The Administrative Courts in France

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The disparagement of French governmental institutions has become fashionable of late in the Anglo-American world. In so far as the law is concerned, censure of institutions that are not of common-law origin finds a ready response in the Anglo-American legal profession. For the common lawyer has always been notoriously insular in his outlook. Ever since the abortive attempt of the civilians to import the Roman law into his system, he has tended to look with distrust upon foreign systems of law. This feeling of distrust has been particularly apparent in the field of public law. Here, especially, the common lawyer has felt that he has little to learn from foreign legal theories. Has not the public law of the common-law world proven itself in the centuries of Anglo-American constitutional development? With Dean Pound, the common lawyer has invoked the pragmatist criterion. "Our theory has worked — to adapt the answer of Diogenes, *solvitur gubernando*. Continental European theories have produced no such results."[1]

The common lawyer's misgivings on this score were strongly reinforced by the conclusions of A. V. Dicey on the workings of the *droit administratif*. As Dr. Allen has recently pointed out, "Chiefly through the misrepresentations (later recanted) of . . . Dicey, French administrative law has been grievously misunderstood in this country".[2] But "misrepresentation" though his account may have been, no one can doubt the widespread effect of Dicey's teaching. "Despite frequent counterblasts to Dicey, there is still something in the very term 'administrative law' which stirs the English lawyer's deepest suspicions."[3] Nor need one look far

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[1] Pound, Administrative Law (1942) 56.

[2] Foreword to Sieghart, Government by Decree (1950) x.

[3] *Ibid.*

in seeking the reason for Dicey's influence. The common lawyer would be more than human if he did not look with complacency upon an account which emphasized the superiority of his own system.

Complacency on the part of the common lawyer with regard to his system of public law is, however, much less justified today than it was when Dicey wrote. Many in the common-law world are, in fact, coming to realize this. Thus, "jurists and lawyers of divergent political views have become deeply disturbed at the trend of constitutional development in Britain during recent decades. Their anxiety is caused partly by the immense administrative powers of a discretionary character acquired by the central government; partly by the vast increase in the legislative powers delegated to ministers; partly by the decline in local government and the tendency towards centralization; but chiefly by the decline or elimination of judicial control as an effective barrier against arbitrary or irresponsible public administration."[4]

The supposed inadequacy of the law courts in effectively controlling administration has led many in the common-law world to propose that control be vested in specially created administrative courts. Thus, a bill now before the American Congress would set up a five-judge court, to be known as the Administrative Court of the United States. Upon this court would be conferred jurisdiction (1) in cases involving the judicial review of administrative action, otherwise cognizable in any other federal court, other than the Supreme Court, and (2) in cases involving the civil enforcement of the rules, orders or investigative demands of administrative agencies.[5] It should be noted that the jurisdiction of this proposed Administrative Court would be permissive and not mandatory. Persons adversely affected by administrative action would still have a choice of bringing their review action before the ordinary courts of law.

Similar proposals have been made with regard to the British system, although they have not yet reached the stage of proposed legislation. Perhaps the earliest suggestion along this line was that of Professor Robson in his evidence before the Committee on Ministers' Powers.[6] He advocated the creation of an administrative Appeal Court, "grafted on to the Privy Council", a proposal which involved the abolition of both the supervisory and the appellate jurisdiction of the English High Court in matters pertaining to

[4] Robson, Book Review (1950), 21 Pol. Q. 411.
[5] Caldwell, The Proposed Federal Administrative Court: The Arguments for Its Adoption (1950), 36 A.B.A.J. 13.
[6] Committee on Ministers' Powers, Minutes of Evidence (1932) 58.

administration and the vesting of such jurisdiction in the proposed tribunal.

Although the Committee on Ministers' Powers saw fit to advise "without hesitation" [7] against the adoption of Dr. Robson's proposals, his views have recently been re-affirmed both by himself [8] and other writers. Thus, R. C. FitzGerald, writing for a Canadian audience in 1950, after posing the problem presented by the present position in the common-law world, goes on to assert, "Surely what is wanted is a Supreme Court of Administration with power (a) to inquire in disputed cases into the motives for exercising an administrative act affecting private interests; (b) to annul an executory administrative decision; and (c) to award damages for loss suffered as the result of a wrongful act committed by an agent of a public service in the exercise of his administrative function".[9]

The advocates of this type of appellate administrative tribunal have recently found an unexpected supporter in Dr. C. K. Allen, heretofore one of the most doughty exponents of the virtues of the existing common-law system of control of administration by the ordinary courts. "For many years", says Dr. Allen, he "has believed, or hoped, that administrative law, as a separate and distinct branch, could continue to be fitted into the existing framework of our judicature, without any special machinery. He is now inclined to believe that the time has come, in view of the great and increasing pressure of administrative problems, to assign this type of jurisdiction to special courts. . . . There is no reason why an appellate administrative tribunal should not combine the purely judicial with the expert administrative elements." [10]

The student of administrative law who examines these proposals of Anglo-American jurists for the creation of specialized administrative courts cannot help but conclude that they represent a significant step in the direction of the *droit administratif*. "The main difference between the English and the French method of judicial control lies in the fact that in England the general jurisdiction over litigation to which the administration is a party belongs to the ordinary Law Courts, whereas in France it belongs to administrative Tribunals and foremost to the Council of State."[11] The setting up in the Anglo-American world of separate admin-

[7] Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) 110.
[8] Robson, Justice and Administrative Law (2nd ed., 1947) 327.
[9] FitzGerald, Safeguards in the Exercise of Functions by Administrative Bodies (1950), 28 Can. Bar Rev. 538, at p. 556. See also Sieghart, Government by Decree (1950) 317.
[10] *Supra* footnote 2, at p. xiii.
[11] Sieghart, *op cit. supra* footnote 9, at p. 72.

istrative courts to perform the function of controlling administration which has heretofore been vested in the common-law courts would go far towards eliminating this basic difference between the French and the Anglo-American systems.

The common lawyer, influenced by the distrust which Anglo-Americans feel for French governmental institutions in general and by his own antipathy towards foreign legal institutions in particular, tends cavalierly to reject any proposal which would result in a *rapprochement* between his system and the *droit administratif*. With Lord Hewart, he feels that *droit administratif* is "completely opposed to the first principles of our Constitution",[12] and that is enough, in his view, to condemn suggestions that may involve any implantation of the French system in the common-law world.

One wonders, however, whether the time has not come for the common lawyer to abandon his insular prejudice and to appraise the working of the *droit administratif* upon its own merits. An objective appraisal of the French system would, more than anything else, give to the Anglo-American the foundation for a proper judgment on the value of proposals to create administrative courts in the common-law world. What better basis can there be for an assessment of the merits of the proposed tribunals than an equitable examination of the workings of an actual system of administrative courts, such as that which prevails in France?

