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FRENCH ADMINISTRATIVE LAW

SECOND EDITION

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French Administrative Law

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Preface to the Second Edition

Developments in both French and English administrative law have led to a new edition of this introductory book in which we have again had the invaluable assistance of Mme Nicole Questiaux.

Except for an additional chapter on the influence of *droit administratif* upon other legal systems (including the law and practice of the European Communities), the scope of the book remains unchanged and is sufficiently indicated in Chapter 1. We have included references to a number of recent French decisions and have tried to embody many of the helpful suggestions of the reviewers of the first edition, although some of their criticisms could not be met without departing from our original concept. In this respect, we entirely endorse the comment of Professor A. W. Bradley in his review of the first edition: "There is still much room for comparison in depth between English and French public law but the authors will surely be content if they have stimulated a demand for more."

We have attempted to describe the French law as it was on 1 January 1973.

L. N. B.

J. F. G.

March 1973

Preface to the First Edition

This book is based on the lectures that the two authors have given in the last few years in their respective Universities as part of their courses on Administrative Law, but it is thought that the work will have a wider appeal than simply to those students reading for a law degree at an English university. The main purposes the authors had in mind in writing the book are set out in Chapter 1; suffice it here to express the hope that it will be found useful and interesting by all who wish to look beyond the narrow confines of our own shores in public law.

Neither one of the two authors is responsible for any particular portion of the book, as they both accept responsibility for the whole and for such errors or omissions as there may be. Any merit the book may possess will certainly be due in large measure to the painstaking assistance given to the authors by Mme Nicole Questiaux, whose practical experience as a Commissaire du Gouvernement in the Conseil d'Etat has been invaluable. She has checked the text in detail, in particular the accuracy of statements about French law and the practice of the Conseil d'Etat, but she must not be held responsible for any of the opinions expressed, as the value judgments have been formulated by the two authors without correction from her. Needless to say, none of the observations expressed in the book is in any sense the official view of the Conseil d'Etat.

In a book of this kind it is considered that up-to-date accuracy is not essential, but the account of French law that has here been attempted is descriptive of the system as it was on 1 January 1967.

L. N. B.
J. F. G.

January 1967

List of French Cases

In the following List, "C.E." means Conseil d'Etat and "T.C." means Tribunal des Conflits. The name and date of the decision is all that is required to trace a case in any series of French reports.

The number in heavy type after each date is a reference to the page in *Les Grands Arrêts de la Jurisprudence Administrative* **(5th edn.) Sirez 1969.**

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CHAPTER 1

Introduction

Why should an Englishman study French administrative law? This is a question that the student of English law, to whom this book is primarily addressed, may fairly ask. The answer lies in the value of a comparative approach to a study of English law. In order partly that the answers given to problems arising in English administrative law may be better understood, it is instructive and valuable to appreciate how those same or similar problems have been or are being resolved by the corresponding institutions of another highly developed legal system. Great benefit is to be derived from a study of other common law jurisdictions, but it is sometimes even more valuable to go outside the common law world and make comparisons with a legal system having a quite different history and tradition.

This comparative method is useful in many branches of law, but it is of particular importance in administrative law, because the nature of the leading problems, and in particular, the question of how government can be controlled in the interests of both state and citizen, are common to all the developed nations of the Western World.

The choice of French law as the means of comparison has been made, not simply because the authors share a deep admiration for a highly developed and flexible but logical system, but for a number of less personal and more valid reasons:

a. France and the United Kingdom are both highly developed industrial countries, faced in the modern world with the same problems of the control of power within the state in the interests of the individual. As Professor H. W. R. Wade has said, "the great problem as we now see it is how far is power to be governed by law".[1] This problem is common to both countries.

b. The civilisation of France, whilst in many details different from that of the United Kingdom, is based on the same essential principles of democracy and the need to observe "due process" in matters touching the rights of the individual.

