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A Common Lawyer Looks at the Droit Administratif

BERNARD SCHWARTZ*
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The common lawyer seeking to pursue research in a civil-law system, such as that in France, soon finds that he must work along lines to which he is wholly unaccustomed. The concepts and techniques which have served him so well in his own law are all too often handicaps to accurate understanding. He is now in a system where the case-law is of secondary significance—where the legislative *ought* is, at least in theory, of more importance than the *is* of the decided case. For he is in a realm where the Code reigns supreme. "Franco-German doctrine rests upon the absolute sovereignty of the written law."[1] Legal principles are deduced from the law laid down by the legislator. The rôle of the judge is limited to interpretation and to filling in the lacunae in the Code. The inductive method, which is second-nature to the common lawyer, leads only to misconceptions.

The French Code was, however, promulgated at a time when legal thought was concerned primarily with the field of private law. Public law, in the modern sense, had only begun to develop. Codification was hence largely a codification of the rules of private

* Bernard Schwartz, B.S.S. (College of the City of New York), LL.B. (New York University), LL.M. (Harvard), Ph.D. (Cantab.). Assistant Professor of Law, New York University. Author of *Law and the Executive in Britain* (1949) and *American Administrative Law* (1950) and contributor to many legal periodicals and collected works. Guggenheim Fellow, 1950-1951, and advanced research scholar under the Fulbright Act, 1950-1951; presently doing research at the Faculté de Droit, Paris.

[1] Alibert, Le Contrôle Juridictionnel de L'Administration (1926) 15.

law. The result was that when the need arose for a system of public law and above all, with the diffusion of the democratic ideal, for a system of legal principles to govern the relations of the State with the citizen, such a system had to be developed without the aid of a detailed set of authoritative principles laid down in a code. If such a system was to be developed at all, in the absence of legislative intervention, it had to be done by the judge, along the lines which are so familiar to the Anglo-American lawyer. In this field, the judicial rôle was not limited to one of filling in the gaps in the Code. The judge was confronted with a *tabula rasa*, much as were the creators of the common law.

The normal reluctance of the judge in a civil-law system to make law, in the Anglo-American sense, has had to give way in the face of the need for defined rules in the field of public law. The need for such rules has been at least as pressing in countries governed by the civil law as it has been in the common-law world. "How to fit ancient liberties, which have gained a new preciousness, into solution of those exigent and intricate economic problems that have been too long avoided rather than faced, is the special task of Administrative Law", wrote Justice Frankfurter in 1941.[2] An adequate system of administrative law fulfills the task referred to by ensuring that governmental functions will be exercised "on proper legal principles"[3]—"according to the rules of reason and justice",[4] and not at the mere caprice of the magistrate. It affords a remedy to the citizen who has been adversely affected by improper governmental action.

It is in the modern State that the need for an adequately developed system of administrative law has become especially apparent. At the time of the promulgation of the French Code, the rôle of the State was, after all, not nearly as important as it is today. Government was then but one of many competing power structures. In the contemporary State, on the other hand, "there is not a moment of his existence where . . . man does not find himself in contact with government and its agents".[5] Government today tends more and more to become the all-dominant factor in society, by taking over or controlling the functions heretofore performed by private institutions. As it does so, it comes into ever-increasing contact with the individual life. "It is in this ceaseless

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[2] Foreword (1941), 41 Col. L. Rev. 585, at p. 586.
[3] *Pioneer Laundry and Dry Cleaners, Ltd.* v. *Minister of National Revenue*, [1940] A.C. 127, at p. 136.
[4] *Sharp* v. *Wakefield*, [1891] A.C. 173, at p. 179.
[5] Duguit, Manuel de Droit Constitutionnel (1923) 39.

contact of the individual with the State that the danger of arbitrariness has especially arisen."[6]

As has been indicated, the development of a system of administrative law to help minimize this danger has, in France as in the common-law world, been largely the handiwork of the judge. In this respect, the *droit administratif*, unlike most other branches of French law, bears a close resemblance to the kind of law prevalent in the Anglo-American system. The French administrative lawyer, like his confrère in the common-law world, is accustomed to derive the basic principles of his system inductively from the decided cases. Since these principles have not been clearly expressed by the legislature, they have had to be worked out by "the gradual process of judicial inclusion and exclusion",[7] much as they have in Anglo-American law. The judge, having to seek a correct solution in the infinite variety of cases presented to him, and finding no clear guide in a code enunciating the fundamentals of administrative law, has had to establish these himself.[8] It is this which gives to the common lawyer seeking a comparative understanding of the *droit administratif* a facility of comprehension which is his in almost no other branch of a civil-law system. French administrative law, like that of the system in which he has been grounded, is judge-made law.