If he wishes properly to conduct such an examination, the Anglo-American administrative lawyer will have to forego the legal isolationism that has characterized the common lawyer. It is not enough today to declaim with Dicey that the principles of the *droit administratif* are foreign to the spirit and traditions of common-law institutions.[13] Though the common-law world is not necessarily obliged to imitate the French system, it should at least take the trouble of understanding it before thanking God for having been preserved from it.[14]

An understanding of the *droit administratif* is largely to be derived from an understanding of the working of the administrative courts that have created the French law in this field. It is only after he comprehends the functioning of these law-creating organs that the Anglo-American can hope to grasp with any success the details of the substantive law laid down by them. A survey which seeks to unfold the *droit administratif* to the common lawyer must therefore concentrate first of all upon the French administrative

[12] The New Despotism (1929) 41.
[13] Dicey, Law of the Constitution (8th ed., 1915) 326.
[14] Compare Morgan, Introduction to Robinson, Public Authorities and Legal Liability (1925) lxxii.

courts. Their organization, jurisdiction and manner of proceeding must be explained before any attempt can be made at analyzing the substantive details of the *droit administratif*.

Council of State

"Of all French governmental institutions, the Conseil d'Etat is to an English observer perhaps the most interesting. Stable and continuous but responding empirically to its changing environment, it has evolved a system of case-law as elaborate almost as the Common Law itself; and by that system it has achieved for the French nation a solution of the critical political problem of to-day — the reconciliation of the powers of the executive with the rights of the subject and the rule of law." [15]

The Council of State is by far the most important of the French administrative courts. It is both the base and the apex of the French system, for, as we shall see, to it is confided the most important original and appellate jurisdiction in the *droit administratif*. Its key position was recently underlined by its vice-president. "In its action, either preventive or *a posteriori*, against arbitrariness, the Council of State may be only a cog-wheel of our public-law machinery, but is it a vital wheel whose influence extends far beyond the individual cases of which it has cognizance. Its very presence holds the prospect of potential control over the Administration and maintains the confidence of the public in law and liberty." [16]

Although the modern Council of State was set up on December 25th, 1799 — its one hundred and fiftieth anniversary was, indeed, commemorated by impressive ceremonies held in Paris on June 9th, 1950 — French students generally see in the Council in its present form but a renaissance of the King's Council which existed under the *Ancien Régime*. Looked at in this manner, the Council of State dates back to the earliest years of the French monarchy and, as such, has been characterized as, "with the French language and our cathedrals, one of the oldest living institutions of our country".[17]

An outside observer seeking to comprehend the organization of the Council of State need not, however, tarry long over its historical development. For his purposes, the basic materials are

[15] Hamson, Rule of Law in France: I. The Conseil d'Etat and the Executive, The Times (London), Feb. 20th, 1951, p. 5.
[16] Conseil d'Etat, Etudes et Documents (1949) 19.
[17] Conseil d'Etat, Etudes et Documents (1950) 180, by M. Cassin, Vice-president of the Council of State.

to be found in the Ordinance and Decree of July 31st, 1945,[18] the organic instruments under which the Council was reconstituted after the Liberation. It should be noted that the Constitution of the Fourth Republic, like that of its predecessor of 1875, makes no mention of the Council of State as an institution, limiting itself to an almost casual reference to the appointment of its senior members.[19] Nor, in the French view, is this lack of specific constitutional provision to be regretted. "Overly detailed legal texts can be a source of inconvenience — the rules of judicial jurisdiction should retain a flexibility which is not always consistent with the rigidity of constitutional provisions." [20]

The actual composition of the Council of State is as follows:

(1) a vice-president, who is today its actual head;
(2) 5 presidents of sections;
(3) 46 councillors of state in ordinary service;
(4) 12 councillors of state in extraordinary service;
(5) 49 *maîtres des requêtes*;
(6) 38 first-class auditors; and
(7) 10 second-class auditors.

If one adds up the list, he will see that the Council of State contains some 161 members. The first reaction of the common lawyer to this figure will undoubtedly be one of surprise. One nurtured upon Anglo-American judicial traditions can picture a legislative body or a consultative assembly of over 150 members. He can, however, only with the greatest difficulty visualize a court of such dimensions. The entire federal judiciary in the United States (district courts, courts of appeal and Supreme Court), he will say, is composed of some 281 judges. Is it then to be wondered if he looks with astonishment at one French court which has 161 judges?

A closer examination of the distribution of its members within the French tribunal and of the manner in which that body performs its functions will, it is believed, show that the size of the Council of State is not in actual fact disproportionate. In the first place, the common lawyer, who is told that the Council of State is the supreme administrative court in the French system and then goes on to compare that tribunal to the highest court in his own system, is proceeding under a basic misconception of the nature of the French tribunal. The Council of State is not only the ultimate appellate body in the French system of administrative law; it is also, as we shall see in more detail in discussing its competence, the most important jurisdiction of first instance. The proper an-

[18] As amended by a law of February 11th, 1950.
[19] Constitution of 1946, article 30.
[20] *Loc. cit. supra* footnote 17.

alogy is thus not between the Council of State and a body like the United States Supreme Court, but rather between it and a combination of the Federal Supreme Court and district courts in one large tribunal, endowed with both original and appellate jurisdiction.

In addition, in considering the size of the French body, one should constantly bear in mind that the Council of State is not exclusively, or even mainly, a court. The common lawyer who examines the Council will naturally be interested primarily in its rôle as a judicial tribunal. Looked at as a whole, however, its judicial functions constitute but a part of its work. In addition to its work as a court, the Council is also the chief advisory body of the administration. "The main business of the Conseil as a whole is to tender advice to the Government and to the Executive." [21] As a consultative council, it is quite proper that its membership should be larger than might be considered necessary for a purely judicial organ.

The common lawyer will doubtless question the judicial efficacy of a court set up to control the legality of administrative action which is also the consultative collaborator of the administration. Such a question would have been wholly justified at the time of the creation of the Council of State. Since that time, as we have seen,[22] there has been a separation of administrative and judicial functions within the Council, so that its work as a court is carried on independently of its work as a consultative council. The actual mechanics of the separation will be discussed more fully in our analysis of the internal organization of the Council.

Appointment. The composition of the Council of State, at least so far as bare numbers are concerned, has already been given. From it one can see that the Council consists of three types of members: the councillors of state, the *maîtres des requêtes* and the auditors. These three positions correspond to three *échelons* within the Council, the councillors being at the highest part of the scale and the auditors at the lowest.

It should, perhaps, be pointed out that the name which is given to those members who are at the bottom of the hierarchy within the Council of State — that is, the auditors — is today wholly a misnomer. Originally, it is true, they were only "listeners", so far as the work of the Council was concerned. The auditors then were younger members of the administration assigned to aid the members of the Council in their duties, though without an

[21] Hamson, *supra* footnote 15.

[22] Schwartz, A Common Lawyer Looks at the Droit Administratif (1951), 29 Can. Bar Rev. 121, at p. 133.

effective voice in the work of the Council. That stage has long since been passed. Today, the auditors are full members of the Council of State, with an equal vote in the deliberations in which they take part, but the name of "listener" has persisted.

Since the great majority of its members start their careers in the Council of State as second-class auditors — that is, at the lowest level of the hierarchy within the Council — the manner by which the auditors are appointed is of cardinal significance. Until 1946, the second-class auditors were chosen directly by competitive examination emphasizing legal knowledge, open to those between 21 and 26 years of age. Since that time, direct recruitment by open examination has been done away with. Instead, the auditors are chosen among the graduates of the National School of Administration. This institution was set up by the French Government in October 1945 as an administrative laboratory, as it were, to prepare those destined for careers at the upper level of the French administration. Entry in the School is by competitive examination held every year. There are two types of examinations. The first is open to university graduates less than 26 years old; the second is intended for those who have already had at least four years of service in the administration and are between 24 and 30 years of age. There is thus a conscious effort to ensure that a substantial proportion of those admitted to the School will have had previous administrative experience. The examinations themselves are both written and oral. The outsider is struck by their general character — they are intended to test the general culture of candidates, as well as their ability to analyse and synthesize, rather than their detailed technical competence in specific fields of administration. The course of study at the School is of three years duration and includes practical training in various administrative agencies as well as the more normal type of academic study. While at the School, students are, in effect, in the position of civil servants, receiving a fixed salary from the State.

