffice to state that personally I happened to find most helpful, on the modern law, the general treatises of

Marcel Waline (*Manuel Elémentaire de Droit Administratif*, Recueil Sirey, 6th ed., 1951, which may be regarded as the post-war standard textbook) and of André de Laubadère (*Traité Elémentaire de Droit Administratif*, Librairie Générale de Droit et de Jurisprudence, 1st ed., 1953). Both are professors at the Paris Faculty of Law. In a slightly more specialised field, I found equally helpful Raymond Odent's *Contentieux Administratif* (Les Cours de Droit 1950). M. Odent is now a Conseiller d'Etat.

F. The outstanding treatise in French on the special subject-matter of these lectures is Raphaël Alibert's *Le Contrôle Juridictionnel de l'Administration* (Payot 1926). It is now unfortunately out of date.

G. The most complete account in English of the Conseil d'Etat is by Prof. Bernard Schwartz of New York University (*French Administrative Law and the Common Law World*: N.Y.U.P., 1954, xxii + 867 pp., \$7.50). The work is enriched by some useful comparisons with the English and the U.S.A. systems. Professor H. Street of the University of Nottingham treats of the relevant French law in his notable comparative study, *Governmental Liability* (C.U.P. 1953. 223 pp. 25s.) but is necessarily not concerned to discuss the Conseil d'Etat as such. Some useful information is to be found incidentally in Mrs. M. A. Sieghart's *Government by Decree* (Stevens, 1950). The 9th edition of Dicey's *Law of the Constitution* (Macmillan, 1939 and reprinted) by Professor E. C. S. Wade, in addition to the valuable introduction by the editor, contains an appendix on Administrative Law

of which one section (*Droit Administratif* in France) is by Professor René David. This pioneer statement by Professor David is still of great interest.

H. The rules of English law are merely incidental to these lectures. It must suffice to refer the reader to the most recent publication—the fourth edition of Keir & Lawson's *Cases in Constitutional Law* (Oxford, 1954), and especially to Part V "Judicial Control of Public Authorities." The excellent section (pp. 331–384) on "Principles governing the exercise of discretionary remedies" is the most relevant portion. Much important material may be found in Sir C. K. Allen's *Law and Orders* (Stevens, 1945) of which a second edition is desired.