There is, however, an essential difference between the judge who has made the *droit administratif* and the judge who has made Anglo-American administrative law. In the common-law world, the basic principles of administrative law have been worked out by the ordinary courts of law by analogy from the principles of private law. In France, on the other hand, the law courts which are concerned with the dispensation of justice between individuals have played only a minor part in this field. French administrative law has been the work of a series of administrative courts, a group of tribunals which have been created outside the ordinary judicial system. Under the Anglo-American system, the State is subject to the same law and the same judges as is the individual. The citizen who is adversely affected by administrative action has his remedy before the ordinary courts. The *droit administratif* is based upon the existence of a special law for cases involving the administration and of special courts to decide such cases.[9]

The common lawyer has normally felt that one of the great virtues of his system has been the fact that control over adminis-

[6] *Id.* at p. 40.
[7] *Davidson* v. *City of New Orleans* (1877), 96 U.S. 97.
[8] Waline, Traité Elémentaire de Droit Administratif (5th ed., 1950) 19.
[9] Laubadère, Manuel de Droit Administratif (2nd ed., 1947) 12.

trative action is maintained in it through the same institutions that administer the ordinary law of the land, and on the same fundamental principles of justice. This has been seen to be the basis of the rule of law in the common-law world and its absence in the French system led to the well-known criticism of the *droit administratif* by A. V. Dicey. With us, Dicey insisted, it must be the law courts that are to determine questions of administrative law, and the applicable principles are those that have been worked out from the ordinary private law by the method of judicial empiricism. This, indeed, is implicit in his third meaning of the rule of law in his classic definition of that concept. The "law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts; . . . in short, the principles of private law have with us by the action of the courts and Parliament been so extended as to determine the position of the Crown and of its servants."[10] This is the cardinal principle under which administrative power is controlled in our polity. "Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the authority of the ordinary courts, and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power, and whether the orders under which he has acted were legal and valid."[11]

The French lawyer, on the other hand, has been no less attached to what are seen to be the virtues of a system in which the control of administrative authority is vested in special administrative tribunals rather than in the ordinary courts. "In reality", states a leading contemporary treatise on the *droit administratif*, "for France, the system is, on the whole, satisfactory. It is wise not to submit cases involving the knowledge of administrative law and of the necessities of administrative life to the law courts. The law courts do not possess this knowledge. They would be inclined either to exaggerate the prerogatives of the Administration or to neglect them through ignorance or partisanship. The administrative judge knows administrative law. By reason of the manner of his recruitment, he can understand the facts and grasp their reality and complexity. From this, his decision acquires the authority needed to make an Administration naturally disposed to abuse its prerogatives defer to it."[12]

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[10] Law of the Constitution (9th ed., 1939) 203.
[11] *Id.* at p. 389.
[12] Rolland, Précis de Droit Administratif (9th ed., 1947) 279.

The difference between the Anglo-American and French systems of administrative law, in so far as the organs in whom are vested the controls of administrative action are concerned, can be attributed to differing interpretations of the doctrine of the separation of powers. That doctrine has been of basic importance in the constitutional theory of both systems. Though Montesquieu may have erred in assuming that free government, like all Gaul, is divided into three parts, there clearly must be some separation of governmental authority in the democratic state. Of late, there has been a tendency to overlook this — to consider the separation of powers as an outmoded idea of the eighteenth century, "said to belong to the age of etiquette, the age of overrefinement, when every practical activity was embarrassed by ceremonial and checks".[13] Yet, as the Committee on Ministers' Powers pointed out, this extreme view loses sight of the need for some distinction between the branches of govermnent. "One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities."[14]