Once each year, the French Government fixes the number of positions open to graduating students in the careers for which the National School of Administration prepares. These include careers in the various branches of the domestic and foreign civil service, as well as that of second-class auditor in the Council of State. The career to which a specific graduating student is assigned depends upon his own choice, if a sufficient number of positions are available. If more choose a particular career than there are situations available, the positions are assigned on the basis of the students' rank in the graduating class. The status and prestige of the Coun-

cil of State ensures that it will obtain the best graduates of the School for the positions of second-class auditor that may happen to be open in a particular year.

Appointment to the lowest *échelon* within the Council of State is thus the end result of, first, open competitive examination and, then, of closed competitive selection over a three-year period of study. Neither the examination nor the selection is part of a process intended only, or even primarily, to secure members for the Council of State; their main function is to obtain qualified young people destined for the upper levels of the active administration, with only a portion of those so obtained being allotted to the Council, instead of the administration.

To one trained in common-law traditions, the method of appointment just outlined, which, it should be emphasized, is now the method by which the great majority of its members originally come to the Council of State, seems to be a singular way of choosing the members of a tribunal entrusted with the task of controlling the legality of administrative action. The way in which the second-class auditors are chosen smacks more of the manner in which civil servants, rather than judges, are appointed in the Anglo-American world. Indeed, to the common lawyer, the very notion of choice by competitive examination, followed by a period of schooling at government expense, seems wholly out of place in the recruitment of members of a judicial tribunal. Especially does this seem to be true where the examination and the schooling are part and parcel of an over-all scheme for securing competent candidates for careers in the active administration.

Once again, it must be emphasized that, even today, the Council of State is not wholly a court. As we shall see, it contains important administrative sections, which serve as a consultative organ of the administration, as well as the judicial section, which controls the legality of administrative action. Clearly, the method of appointment outlined is appropriate for the securing of those who are to participate in the work of the administrative sections of the Council. Yet, even if we consider only those who are to perform the purely judicial tasks entrusted to the judicial section, the manner of appointment is not unwonted, by French standards.

In France, the judiciary as a whole is considered more or less as a branch of the civil service.[23] The judges of the law courts themselves are recruited at an early age by means of open competitive examinations. Those appointed start at the lowest *échelon*

[23] Thus, according to Brethe de la Gressaye and Laborde-Lacoste, Introduction Générale à l'Etude du Droit (1947) 428, "Les magistrats . . . sont des fonctionnaires de l'Etat".

of the magistrature, and, in recent years indeed, there has even been advocated the idea of a further period of schooling for the fledgling judge before he actually begins his judicial carreer — something not unlike the schooling received in the National School of Administration by future auditors of the Council of State.

It may thus be seen that the way in which the lowest level of administrative judges in the Council of State is appointed corresponds roughly with the general manner by which the judiciary is recruited in the French system. Indeed, in so far as there is any difference in the manner of appointment, to the French administrative lawyer at least, the advantages are with the system of recruitment used for the Council of State. He feels that it is not undesirable that those destined for careers as administrative judges should acquire some knowledge of the administration before assuming their judicial functions. He looks at the system of appointment solely by competitive examination on legal matters which prevailed before 1946 and sees as its great deficiency the fact that the auditors chosen by the examination arrived at the Council of State with purely legal training and inclinations, without any practical experience of administration. Today, he says, with appointment from the graduates of the National School of Administration, this defect is corrected.[24]

The solution which the French administrative lawyer has adopted for securing appointments to his principal administrative court has found an echo in the writings of Anglo-Americans who have urged the creation of administrative courts in the common-law world. What is needed, in their view, in so far as the personnel of these proposed tribunals is concerned, is "a combination of legal training with special experience or training in the particular field in which the jurisdiction is to be exercised. . . . The administrative judiciary of the future should consist of youngish men who have had a training in law . . . , and who have also a knowledge of the social sciences such as economics, government, public health, business administration, or educational science."[25]

The French method of appointment to the administrative judiciary carries this concept of an administrative judge who is both an expert lawyer and administrator even further than these Anglo-American jurists have advocated. That there are advantages in securing review of administrative action by judges who are specialists in administration as well as law cannot be denied. What seemingly simpler way is there of solving the problem of control

[24] Waline, Traité Elémentaire de Droit Administratif (6th ed., 1951) 73.
[25] Robson, *op. cit. supra* footnote 8, at p. 479. See also Sieghart, *op. cit. supra* footnote 9, at p. 317.

of the expert administrator than by having the control exercised by an equally expert judge?

It is one thing, however, to understand the French method of appointment in its own setting and another to advocate its use in any administrative courts that might be set up in the common-law world. The French method of appointment to the administrative judiciary is not unreasonable when one bears in mind the normal manner of judicial appointment in France. Even so, one may have some doubts about the merits of a system in which one destined to perform the rôle of a controller of administration receives the same administrative schooling as the prospective administrator. Though there may be no conscious effect, there is always the danger of some bias in favour of administration forming in the mind of the future member of the Council of State. The expertness of the administrative judge may thus be bought at too high a price. It is, of course, still too early to say whether the danger adverted to is a purely theoretical one, for the system of appointment of second-class auditors in the Council of State through the National School of Administration has been in effect only since the latter part of 1937, when the first graduating class left the School.

Promotion. Once appointed to the Council of State, the second-class auditor can look forward to a life-time career within that body, after he has successfully weathered a two-year probationary period. During the probationary period, he may be transferred to some other public function if his "abilities do not appear to meet the demands of his duties with the Council". After the two year period has expired, the auditor can expect with confidence promotion in due course to the higher ranks of the Council — to the position of first-class auditor, then of *maître des requêtes*, and ultimately to that of councillor of state[26] itself.

To avoid that jockeying for promotion which mars many French institutions, the Council of State has adopted an absolute rule of promotion by seniority alone.[27] To the common lawyer, accustomed to Anglo-American concepts of competitive stimulus, such a rigid rule of promotion, with no attention at all paid to individual merit, seems to be one which is least calculated to ensure the advancement of those best suited for the higher positions in the Council. In addition, it would seem wholly to lose sight of the need for incentive to ensure the proper performance of their duties by the junior members of the Council.

[26] The councillors of state must be at least 40 years of age when appointed.

[27] Hamson, Rule of Law in France: II. Form and Function of the Conseil d'Etat, The Times (London), Feb. 21st, 1951, p. 5.

If, however, the method of promotion that prevails in the Council of State is judged solely in comparison with that in other French governmental institutions, its advantages appear to outweigh these defects. The danger of purely political promotions is one that hangs heavily over the public servant in France and he has had to perform his duties with an eye toward the wishes of those in the government responsible for advancement. This has even been true of the French judiciary, for, though French judges hold office for life, their advancement has been wholly in the hands of the Minister of Justice, a political official.[28] The importance of this can be realized if one does not look at the French judiciary with common-law conceptions of judicial office. Judicial office in France is a life-time career. The French judge starts at an early age at the bottom of the judicial ladder and his constant hope is of promotion to a more desirable position. It is not surprising, therefore, that efforts aimed at securing promotion have been as characteristic of the French judiciary as they have been of other branches of French public life.