1. (1962), 78 L.Q.R. 189.

c. Whereas *droit administratif* is a fully developed system, in England "we do not have a developed system of administrative law—perhaps because until fairly recently we did not need it".[2] Today there can be no question of our need, to meet which valuable lessons may be drawn from French experience. As Professor J. D. B. Mitchell has emphasised:

> "The question, quite bluntly, is whether we want to restore the place of law in government. That restoration demands a susceptible law and a susceptible body which administers that law, a body which at the same time is aware of the real needs of government and of the value of the idividual. That is what, behind its technicality, Droit Administratif is about; it is what the Conseil d'Etat tries to be."[3]

d. The original source materials of *droit administratif* are readily available, and French is the one foreign language studied by most Englishmen in their youth. For this reason the authors have not hesitated to employ French legal terms in the pages that follow, although, it is hoped, with an adequate explanation of their meaning.

e. Droit administratif is that rare phenomenon—an uncodified branch of a civil law system. For a common lawyer it has the special fascination of appearing familiar, yet at the same time strange. The familiarity comes from its being a judge-made law; the strangeness resides in the form and content of the judgments which compose this case-law as well as in the procedural techniques by which they are arrived at.

f. Further at a time when a new Benthamite wind is blowing through the English legal system and the codification of much (if not the whole) of the common law is under consideration, it may be salutary to remind English lawyers that a sister country which pioneered codification is content to allow her judges to shape this vitally important part of French law virtually unhindered by statute. For, as Professor David observes in *Le Droit Français* (1960, vol. 1, p. 116), "in this field there is no movement in favour of codification".

g. Lastly, the developed French system of *droit administratif,* centred upon the institution of the Conseil d'Etat, forms the basis of many other continental systems, and has influenced such international institutions as the Administrative Tribunals of the United Nations Organisation and the Court of Justice of the European Communities.[4] Our subject, therefore, has a wider significance and one that the entry of the United Kingdom into the European Communities cannot but emphasise.

These reasons have led the authors to follow the advice of the late Professor A. W. Dicey who, as long ago as 1885, said:

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2. Lord Reid, in *Ridge* v. *Baldwin,* [1963] 2 All E.R. 66, at p. 76.
3. J. D. B. Mitchell, "The Real Argument about Administrative Law" (1968), *Public Administration* 167.
4. See Chapter 10, *post,* p. 148.

> "it is not uninstructive to compare the merits and defects, on the one hand, of our English rule of law, and, on the other, of French droit administratif".[5]

As is well known, Professor Dicey's comparison concluded with a judgment as to the resounding superiority of the English "Rule of Law", and a correspondingly almost unreserved condemnation of the French system:

> "it is difficult, further, for an Englishman to 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."

(*ibid.*, p. 403). It has been fashionable for some time to point out Dicey's errors; the late Sir Ivor Jennings did this most effectually some years ago in relation to Dicey's "Rule of Law".[6] More recently, however, Professor Lawson has demonstrated the essential rightness of Dicey's comparison at the time he first made it ("Dicey Revisited", *Political Studies,* vol. 7, 1959, at pp. 109 and 207). For, in extenuation of his strictures on the *droit administratif,* it should be remembered that Dicey was writing only twelve years or so after the decision in BLANCO (T.C. 8 February 1873), often regarded as the starting point of the modern jurisdiction of the Conseil d'Etat, and that the full development of such concepts as *détournement de pouvoir* and *les principes généraux du droit* were then some way in the future.

For simplicity we have adopted Dicey's phrase for the title to this book. It is, of course, inexact. *Droit administratif* is correctly translated into English as "administrative law", and both expressions include (with much more precision of content in France than in England) the whole of the law relating to the various organs of the administration, and also the law relating to the civil service ("la fonction publique") which latter in France includes much of what in England would be classified as local government law. This book, however, is primarily concerned only with "le contentieux administratif" and the jurisdiction of the Conseil d'Etat "statuant au contentieux"; that is to say, we are concerned with litigation between a citizen and some organ of the state in an administrative context. There is no direct translation of these expressions into English; "judicial review" is perhaps the corresponding phrase in English law, but this refers *ex hypothesi* to review or control of the administration by the "ordinary" courts of law, whereas in France (as we shall see) the Conseil d'Etat is by no means an ordinary court but the head of a separate hierarchy of special administrative courts. Moreover, "judicial review" carries a very different connotation in the United States and certain other parts of the English-speaking

5. *Law of the Constitution*, p. 394.
6. *The Law and the Constitution* (1st edn., 1933).

world, where it refers to the power of the courts to declare legislation to be unconstitutional.