The common lawyer has usually been accustomed to think of the separation of powers as one of the leading characteristics of his constitutional system. "It is believed to be one of the chief merits of the American system of constitutional law", the United States Supreme Court has asserted, "that all the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."[15]

In the Anglo-American system, the doctrine of the separation of powers has become, in effect, a doctrine of the *specialization* of powers. Each branch of government is to exercise the type of power conferred upon it — legislative, executive or judicial — free of interference from the other branches. So far as the courts are concerned, the delegation to them of *the* judicial power has meant that to them are to be confided the resolution of all judiciable controversies. But this has meant, in turn, that they were competent

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[13] Pound, Administrative Law (1942) 45.
[14] Report (Cmd. 4060, 1932) 4.
[15] *Kilbourn* v. *Thompson* (1880), 103 U.S. 168.

to decide cases involving the exercises of authority by the executive branch. The result has been that, in the common-law world, the courts have become the controllers of the legality of administrative action. With us, as stated by Farwell L. J., an administrative "tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals".[16] Nor, in the Anglo-American view, does this kind of judicial control compromise the independence of the executive branch, which is required by the separation-of-powers doctrine. The judicial function is seen to be solely that of determining the law applicable to controversies which arise. The simple fact that the administration happens to be one of the parties in a particular case does not mean that a court, in deciding that case, is exercising other than purely judicial power.

In France, as in the common-law world, the separation of powers forms a cornerstone of constitutionalism.[17] The doctrine there has, however, received an interpretation wholly unlike that to which the common lawyer is accustomed. Anglo-American constitutional history is a record of attempts by the legislature and courts to restrain excesses by the executive branch. French constitutional theory has, on the other hand, been influenced by the memory of constant obstruction of the executive branch by the *Parlements* — the common law courts of appeal under the *Ancien Régime*. Whether rightly or wrongly, it was felt that they had unduly opposed efforts at necessary administrative reforms in order to conserve their own privileges and prerogatives. "It is . . . the memory of these struggles [that is, between the *Parlements* and the executive] and of the detrimental effect on the country's administration which explains the deep distrust with which subsequent French Constitution-makers viewed all judicial activities, and which resulted at the time of the First Revolution in a complete separation not only of the judicial and administrative functions, but also of the judicial and administrative jurisdictions."[18] In the Anglo-American world, the struggle of the common-law courts with the executive led to the supremacy of the former over the latter. In France, a like conflict has led to the opposite result.

The necessity of destroying the *Parlements* was one of the dominant ideas of the Constitutent Assembly of 1789, which did

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[16] *Rex* v. *Board of Education*, [1910] 2 K.B. 165, at p. 178.
[17] Sieghart, Government by Decree (1950) 157.
[18] *Id.* at p. 153.

away with them as early as November 3rd of that year.[19] But the members of the Assembly sought also to prevent a return of the *Parlementary* abuses by forbidding the courts which were created in place of the pre-Revolutionary tribunals from interfering with the working of administrative agencies. The consequence of this was the enactment of the basic law of August 16-24, 1790, which proclaimed the separation of administrative and judicial functions: "Judicial functions are and will always remain distinct from administrative functions. Judges may not, under penalty of forfeiture of office, interfere in any manner with the workings of administrative bodies, nor summon administrators before them in connection with the exercise of their functions." It was the enactment of this principle that restrained the French law courts from asserting a control over administrative action similar to that which has been exercised by Anglo-American courts. In the common-law world, much of the course of constitutional history has been concerned with securing the independence of the judiciary from the executive. In France, there has been, in addition to this, an even stronger movement aimed at securing the independence of the executive from the judiciary.[20]

With the enactment of the principle of the separation of administrative and judicial authorities, the principal concern of the men of the Revolution with regard to the question of judicial competence was eliminated. But where did this leave the individual citizen who was adversely affected by administrative action? In actual fact, he was left only with whatever remedy he had available in the administration itself. "In reality, in 1790, if the reform was proclaimed, it was only half realized; the judges were, indeed, prevented from administering, but the administrators were not prevented from judging. On the contrary, they were given every incentive to do so. In effect, let us suppose a citizen who has a complaint against the Administration. The law courts cannot receive his complaint; to whom, then, can be bring it? He has no remedy other than to file a petition, a gracious request, either with the author of the act complained of or with his superior. . . . The Administration was thus appointed its own judge." [21]