The rule of promotion by seniority alone was adopted by the Council of State to avoid this sort of thing. The choice before the Council was less between promotion by merit and promotion by seniority than between a rule leaving promotion to the discretion of the government, in which case political considerations might often be the determinative factor, and an inflexible rule of advancement, which would eliminate the danger of political promotions. Looked at in this light, the rule of promotion adopted by the Council of State does not seem as unreasonable as it at first appears. At least, the newly appointed second-class auditor can devote all his effort to his duties, without having to curry favour with those responsible for his promotion.

"Outside" Members. In addition to the members of the Council of State who begin their careers as second-class auditors and progress up the hierarchy within that body by the rule of promotion according to seniority, there are within the two upper *échelons* of the Council a certain number of members appointed from the outside. Thus, it is only three-quarters of the *maîtres des requêtes* who must be chosen from among the first-class auditors. The other quarter may be chosen from employees of the active administration who are more than thirty years of age and have had at least

[28] An attempt to remedy this situation was made by the provisions of articles 83 and 84 of the Constitution of 1946. Under it, promotions within the judiciary are made upon the recommendation of the Superior Council of the Judiciary, a body composed of members chosen from the legislative, executive and judicial branches of the government, and the legal profession.

ten years of public service. So far as the councillors of state are concerned, the proportion of those who may be chosen from outside the Council is even greater. Only two-thirds of the councillors need be appointed from among the *maîtres des requêtes;* the other third is chosen at the discretion of the government. In practice, the choice of these councillors from the "outside" is among distinguished civil servants. These "outside" members, once appointed, become ordinary members of the Council and participate on terms of full equality in its work.

In addition to the "outside" members just discussed, there are also attached to the Council twelve councillors of state in extraordinary service. These are chosen from among "qualified persons in different domains of national activity". They, too, are normally selected from the upper levels of the civil service, though others, such as distinguished law professors, may also be appointed. These councillors in extraordinary service are not in the position of ordinary members of the Council. They are appointed for terms of only one year (though their terms are renewable) and they may participate only in the work of the administrative sections of the Council, not in that of its judicial section.

To the French administrative lawyer, the fact that not all of the appointments to the two higher *échelons* of the Council are made from within that body gives it a great advantage over the French law courts. Like most common lawyers who have looked at the French judicial system, he feels that one of its great defects is the failure to provide for the infusion of "outside" blood into the upper ranks of the French judiciary. Vacancies in the superior courts in France are filled from the lower levels of the judiciary, from among men who have made the judicial career a life-time one. French students have often pointed to the superiority of the common-law system of judicial appointment, under which it is common for high judicial office to be bestowed upon those who have distinguished themselves other than by service at the lower levels of the judiciary. In so far as the Council of State is concerned, the appointment of some outsiders to its higher ranks constitutes a step in the direction of the Anglo-American system of recruiting judges, probably as large a step as is possible in France. The common lawyer may regret that, in practice, the choice of "outside" members of the Council is limited to those in the active administration itself. Still, it is difficult to see how it could be otherwise in France. French tradition knows nothing like the elevation to the bench of the leading members of the bar, which has constituted the chief source of supply for the common-law judiciary.

Tenure. The common lawyer rightly looks upon security of tenure as one of the cardinal safeguards to ensure that judicial functions will be properly performed. "It is quite evident", the United States Supreme Court has asserted, "that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[29] It is only when tenure during good behaviour became the accepted practice that the independence of the judiciary in the common-law world was effectively secured.

The rule of irremovability from office is expressly stated to be the principle that governs the tenure of the judges of the French law courts. Security in office, though provided for only in the statute-law of the Third Republic, has now, indeed, attained the status of a constitutional principle, with the inclusion of an express provision for irremovability in the Constitution of 1946.[30] One will, however, look in vain in both the French statute-book and organic instrument for a similar provision with regard to the tenure of members of the Council of State. All he will find is a statement in the ordinance which governs the Council's organization that councillors of state can be removed from office only by a decree of the French Cabinet, rendered upon the initiative of the Minister of Justice. So far as the other members of the Council — that is, the *maîtres des requêtes* and auditors — are concerned, a removal power is given to the vice-president of the Council, acting upon consultation with its section presidents.[31]

It may thus be seen that the principle of security of tenure is not provided for in the French legal texts for members of the Council of State. This appears at first glance to be a most unfortunate omission, especially in a country where the *lex scripta* is of such significance. Yet, in this respect, as in so many other aspects of the *droit administratif*, the legal texts do not tell the whole story. Though "it is annoying in principle that the members of the Council of State are not irremovable, because of their exercise of judicial functions, in practice this has never presented any disadvantages".[32] The right to remove members of the Council has not been exercised for nearly a century and its exercise today would be almost unthinkable. Even "if, according to the letter of the law, members of the Council may be removed from office by the government, in actual practice, their situation is as secure as that of the French or English judiciary. . . . French public opin-

[29] *Humphrey's Executor* v. *United States* (1935), 295 U.S. 602.
[30] Article 84.
[31] Ordinance of July 31st, 1945, article 17.
[32] Waline, *op. cit. supra* footnote 24, at p. 74.

ion today would not tolerate either the removal of a councillor of state for political reasons or the exertion of pressure upon him to obtain a decision favorable to the administration."[33] Security of tenure for members of the Council of State has thus attained the status of a constitutional convention in France — a status which the common lawyer can readily appreciate from the constitutional experience of his own system. Constitutional practice, if not the letter of the law, ensures to members of the Council their tenure during good behaviour until the retiring age — which has been fixed at seventy — free from any subservience to the executive.[34]

Presidency. Its vice-president is today the actual head of the Council of State. It is true that, according to the ordinance of 1945 which prescribes its composition, the presidency of the Council is legally vested in the Prime Minister of the French Republic and, in his absence, in the Minister of Justice. In practice, however, this right to preside over the Council has never been exercised by the Prime Minister, and, so far as the Minister of Justice is concerned, the custom has developed that each newly-appointed Minister pay a visit to the Council and preside over a purely formal session. Aside from such state occasions, the Council is effectively headed by its vice-president, although, in a body of such size, it is only natural that much of the detailed leadership should come from the presidents of the sections, whose work will shortly be discussed. Both the vice-president and the section presidents are chosen from the senior members of the Council. In their case, the rigid rule of promotion by seniority does not apply. They are appointed at the discretion of the government, though normally upon the advice of the senior members of the Council.

Administrative Sections. In addition to its functions as an administrative court, the Council of State has important legislative and administrative functions. In this respect, its rôle is primarily that of a consultative organ. Thus, the government asks its advice on drafts of bills which it intends to submit to the legislature. It must also be consulted before certain important administrative regulations are promulgated.[35] In addition, statutes often provide

[33] Garner, La Conception Anglo-Américaine du Droit Administratif, in Mélanges Maurice Hauriou (1929) 355. Writing in 1929, Professor Garner was able to assert, *ibid.*, that he had received "the assurance, from distinguished members of the Council of State, that there is no basis for the Anglo-American opinion that the councillors of state are not entirely independent in the exercise of their judicial functions"— an assurance which has recently been repeated to the present writer by equally distinguished members of the Council.