The scope, therefore, of this book is limited to a straightforward exposition of those institutions whereby control over the acts of the administration is exercised in modern France, together with some account of the more important principles of law that such institutions apply in carrying out this function. Our primary purpose is to expound French law, but some comparative references will be made to English law, mainly in order to stimulate—or provoke—the informed teacher or enquiring student to explore further, the comparison. A full-scale comparative treatment is not possible within the compass of a short book, although whenever a common lawyer tries to describe a civil law institution or doctrine the approach necessarily becomes a comparative one, simply because by force of training he sees his chosen subject differently from the way the civilian sees it.

Our readers must not assume that the pages which follow describe the whole area of *droit administratif,* nor again that they contain the whole of the law relating to such parts as we have selected for examination. Those readers seeking a fuller treatment of our subject or concerned with other aspects of French law and administration may find helpful the works listed in the short Bibliography at the end of this book. Moreover, it has been assumed that a reader of this book already has a basic knowledge of English administrative law; this is not a book on the English "system", although we hope that the reader may be assisted in his comprehension of English law as well as French.

The Germans would say that in England we have a *Justizstaat*, where conflicts between public authorities and the ordinary citizen are determined by the "ordinary" courts; France, on the other hand, is a *Rechtstaat*, where a series of specially constituted administrative courts exercise control over the state.[7] This fundamental difference between the two systems will be examined in the pages that follow. As we shall see, the difference is more than one of institutions; the principles of law applied also have been developed differently in the two countries, although the results in particular cases may be similar.

The secret of the strength of the Conseil d'Etat and the case-law (or "jurisprudence") which it administers is to be found in the history of this unique French institution, in the methods adopted for the recruitment of its personnel and also in its career structure generally. It will be necessary therefore in the pages that follow to deal fairly fully with historical and organisational matters, before we come to describe the extent of the jurisdiction of the administrative courts or the kind of law they administer. First, however, we must supply the *mise en scène:* the constitutional, administrative and political background.

7. See Chapman, *The Profession of Government*, at pp. 183 *et seq.*

CHAPTER 2

The Constitutional and Administrative Background

1 INTRODUCTION

The "duality" of the *droit civil* and the *droit administratif* in France, and more particularly the dual system of courts, cannot be understood without some appreciation of French constitutional history and the constitution of the Fifth Republic. This is particularly important because the Conseil d'Etat was the child of the Revolution of 1789 and the period of the Consulate (1798–1802), although *droit administratif* itself was, as we shall see in a subsequent chapter, a later development.

2 THE CONSTITUTION

The course of French political history since the Revolution has been charted by repeated shifts of power between the executive and the representative assembly. On the one hand, there has been the authoritarian or Bonapartist tradition (inherited from the Ancien Régime) of autocratic rule based upon a powerful and centralised bureaucracy and acting more or less independently of parliament. On the other hand, there is the parliamentary tradition whereby the elected assembly imposes its will upon the executive, although still relying upon a strong bureaucracy. This last tradition reached its apotheosis in the Third and Fourth Republics (1875–1940; 1946–1958), although (for reasons which cannot be analysed here) neither produced strong and effective government.

The Constitution of the Fifth Republic established in 1958 retains, in theory, the essential features of a parliamentary régime. Although adopting a rigid separation between executive and legislature (a minister cannot be a deputy), it does not set up an American-style presidential system. The Prime Minister remains responsible to parliament, and only parliament has the power to enact statutes ("lois"). The Fifth Republic differs, however, radically from its two predecessors