Such a system, under which the same organ was at the same time judge and interested party, would appear today to be the very negation of justice.[22] "Of course", said Cotton L. J., in an important case, "the rule is very plain that no man can be plain-

[19] Waline, *op. cit. supra* footnote note 8, at p. 42.
[20] Compare Report of the Committee on Ministers' Powers, 110.
[21] Waline, *loc. cit. supra* footnote 19.
[22] Labaudère, *op. cit. supra* footnote 9, at p. 42.

tiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that case." [23] A concentration of functions in administrative agencies much less invidious than that involved in the French system in the post-Revolutionary period has been the object of constant criticism in the common-law world. As recently explained by the United States Supreme Court, indeed, one of the fundamental purposes of the American Administrative Procedure Act of 1946 was to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. That "Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions. But that the safeguards it did set up were intended to ameliorate the evils from the commingling of functions . . . is beyond doubt." [24]

The French system of the post-Revolutionary period, under which there was no judge of the validity of administrative action other than the active administration itself, was subject to even greater dangers than those involved in the concentration of the functions of prosecutor and judge in Anglo-American administrative law. It is not surprising, therefore, that efforts were soon made to eliminate these dangers. These sought to prevent the active administration from being the final judge of the validity of its own action. At the same time, however, there was the need to have *a* judge of the legality of administrative action. Such a judge has been found with the development of a series of administrative courts wholly distinct from the active administration. "To prevent the law courts from judging cases affecting the administration, to prevent the latter from being the judge in its own cause, and, all the same, to find a judge — these seemed to involve the squaring of the circle. French law has, however, resolved the problem very neatly by the creation of two orders of jurisdiction, namely, of two systems of courts subject to two different supreme courts: the judicial and administrative jurisdictions. The latter are distinct both from the judicial order and from the active administration." [25] The application of the separation-of-powers doctrine in France has thus had two stages. The first consisted in removing cases involving questions of administrative law from the cognizance of the law courts. The second has consisted in removing such cases from the cognizance of the active

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[23] *Leeson* v. *General Council of Medical Education* (1889), 43 Ch. D. 366, at p. 379.

[24] *Wong Yang Sung* v. *McGrath* (1950), 70 Sup. Ct. 445, at p. 452.

[25] Waline, *op. cit supra* footnote 8, at p. 44 (italics omitted).

administration and vesting them in a series of separate administrative courts.

To the common lawyer, the term "administrative court" is one which appears self-contradictory. A *court*, to his way of thinking, is an organ "discharging judicial power with all the implications of the judicial function in our constitutional scheme".[26] An organ characterized as *administrative* stands on a wholly different footing. As was aptly pointed out by Lord Greene, a court in the common-law world is ill-fitted for the determination of the type of dispute which is normally conferred upon an administrative body. "Certain types of questions are not so suitable for decision by courts of law as by a different type of tribunal. A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this the law becomes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law by which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so."[27] The advantages of decision by administrative organs — directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively expressed policy[28] — can only be bought at the cost of many of the traditional checks which obtain upon courts. Certainty and predictability, the technique of decision according to authoritative principles, and the bridling of the individual will of the magistrate by formalized rules of procedure — these must inevitably be lessened as freer play is given to administrative discretion.

The basic dissimilarity between courts and administrative organs in the common-law world was underlined by the well-known attempt by the Committee on Ministers' Powers to distinguish between "judicial" and "administrative" decisions. A judicial decision was said by the Committee to presuppose an existing dispute between two or more parties and to involve four requisites: (1) the presentation of their case by the parties to the dispute; (2) the ascertainment of questions of fact by means of evidence adduced by the parties; (3) the submission of legal argument on questions of law; and (4) a decision that disposes of the whole matter by a finding upon the facts in dispute and an

[26] Frankfurter J., dissenting, in *Penfield Co.* v. *Securities and Exchange Commission* (1947), 330 U.S. 585, at p. 604.

[27] Law and Progress (Haldane Memorial Lecture, 1944) 20.