[34] Hamson, *supra* footnote 15.

[35] Another advisory rôle, which is potentially of great significance, is that conferred upon the Council by the ordinance of 1945, authorizing it to call

that the Council must be consulted by the administration before certain decisions can be made. Such consultations often occur, indeed, even though there is no statutory requirement that the advice of the Council be sought.[36]

Within the Council itself, there is a separation of functions to ensure the insulation of those engaged in the work of the judicial section from those engaged in the consultative tasks of the Council. The consultative work of the Council is actually entrusted to the four administrative sections into which the administrative portion of the Council is divided. These are known as the sections of the interior, finances, public works and social problems. Each of them is concerned with a certain number of related government departments and deals with matters involving them. They are composed of a president and six councillors of state and, in addition, contain a certain number of *maîtres des requêtes* and auditors. In so far as legislative texts and the important administrative regulations which must be submitted for the advice of the Council are concerned, the administrative sections do only preparatory work. The actual advice in such cases is given by the general assembly of the Council as a whole, which meets every week.

In the Council of State conceived of as the consultative organ of the administration, the French have very neatly solved a problem which has greatly troubled the common-law world. The common lawyer, too, has often sought a means by which competent disinterested advice could be made available to the administration before it undertakes particular action. In the field of delegated legislation, Anglo-American efforts in this direction have been along the lines of setting up *ad hoc* or permanent advisory bodies attached to particular administrative agencies. But the question of the constitution of such advisory bodies has always been unresolved. The general tendency has been to try to make them representative of the interests to be affected by the administrative regulations, which results, of course, in the giving of anything but impartial advice.[37] A body such as the French Council of State, composed of specialists in administration and administrative law, wholly independent of the active administration, appears to be ideally suited to perform this type of consultative task.

The existence of the Council of State as a central advisory organ has also prevented French jurists from feeling the need for

the attention of the government to those reforms, legislative or administrative, which appear to the Council, acting upon its own initiative, to be desirable — a rôle which the Council first exercised during 1949.

[36] During 1946-47, to take a recent example, the Council was consulted on some 2,691 occasions by the administration.

[37] See Schwartz, American Administrative Law (1950) 40.

executive consultation of the judiciary, of the type that has at times been advocated in the common-law world. That the need for expert judicial advice has often been felt by Anglo-American administrators is shown by the attempts they have made to introduce advisory opinion procedures by which the validity of administrative action could be tested at the outset, the best known of which is that which was contained in the English Rating and Valuation Bill, 1928.[38] Such attempts to use the advisory opinion technique in the field of administrative law have been consistently resisted by the common lawyer, who has felt that for the courts to give advice to the executive is inconsistent with common-law notions of the judicial function. Yet the problem with which the proponents of administrative consultation of the judiciary seek to deal — namely, that of enabling the administration to act without undue fear of later judicial invalidation — still remains. The existence of the administrative sections of the Council of State helps to avoid a similar difficulty for the French administrator.

Judicial Section. The administrative lawyer who examines the organization and functioning of the Council of State will, of necessity, devote most of his attention to its judicial section. To it is entrusted the task of dealing with litigation that arises between the public and the administration and it is the judicial section alone, rather than the Council as a whole, that can properly be designated as an administrative court.

Although there is only the one judicial section in the Council, as compared with the four administrative sections, to it is assigned over half of the Council's ordinary personnel. With so many members, the judicial section is too unwieldy a body to function as one judicial tribunal. In fact, it is divided into a number of smaller units, each of which constitutes a separate court, with full powers of decision, in the cases that come before it. These units within the judicial section are known as sub-sections. There are eight of them, composed of a president and two other councillors of state and a certain number out of the 28 auditors and 30 *maîtres des requêtes* who are assigned to the judicial section. These sub-sections are designated according to number. The first four are preparatory organs; they study and prepare the records until particular cases are ready for judgment. Such cases are then decided by two of these sub-sections combined. The last four sub-sections have the power to decide cases by themselves, and are given jurisdiction in a number of less important, though numerous, types of cases.

[38] See Schwartz, Law and the Executive in Britain (1949) 202-04.

The normal organ of judgment in the judicial section is thus one of the last four sub-sections or two of the first four, combined. They deal with the more or less ordinary cases that may arise. When a case of greater difficulty comes up — if, for example, the question to be decided is a novel one or the amount involved in the litigation is very great—it is reserved for the decision of the judicial section as such, which, for the purposes of decision, includes its president, the eight presidents of the sub-sections, and the two councillors of the sub-section where the case first came up. Finally, if a case is considered of even greater importance and difficulty, it is decided by what is known as the plenary assembly of the judicial section. This consists of the vice-president of the Council of State, the president of the judicial section, the presidents of its sub-sections, and four councillors elected from the administrative sections by their colleagues. The decisions of all these organs of judgment, it should be pointed out, have the same juridical authority; all are considered equally as judgments of the Council of State.

Within the judicial section of the Council, the work of deciding cases is carried on in accordance with a defined division of labour between the various levels of the hierarchy within the Council. The task of the auditors and *maîtres des requêtes* is essentially that of preparing the record for decision in the cases that arise; that of the councillors of state is wholly one of deciding. This does not mean that the lower ranks of the judicial section do not play a part in the crucial stages of the decision process. They have the same voice as that of the councillors in the final decision, and the rule of an equal vote for each member, regardless of his age or position in the hierarchy, is indeed that which governs all the work of the Council. "All are equals within the house and the interchange between the most senior and the most junior is truly remarkable."[39]

The need for a division of labour among the members of the judicial section arises from the procedure which is followed by it. The procedure of a French administrative court, such as the Council of State, is totally unlike that to which the common lawyer is accustomed. To him, judicial procedure is synonymous with adversary procedure. The mind of the judge is informed at an adversary hearing, largely directed by the advocates of the parties, and it is only within the narrowest limits that the judge may direct his mind to materials other than those presented by the parties.

[39] Hamson, *supra* footnote 27.

Common-law procedural concepts are, however, wholly out of place in the French administrative courts. Largely for historical reasons, their procedure has always been inquisitorial, rather than adversary, in nature, much as has been that of the criminal courts in civil-law countries. Under the inquisitorial type, the procedure is directed by the judge, not by the parties. The judge's rôle is not solely that of an umpire; he has a duty actively to inquire into the facts and legal issues upon his own motion and is not limited to materials presented by the parties. This necessitates an investigatory stage in each case in which the facts and the law are inquired into by the court. In the judicial section of the Council of State, this investigatory work is entrusted to the auditors and, to a lesser extent, to the *maîtres des requêtes*. When a complaint is received by the judicial section, it is allocated to an auditor or *maître des requêtes*, whose task it is to examine the record as it is developed by the parties and to work up a tentative opinion. If he is not sure upon any matter, he may, and indeed should, seek to clarify it by his own independent investigation. It is only after this preparatory stage, in which the affair is actively investigated by one of its members, that it is actually submitted for a decision by the relevant organ of the judicial section.