[28] See Pound, Justice According to Law (1914), 14 Col. L. Rev. 1, at p. 24.

application of the law of the land to the facts so found.[29] An administrative decision is something entirely different. Indeed, asserted the Committee, the very word "decision" has a different meaning in the one sphere of activity and the other. "In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion."[30]

One grounded in the Anglo-American emphasis upon the sharp distinction between administrative and judicial functions cannot help but feel that an "administrative court" is a singular kind of hybrid. Either an organ is an administrative agency or a court; it cannot, at one and the same time, be both. If, in investigating the *droit administratif*, the common lawyer is confronted with a series of organs termed "administrative courts", which are said to be the sole supervisors of the legality of administrative action in France, he will seek to probe more deeply into their true nature, to determine whether the administrative or the judicial element in them preponderates — that is, whether they are actually administrative agencies or courts, in the common-law sense of the term.

In post-Revolutionary France, as has been indicated, the only remedy available to citizens adversely affected by improper administrative action was within the administration itself. As time went on, there was a natural tendency to defer the complaints of such citizens for decision to an organ of the administration specialized in the handling of such complaints. It was felt that the earlier system of having the complaints decided only by the agency whose action had caused the grief complained of gave no serious guaranty of justice to the individual citizen.[31] The obvious step in the direction of obviating this difficulty, bearing in mind the impotence of the law courts under the French interpretation of the separation-of-powers doctrine, was to carry such complaints to the head of the executive branch, supposed to be less subject to partisanship than a subordinate official.

A chief executive, even though he be a Bonaparte, is not, however, omnicompetent. He cannot, himself, personally perform all the functions exercised in his name. The actual accomplishment

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[29] Report, 73.
[30] *Id.* at p. 81.
[31] Rolland, *op. cit. supra* footnote 12, at p. 275.

of many of such functions must be delegated to subordinate officials. In the case we are concerned with, the examination of complaints brought by citizens adversely affected by improper administrative action was vested in a newly-created organ — the Council of State. It is this body which was to evolve into the supreme administrative court in the French system.

There is little doubt that, at the time of its creation, the Council of State was more an administrative agency than a court. "No member of the Council specialized as a judge. If many of its members were jurists, so also were many of a military or naval background."[32] The resolution of individual grievances was but a small part of the work of the Council. It had, in addition, important legislative and administrative attributes and was, in effect, part of the hierarchical head of the administration, acting in this respect as the consultative organ of the chief executive. In dealing with the complaints of individuals adversely affected by administrative action, it was not bound to dispose of them in accordance with purely legal concepts. Its decisions were swayed just as much by policy as by law. In this respect, its decisions were patently not those of a court. To adopt once again the terminology of the Committee on Ministers' Powers, they were at most, "quasi-judicial". The Council of State's decision, at the time of its creation, was "quasi-judicial", and not judicial, because it is governed, not by a statutory direction to [it] to apply the law of the land to the facts and act accordingly, but by a statutory permission to use [its] discretion after [it] has ascertained the facts and to be guided by considerations of public policy. This option would not be open to [it] if [it] were exercising a purely judicial function."[33]

"The natural tendency of administration is to treat each case by itself, to give more weight to facts than to principles and to prefer an easy solution of policy to a difficult solution of law. The natural tendency of a court, on the other hand, is to relate each case to a general rule, to look for the question which is involved rather than the interests which are at stake, and to subject the expediency of administration to the exactitude of juridical theory."[34] The history of the post-Napoleonic Council of State has been one of uniform evolution from the former to the latter tendency. In its origins, the Council of State was entrusted with legislative, administrative and quasi-judicial functions. It prepared and

[32] Sauvel, Les origines des commissaires de gouvernement auprès du Conseil d'Etat statuant au contentieux (1949) Revue de Droit Public 5, at p. 9.
[33] Report, 74.
[34] Waline, *op. cit. supra* footnote 8, at p. 66.

edited the text of statutes;[35] it performed the rôle of a superior council of administration; and it dealt with the grievances of individuals who claimed to have been adversely affected by improper administrative action. The merger of the functions of legislator, administrator and judge in the one organ militated against the exercise of the latter function in a truly judicial manner. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constituted an unwholesome atmosphere in which to adjudicate private rights.[36] "Could the Council of State be impartial when it will have to judge the legality of an act upon which it may have been consulted preliminarily and given its approval?"[37] The obvious means of meeting this defect was by specialization and division of labour within the Council of State. "The danger would be eliminated if organs and functions are differentiated internally within the Council, with certain of its members judging, the others giving administrative advice."[38]

The development within the Council of State here has been very similar to that urged by the President's Committee on Administrative Management in 1937 to deal with the problems arising from the concentration of the functions of prosecutor and judge in American administrative agencies. The Committee recommended a redistribution of functions within the federal regulatory agencies. They "would be divided into an administrative section and a judicial section". The former "would formulate rules, initiate action, investigate complaints . . ." and the latter "would sit as an impartial, independent body to make decisions affecting the public interest and private rights".[39]

Within the French Council of State, there has been a complete separation of functions, not unlike that advocated by the President's Committee. As early as 1806, there was created a separate section to deal with cases concerning the validity of administrative action. "It was the Emperor himself who decided to put an end to the unsatisfactory existing situation. He recognized . . . that among the cases which he decided every day in accordance with the advice of the Council of State were many which affected the reputation and property of citizens . . . and thought that such decisions were veritable judgments, for which it was necessary to

[35] It was, indeed, the Council of State which was called upon to draw up the great Codes of the Napoleonic era.

[36] Report of the President's Committee on Administrative Management (1937) 36.

[37] Waline, *loc. cit. supra* footnote 34.

[38] *Ibid.*

[39] Report, 41-42.

organize within the Council a *true tribunal* which would follow established procedures, and which would, above all, give the parties an opportunity to be heard. This led to the decree of July 22, 1806, which set up, within the Council, the judicial section, whose function it was to examine these cases, and laid down a procedure to be followed by it whose main features still subsist today."[40]

Subsequent stages saw the enlargement of this judicial section's competence and the development of a duty to exercise its functions in a truly judicial fashion. Of no less importance was the insulation of the administrative judiciary thus established from the active administration. If the separation of functions within the Council of State was to be more than a merely formal one, it was not enough to divide the Council into administrative and judicial sections. Steps had to be taken to ensure that those exercising administrative functions could not participate in the work of those deciding cases. As was provided for in the American Administrative Procedure Act, no one engaged in non-judicial functions could be permitted to share in the work of the judicial section.[41] Such insulation of the decision process in the French Council of State dates from two ordinances of 1831 and 1839, which eliminated those of its members connected with the work of the active administration from the deliberations of the Council acting in its judicial capacity. "But the precautions have been carried even further; as a rule no Councillor can act as a judge with regard to any administrative operation on which he has previously given advice. If, for instance, a decree has been prepared by the Council of State and the same decree forms the subject-matter of litigation, all Councillors who have taken part in the deliberations on the draft are debarred from acting as judges in the law-suit."[42]

With the separation of its administrative from its judicial functions, the essential step was taken to enable the Council of State to perform its rôle of deciding cases involving the administration in a truly judicial manner. Of even more importance, perhaps, has been the fact that, once this step was taken, the judicial section of the Council of State has been able to evolve into a veritable court. If, in its origins, there is little doubt that the Council of State was an administrative agency exercising at most some quasi-judicial functions, today, at least, it seems clear that the judicial section of that body is a court exercising judicial power, in the Anglo-American sense of the term.

[40] Sauvel, *supra* footnote 32, at p. 10.

[41] Compare the problem involved in cases like *Errington* v. *Minister of Health*, [1935] 1 K.B. 179.

[42] Sieghart, *op. cit. supra* footnote 17, at p. 226.