The need for a division of labour within the judicial section, which arises from the use of the inquisitorial type of procedure, has been met most neatly by the partition of work among the hierarchy that has existed in the Council of State since its origin. The existence of such a hierarchy is perhaps the most notable difference between the organization of the French tribunal and that of courts in the common-law world. It enables the judicial section of the Council of State to carry on its work through a co-operation between very different age groups, which is most striking to an outside observer. The judicial section is "the only Supreme Court which comprises persons varying in age between 25 and 70; the balance in fact achieved is admirable".[40] It is this constant contact and collaboration between youth and age which helps to account for the success of the Council in moulding its case-law to meet changing conditions, in a manner that would do credit to the best common-law courts, in a country where changes in the law are more normally the work of the legislature than of the courts.

Extent of Separation of Functions. To the common lawyer, a body such as the Council of State, which is both the consultative organ of the administration and the tribunal which decides cases

[40] *Ibid.*

arising between the administration and private individuals, can function properly, if at all, only if there is a sharp differentiation between its administrative and judicial functions. The essentials of such separation of functions do, in fact, exist within the Council of State in its internal division into administrative and judicial sections. As has been shown, the former discharge the duties of the Council acting as a consultative organ; it is only the judicial section that performs the rôle of an administrative court.

It is, however, a mistake to think of the Council of State as divided into wholly watertight administrative and judicial compartments. In the first place, it should not be forgotten that both the administrative and judicial sections still form a part of the one corporate entity. "The Conseil calls itself *la maison* and has a strong corporate spirit."[41] All its sections are housed in the same building and there is inevitably much personal contact between the personnel of the various sections. It is thus not unusual for the members of the judicial section to discuss the cases pending before them with their colleagues in the administrative sections. To a common lawyer, it is true, such *ex parte* discussions by an administrative judge with those who are engaged in advising the administration could greatly compromise the possibilities of a fair trial. In a system where the inquisitorial type of procedure prevails, on the contrary, such contacts by the judge are not looked upon with disfavour. *Ex parte* investigation by the judge is an essential element of inquisitorial procedure.

Another matter which might cause some uneasiness to an Anglo-American is the possibility of interchange of personnel between the administrative and judicial sections of the Council of State. A member of the Council need not remain permanently in one or the other section. In recent years, a tendency has developed for members to specialize in administrative or judicial tasks. But the possibility of a change of functions still exists, and is normally granted when requested by a member. If the transfer is from an administrative to the judicial section, efforts are made to minimize the inconveniences involved. Thus, if the legality of particular administrative action upon which the member concerned has helped to give advice while on an administrative section is challenged after he has been transferred to the judicial section, the case will, if possible, not be assigned for decision to the sub-section of which he is a part.

So far as the councillors of state themselves are concerned, there is a direct interchange between the administrative and

[41] *Ibid.*

judicial sections when matters are dealt with by the plenary assembly of the judicial section and the general assembly of the Council of State as a whole. The plenary assembly of the judicial section, as we have seen, is that organ of judgment which disposes of the most delicate cases that arise. The councillors elected from the four administrative sections participate in the work of the plenary assembly, even though particular cases may deal with the legality of administrative action upon which the administrative sections may previously have been consulted. The general assembly of the whole Council gives the advice of that body on proposed bills and certain important administrative regulations. It is composed of all the councillors of state, and the councillors of the judicial section can, and do, participate in its work. No difficulty arises from this body's consideration of proposed statutes, for such legislative texts cannot be challenged before the Council of State. The administrative regulations on which the advice of the general assembly is given are quite another matter. Their legality can be questioned before the judicial section. There is, however, no provision for the recusation of councillors who had participated in the work of the general assembly which considered particular challenged regulations.

The common lawyer might find it difficult to see how one who had previously given advice on the subject matter of litigation can later approach the litigation with that "cold neutrality of an impartial judge" of which Burke speaks. It is true that, even in the Anglo-American world, mere prejudgment of a case is generally not enough to disqualify a judge.[42] But that is quite another thing from saying that the judicial function can properly be performed where the judge may have previously acted in a consultative capacity for one of the parties.

The fact that the separation between the administrative and the judicial sections of the Council of State is not as complete as the common lawyer might desire does not, however, mean that the judicial section is not acting as a court in controlling the legality of administrative action. The important thing is the insulation of the administrative judiciary from the active administration and this has been achieved without any question in the Council of State. It must be remembered that full judicial guaranties of security of tenure and independence of the administration are as much provided for with regard to members of the administrative sections of the Council as they are for members

[42] See Schwartz, Disqualification for Bias in the Federal District Courts (1950), 11 U. of Pitts. L. Rev. 415.

of the judicial section. French students of the Council insist that its members are in no way bound by their vote in a matter before the general assembly or the administrative sections if the matter later comes up while they are participating in the work of the judicial section.[43] In essence, what is involved here is a case of prejudgment by the administrative judge; one who has given advice on particular administrative action is bound to be predisposed in favour of the validity of such action, even though he be wholly independent of the administration. The possibility of such prejudgment is much greater in the Council of State, because of the relations between its administrative and judicial sections, than would be possible in the Anglo-American judicial process. Yet this alone does not destroy the judicial character of the French tribunal, much as the common lawyer might prefer a complete dichotomy between the consultative and judicial organs within the Council.

To the French administrative lawyer, indeed, the fact that there is some participation by members of the administrative and judicial sections of the Council of State in each other's work constitutes one of the great virtues of that body. It is this interchange between the sections which, in his view, helps to account for the expert character of the Council that has enabled it so successfully to perform its functions. As stated by perhaps the greatest of modern French administrative lawyers, the Council of State is "at the same time a court and a consultative body; if it were only a court, its members would acquire only the legal competence of the judge, but, as it is also a consultative body, its members, constantly involved (in the framing of advice) in the preparation of the business of the active administration, acquire and retain an adequate assortment of the competences of the expert".[44] In the French view, much more would be lost than gained by wholly depriving the administrative and judicial sections of the Council of State of the advantages of each other's *expertise*.

Jurisdiction. The key position of the Council of State in the *droit administratif* becomes evident when one examines the matters over which it has jurisdiction. In this respect, as in so many others, the French tribunal is different from those to which the common lawyer is accustomed. In the Anglo-American world, the courts

[43] For a similar view with regard to the members of Anglo-American administrative agencies, see *Franklin* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 396, at p. 398; *Federal Trade Commission* v. *Cement Institute* (1948), 333 U.S. 683.

[44] Hauriou, Précis de Droit Administratif (12th ed., 1933) 7.

are generally divided into tribunals of first instance and those of appeal. Although there may be some blending of the two types of jurisdiction in one common-law tribunal — for example, the United States Supreme Court may exercise original jurisdiction in a limited number of cases, in addition to its appellate functions — even in such cases the court concerned is still predominantly either an original or appellate tribunal.

The French Council of State, on the other hand, is neither exclusively, nor even primarily, a court of first instance or a court of appeal. It is entrusted with both original and appellate jurisdiction and, in both respects, its jurisdiction is by far the most important in the French system of administrative law.

The original jurisdiction of the Council of State dates from an important decision of 1889[45] in which the Council laid down the principle that it was henceforth the tribunal of general jurisdiction (*juge de droit commun*) in the field of administrative law. This meant that the Council was competent in every administrative-law case, except where jurisdiction was expressly conferred upon some other administrative tribunal. The Council is thus the court of first instance in the *droit administratif* in every case where a statute has not provided for submission to some other tribunal. In such cases, it should be noted, the decision of the Council of State is final, for there is no appellate tribunal above it in the French system.