The basic difference between a court and an administrative organ, so far as the common lawyer is concerned, has already been mentioned. The difference is not one of mere terminology, or even of form. "In endowing this Court with 'judicial power' [as Justice Frankfurter has said] the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges."[43] A court to whom is entrusted the review of administrative action is not in the position of a hierarchical superior of the administration. The latter may be concerned as much with policy and administrative efficiency as with legality, and may act upon its own initiative to ensure effective carrying out of the policy of the administration. The judicial function is a more limited one. Judicial power, however large, has an orbit more or less strictly defined.[44] It "could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'.... Even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law."[45]

If we look once again at the requisites referred to by the Committee on Ministers' Powers for judicial decisions and apply them to the work of the judicial section of the French Council of State, it will become apparent that that body today renders true judicial decisions. According to the Committee, the key factor distinguishing such decisions from those which may normally be rendered by administrative agencies is their disposition of an existing dispute between two or more parties "by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law".[46] The dispute must, in other words, be decided by the application of appropriate legal precepts, or, where none are directly applicable, the judge must reason from them by analogy in accordance with the trained technique of the judicial process.

Now this is precisely what the judicial section of the Council of State does in deciding cases. It acts upon the initiative of pri-

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[43] *Coleman* v. *Miller* (1939), 307 U.S. 433, at p. 460.

[44] Frankfurter and Fisher, The Business of the Supreme Court at the October Terms, 1935 and 1936 (1938), 51 Harv. L. Rev. 577, at p. 621.

[45] *Loc. cit. supra* footnote 43. Compare Allen, Administrative Consultation of the Judiciary (1931), 47 L.Q.R. 43; Hewart, The New Despotism (1929) 132.

[46] Report, 73.

vate parties who claim to be adversely affected by illegal administrative action, after argument submitted on behalf of such parties and the administration. Unlike a superior in the administrative hierarchy, it has nothing to do with the wisdom or expediency of challenged action. It is concerned only with the legality of such action, and it determines the question of such legality in accordance with applicable legal principles. Nor does the fact that most of these principles have been formulated by the Council of State itself mean that that body has been exercising other than judicial power. The common lawyer, living under the empire of judge-made law, cannot characterize the French tribunal as other than a court merely because the legal principles it applies are derived primarily from its own case-law.[47]

It can, of course, be argued that a tribunal is not necessarily a court simply because it renders judicial decisions. The authority to render such decisions can, in fact, be vested in an administrative agency. "The fact that [such decision] is not reached by a court so-called, but by a Minister acting under statutory powers and under specialised procedure, will not make the decision any less judicial."[48] When such authority is conferred upon an administrative agency, however, it constitutes but a part of the work of that agency. If a body has been vested with only the power to render judicial decisions, as the judicial section of the French Council of State has been, it has come very close to attaining the status of a court. If its decisions are rendered in accordance with judicial technique and procedure, by judges who are secure in their tenure and insulated from political pressures and prejudices, then it has, in fact, attained that status.

That the position of the Council of State has evolved from that of a purely executive tribunal to that of a court should not be a source of surprise to the common lawyer. Anglo-American legal history is rich in analogous developments. Indeed, the early evolution of the courts at Westminster — the very matrix of law in the common-law world — from the *Curia Regis* of the Norman kings was roughly similar to that of the French body. In both cases, there was the submission of petitions to the advisory council of the chief executive, specialization within the council to dispose of the petitions, and a judicialization of the specialists, accompanied by a separation from the other, purely executive, parts of the council. If the judicial section of the Council of State has not

[47] Compare Garner, La conception Anglo-Américaine du Droit Administratif, in Mélanges Maurice Hauriou (1929) 360.

[48] Report of the Committee on Ministers' Powers, 74.

yet in form wholly split off from the administrative sections of that body, as did the common-law courts from the *Curia Regis*, still, for all practical purposes, it is a separate judicial organ.

A realization of the fact that the so-called administrative courts in France, of which by far the most significant is the Council of State, are today courts and not administrative agencies is the beginning of knowledge for the common lawyer seeking to understand the essentials of the *droit administratif*. If the Council of State and the tribunals subordinate to it are considered as courts, then the French system loses much of the strangeness which it may at first present to one grounded in the common law. Likewise, the criticisms that have been levelled at the French system by Anglo-Americans lose much of their force. Thus, the famous denunciation of the *droit administratif* by A. V. Dicey was largely based upon the assertion that administrative action in France is not subject to any judicial control. "The slightly increasing likeness between the official law of England and the *droit administratif* of France must not conceal the fact that *droit administratif* still contains ideas foreign to English convictions with regard to the rule of law and especially with regard to the supremacy of the ordinary Law Courts."[49]

But, even if we admit with Dicey that freedom of administrative action from all judicial control is inconsistent with the rule of law, that does not mean that the French system must necessarily involve the negation of the constitutional principle. In France, as in the common-law world, review of administrative action is available before courts. The fact that they are termed "administrative courts" instead of "law courts" does not make them any less judicial than the courts set up to render justice in cases involving individual citizens. "It is very true that at the outset the Council of State was in large measure a servile instrument of the Emperor and there was thus some basis in Dicey's criticism. . . . But, after 1872, when the Council became an independent court, his criticism no longer had any basis. Since that time, the Council, as every Frenchman knows, has shown its independence with respect to the government and has continually extended its control over the conduct of administrative authorities so that today nearly every act of an administrative authority . . . can be annulled if it is *ultra vires*."[50]

In the modern French legal system, there are in reality two distinct sets of courts — one to dispose of disputes between in-

[49] Dicey, Law of the Constitution (8th ed., 1915) xlvii.
[50] Garner, *supra* footnote 47, at p. 358.

dividual citizens and the other to deal with cases in which the administration is involved. The former are first in origin and are concerned with controversies of the kind that have always been conferred upon courts. The development of the latter is more recent. The justice it dispenses has become necessary as a complement to that rendered by the law courts only with modern expansions of the rôle of the State. With the growth in State power has come the realization that such power must be subjected to judicial control, that the earlier solution of control only within the executive branch was insufficient to protect private parties affected by administrative action.

If the French legal system is considered in this manner, as containing two orders of courts disposing of two different types of cases — the one concerned with private and the other with public law disputes — it is one whose workings the common lawyer should not find difficult to comprehend. Such a system should not seem singular to one who is familiar with the history of courts of law and courts of equity in the Anglo-American system. Just as in the French system today, there were two different sets of courts to administer justice in the common-law world until the Judicature Acts and their American equivalents. Each had its own distinct structure, personnel and procedure, and applied the legal principles appropriate to its own system of law. In its origins, the Court of Chancery, like the common-law courts before it, was an off-shoot of the council of the chief executive and the Chancellor acted more like an administrative agency than a court. His decisions were rendered more in accordance with magisterial discretion than with legal principles. Early equity was thus, in effect, a system of justice without law, for the element of will or discretion was present to a great extent as the determinative factor. It was this aspect of equity which called forth the vigorous criticisms of the common lawyers like John Selden, who complained that the justice dispensed by Chancery was so uncontrolled by authoritative principles that it might just as well have depended upon the size of the particular Chancellor's foot. But the executive tribunal came, in time, to be wholly judicialized and to be fitted into its place in the pre-existing legal order. The result was the co-existence in the common-law world of two distinct sets of courts, each with its own separate jurisdiction and applying its own autonomous system of law.

This is also, more or less, the situation in the French legal system today. The relation of the so-called administrative courts in France to the law courts there can be compared to that which

existed between courts of equity and courts of law in the common-law world. It thus becomes possible for the Anglo-American to determine what is the true nature of the French administrative courts. Just as courts of equity developed into true courts, after starting out as executive tribunals, so have the French administrative courts, like the Council of State, followed a similar pattern.

But what about the self-contradiction in the use of a term such as "administrative court"? The "contradiction" is, however, a contradiction only to the outsider who is not familiar with the actual nature of the French tribunals. Once again, the courts of equity can furnish a useful analogy to the common lawyer, for there is the same apparent self-contradiction in a court characterized solely as one of "equity". A lawyer who understands the Anglo-American system realizes that the courts of equity were those organs in our legal system that administered the legal principles which were characterized under the rubric, the "law of equity". Similarly, the French administrative courts are those organs in the French legal system that administer the principles of the *droit administratif*. The courts of equity were courts created to complement the common-law courts; they were true courts, and not mere organs of executive equity. Likewise, the work of the French administrative courts complements that of the courts rendering justice between individuals; they, too, are true courts today, and not mere organs of the administration.

The Presumption of Innocence

Looking his hostile jury squarely in the eyes, Erskine delivered an apostrophe to his profession: 'I will forever, at all hazards, assert the dignity, independence, and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.' (Lloyd Paul Stryker: For the Defense)