The original jurisdiction which the Council of State has assumed for itself, much as once did the courts at Westminster in the common-law world, is of basic importance in the French system. It is a jurisdiction which is limited only by the boundaries of the *droit administratif* and may hence comprehend every dispute that arises between the citizen and the administration. The French tribunal has made widespread use of its original jurisdiction. Proceeding upon the assumption that for every administrative act which injures a citizen unduly there has to be a remedy, it has in effect made the *droit administratif* coterminous with the activities of the administration. The result has been a review of administrative action in the French system on a far wider scale of availability than exists in the Anglo-American world. Whether or not the citizen is provided with a remedy by statute in his controversy with the administration, the Council of State will step in. And statutory attempts to provide for administrative finality

[45] Cadot, December 13th, 1889. The decisions of the Council of State are customarily cited by the name of the plaintiff and the date. They are reported in chronological order in the Recueil des Arrêts du Conseil d'Etat Statuant au Contentieux, often called the Recueil Lebon, after its founder.

have been treated as ineffective to override the basic principle that the Council of State may decide any dispute in the field of administrative law.

It is only where an express statutory provision gives the citizen an adequate remedy in some other tribunal—and the Council has insisted that the remedy be an effective one—that the original jurisdiction of the Council of State is barred. Yet, even here, the Council is vested with appellate jurisdiction. The decision of every other French administrative tribunal is subject to appeal to the Council of State, either full appeal on the law and facts (*appel*) or appeal more or less limited to points of law (*cassation*). This is true even though there is a statutory provision that the decision of the other tribunal is to be final.

This summary statement of its jurisdiction should serve to show the pre-eminent position of the Council of State in the *droit administratif*. In the French system, "every administrative decision is subject to challenge before a judge. The judge is either the Council of State, acting as a court of first and last instance, or, if a statute has so provided, another administrative tribunal, subject to the appellate jurisdiction of the Council of State. Directly or indirectly, then, either on first instance or appeal, the Council of State has cognizance of every action brought against the administration, whose supreme controller it thus is." [46]

Prefecture Councils

Organization. The type of judicial system that is familiar to the common lawyer is one which has a number of tribunals of first instance at its base, with jurisdiction normally defined upon a territorial basis, and a supreme appellate tribunal at its summit. Our analysis of the Council of State has shown that the apex of the French administrative judicial system is unlike that to which the common lawyer is accustomed. In addition to its rôle as a supreme court, the Council of State is, as has been seen, vested with the general jurisdiction of first instance in the French system. Important original jurisdiction is, however, also conferred on a territorial basis upon the interdepartmental Prefecture Councils.

Ever since the Revolution, the unit of territorial administration in France has been the department. A law of 1800 set up within each department a Prefecture Council, with a limited jurisdiction in administrative-law cases. In their origins, these bodies were closely connected with the prefects, the heads of the active

[46] Odent, Cours de Contentieux Administratif (1949-50) 165.

administration in the departments. Yet, just as was the case with the Council of State, they were to evolve in the course of the nineteenth century into veritable judicial tribunals. The most important step in this direction was a decree of 1862 which imposed rules of judicial procedure upon the Prefecture Councils, including one requiring the holding of an oral public hearing before decision. The detailed rules of procedure for these Councils were laid down in a law of 1889. The procedure thus prescribed, which has not since been changed in its essentials, is basically similar to that which is followed by the Council of State. In 1926, the Prefecture Councils, with the exception of that for the department of the Seine, were abolished and replaced by 22 inter-departmental Prefecture Councils, whose jurisdiction extends over several contiguous departments.

These 22 Councils are each composed of a president and four councillors.[47] Before 1926, the presidency of the Prefecture Councils was vested in the prefects, and members of the prefects' staffs also participated in their work. Since that time, participation by members of the active administration has been done away with. There are now three classes of prefecture councillors. Councillors of the third class are chosen from among the graduates of the National School of Administration, much along the lines that have been discussed in connection with appointments to the Council of State. Second and first-class councillors are chosen from among the members of the class just below them, although, as is the case with the Council of State, a certain number of "outside" members — here, one quarter — may be appointed from the civil service. The presidents of the Prefecture Councils are appointed from among the first-class councillors, although here, too, a choice may be made among designated civil servants. Within the Prefecture Councils, there is a division of labour among the three classes of councillors not unlike that which prevails among the three *échelons* within the Council of State; the need for such division among the prefecture councillors is caused by the use of the inquisitorial type of precedure, similar to that which is employed by the Council of State.

Jurisdiction. The Prefecture Councils, unlike the Council of State, are competent solely in cases where express jurisdiction has been given to them by statute. They are wholly tribunals of first instance. Their decisions are never final: an appeal may be taken from them to the Council of State in every case, however small

[47] That for the department of the Seine consists of twelve councillors and a president.

the amount involved in the litigation may be. Furthermore, the jurisdiction of the Prefecture Councils is essentially a territorial one. They are competent only in cases that arise within the departments where they are located. It should be noted that the territorial jurisdiction of these tribunals does not depend, as it normally does in an Anglo-American court, upon domicile. It is not "determined by either the domicile of the plaintiff or the seat of the defending administrative agency, but by the place where the administrative operation which gave rise to the actual litigation was carried out. Thus any litigation in connection with public works has to be brought before that [Prefecture] Council in whose territory the actual work has been done."[48]

The jurisdiction of the Prefecture Councils, which, it should be recalled, is a competence specifically conferred by statute, extends over a number of administrative-law matters. It includes the cognizance of all cases connected with public works; direct taxes;[49] the sale of public property; elections to local assemblies; and the enforcement of health legislation applicable to business premises. In 1934, the competence of the Prefecture Councils was extended to include cases involving most of the acts — other than those growing out of rule-making activities — of local administrative agencies, as distinguished from those agencies which are connected with the central government. Under this, there has been a tendency for the Prefecture Councils to become the controllers of the legality of local administrative action, subject, of course, to the appellate supervision of the Council of State.

Other Administrative Tribunals

The outside observer who seeks to analyze the *droit administratif* will be concerned primarily with the Council of State and the interdepartmental Prefecture Councils. He should, however, realize that there are, in addition to them, a large number of other tribunals, all of which are subject to the appellate jurisdiction of the Council of State, which the French administrative lawyer considers a part of his administrative judicial system. Among these are the Administrative Tribunal of Alsace-Lorraine, which has roughly the competence of a Prefecture Council for that territory; the Colonial Councils, which have a general administrative-law jurisdiction in the overseas territories of the French Union; the Court of Accounts, which oversees the expenditure of public funds, by a

[48] Sieghart, *op. cit. supra* footnote 9, at p. 232.
[49] Most of the actual litigation before the Prefecture Councils involves taxes.

control analogous to that exercised by the Court of Exchequer in the early common-law system; the Superior Council of National Education, which decides appeals from decisions in the field of education; the Review Councils, set up under the compulsory military service laws; and the Assistance Commissions, which hear appeals in the field of national assistance.

This list is intended merely as illustrative and is by no means complete. In recent years, the French legislature has set up an ever-increasing munber of administrative tribunals to deal with cases arising out of specified administrative activities. There has been a growing tendency in France to remove the decision of cases arising between the administration and the public from the competence of the active administration and to vest it in independent tribunals. A similar tendency has existed in the common-law world, especially in Britain, where there has been a veritable mushrooming of such administrative tribunals since the last war. To the common lawyer, these tribunals do not come within the concept of a court. The French bodies, on the other hand, are treated as courts by the administrative lawyers in France, although they are similar in many ways to the British administrative tribunals. Such treatment is explained by the desire of the Council of State to hold these newly-created bodies to stricter procedural rules than are imposed upon the active administration in the French system. If they are found to come within the concept of an administrative court, they may then be required to follow the usual rules of judicial procedure.

Administrative Justice in Slow-Motion

Anglo-American jurists who have advocated the setting up of administrative courts in the common-law world have often pointed to the great delays involved in litigation before the ordinary courts as one of the main reasons for their proposals. Judicial justice, they say, is dispensed ever so slowly, though it may be dispensed exceedingly well. The vesting of administrative-law jurisdiction in specialized administrative courts would both relieve the workload of the law courts and enable the administrative-law cases themselves to be disposed of more speedily.

The experience of the French Council of State indicates, however, that the mere establishment of separate administrative courts will not, of itself, solve the problems involved in delay in the dispensation of justice. The administrative courts themselves may take as long as the law courts in deciding cases. This may happen either because of the inadequacies of the administrative tribunal

itself or, as is the case with the Council of State, because the number of cases brought before it is too large to be disposed of readily.

One looking through the reports of the decisions of the Council of State rendered during 1948 may chance upon the *Jacquin* case, decided upon appeal from the Prefecture Council on May 14th of that year. The decision of the Prefecture Council appealed from was handed down on May 6th, 1938, a mere ten years earlier, but that decision dealt with the consequences of an accident which occurred on July 14th, 1914, some 34 years before the decision of the Council of State. Nor did the Council of State in 1948 decide the case on the merits. It held only that the case did not involve an administrative-law question, and hence came within the competence of the French law courts rather than of the administrative courts. We are not told what is the ultimate outcome of this French version of *Jarndyce* v. *Jarndyce* — which is undoubtedly now winding its weary way in the French law courts — yet, clearly, as a commentator asserts, "no example is better calculated to show the slowness of the administrative courts".[50]

The *Jacquin* case is the horrible example; but the normal delay involved in decisions of the Council of State, though not nearly as extreme, is still considerable. According to one student, who analyzed a large number of cases, the average time for decision is three years after the filing of the complaint or petition of appeal.[51] This is a considerable delay, especially if one realizes that the granting of intermediate relief against the administration is the exceptional thing in the *droit administratif*. In the absence of power of temporary injunction or *supersedeas*, such as is exercised by Anglo-American courts, a three year lag in the granting of relief against the administration may, in effect, destroy the effectiveness of relief when it is obtained. As expressed by one observer, "justice that takes so long is no longer justice but a parody on it".[52]

Since 1947, the Council of State has published a year-book, entitled *Etudes et Documents*, which contains articles and other materials on various aspects of the Council's work. Included in these volumes are detailed statistics on the work of the judicial section, which enable the outside observer to obtain an over-all picture of its case-load during the past few years. It is this case-load, ever-increasing since the Liberation, that is primarily responsible for the delay in decision which has been noted. The fol-

[50] Waline, Note (1949) Revue du Droit Public 600, at p. 601.
[51] Liet-Veaux, La Justice Administrative au Ralenti, Recueil Dalloz, Chroniques (1948) 133.
[52] Gassie, La Réforme des Conseils de Préfecture (Thesis, 1947) 7.

lowing table, taken from the statistics published in the yearly *Etudes et Documents*, should serve to show this:

	Cases Filed	Cases Decided
1944-45	2,581	2,307
1945-46	6,893	2,782
1946-47	6,772	4,308
1947-48	7,201	4,219
1948-49	5,699	4,777

A consideration of this table indicates clearly the reason for the lag between the filing of complaints or appeals and the actual decision by the Council of State. And it indicates that the cause of the delay is not to be found in the inefficiency of the Council as a deciding organ. Quite the contrary! One who looks at the number of cases decided by the judicial section cannot help but be impressed by the amount of work performed by it. The decision of well over four thousand cases a year is made possible only by the great division of labour within the Council, which has already been discussed, and the extreme devotion of its members to their work. Indeed, as the table indicates, the Council has made an increasingly successful effort to catch up with its judicial business. But the ever-growing number of cases filed makes the Council feel as though it is working on a treadmill. As stated by the vice-president of the Council, "however great may be the devotion of my colleagues and the constant improvement in our methods of work, the number of cases decided remains very perceptibly below that of the new cases filed. The back-log has, it is true, increased less during 1949 than in previous years. But still it did increase and it is continuing to increase." [53]

It is impossible for any one tribunal, even one as well organized for its purpose as the Council of State, properly to dispose of the number of cases filed with the Council. That number, which has increased ten-fold in the past seventy years, is due primarily to the success of the Council as an administrative court. Its effectiveness in controlling the action of the administration and its willingness to intervene at the request of those adversely affected by administrative action have made the French citizen turn to it with far more frequency than the Anglo-American does to his courts in analogous cases. It is the effectiveness of the Council as the controller of administration which, paradoxically, has led to its present impaired efficiency, for it has led to the ever-

[53] Conseil d'Etat, Etudes et Documents (1950) 17. On August 1st, 1949, the Council of State had filed with it a back-log of 18,933 undecided cases.

increasing resort to the Council by the public, with a resultant case-load that is too heavy for any one tribunal. The Council is thus "in danger of being overwhelmed by its own success".[54]

The solution to this problem, in so far as the Council of State is concerned, is the devolution of its jurisdiction of first instance to other tribunals. In 1889, when the Council laid down the principle in the *Cadot* case[55] that it was the general jurisdiction of first instance in the *droit administratif*, the number of cases brought before it was only one-tenth of what it is today. A system with only one court of general first-instance jurisdiction could then be workable. As stated by a contemporary defender of the *Cadot* decision, "there was only one urban praetor in Rome for the whole empire".[56] Today, however, such an argument loses sight of the practical reality of congestion in the Council of State. With the tremendous increase in the number of administrative-law cases, "the maintaining of only one administrative court of general jurisdiction for all of France becomes an indefensible anomaly".[57]

A bill introduced in the French Parliament during 1950, with the approval of the Council of State, would transfer most of the original jurisdiction of the Council of State to the Prefecture Councils. According to the terms of the bill, the Prefecture Councils would, with some exceptions, become the tribunals of general first-instance jurisdiction (*juges de droit commun*) in the field of administrative law, though their decisions would still be subject to appeal to the Council of State. The eventual vote of this bill is a strong probability; but, in line with the way such matters normally proceed in the French legislature, its adoption will necessarily involve a certain amount of delay. If the proposal is enacted into law, the structure of the French administrative judicial system will be drastically altered. Original jurisdiction will then be conferred in most cases upon a number of tribunals of territorial competence located throughout the country, with appeals lying from their decisions to a central court. With such a symmetrical pyramid-like structure, the organization of the judicial system in the *droit administratif* would be of a type which is more familiar to the common lawyer than is the case with the present French system.

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[54] Hamson, *supra* footnote 27.
[55] *Supra* footnote 45.
[56] 2 Hauriou, La Jurisprudence Administrative de 1892 à 1929 (1929) 440.
[57] Waline, *op. cit. supra* footnote 24, at p. 80.