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Introduction

1.1 FRENCH ADMINISTRATIVE LAW IN BRITISH SCHOLARSHIP

French *droit administratif* has been a subject of fascination for British lawyers since the late nineteenth century. Although, on first reading, Dicey's *An Introduction to the Study of the Law of the Constitution*, first published in 1885, might appear to have rejected *droit administratif* as contrary to the British understanding of the 'rule of law',[1] John Allison has admirably demonstrated that Dicey's subsequent writing (often unpublished) reveals a detailed understanding of and admiration for the achievement of *droit administratif*.[2] In those writings, he explains that it is a misconception not to consider *droit administratif* as law.[3] He also explains how French administrative judges have become not just officials who judge cases, but almost equivalent to judges.[4] His particular concern remained that relations between the citizen and the state were governed by different principles to private law relations between citizens and that adjudication was not determined in the ordinary courts.[5] These were key tenets of the British conception of the rule of law which differed from the French and which excluded the existence of administrative law in England.

The published (and less subtle) views Dicey expressed reverberated for most of the following century. Later generations of scholars who sought to establish

[1] See A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, edited by J. W. F. Allison (Oxford: Oxford University Press, 2013), especially chapter 12.
[2] Ibid., 'Editor's Introduction' and J. W. F. Allison, *A Continental Distinction in the Common Law* (Oxford: Oxford University Press, 1996).
[3] See A. V. Dicey, *Comparative Constitutionalism*, edited by J. W. F. Allison (Oxford: Oxford University Press, 2013), p. 304.
[4] Ibid., Notes X ('English Misconceptions as to Droit Administratif') and XI ('The Evolution of Droit Administratif').
[5] Ibid., pp. 304–5.

administrative law as a subject used French *droit administratif* as a positive benchmark of what the common law could achieve. Port in 1929 was one of the first writers of a treatise on 'administrative law' in the UK.[6] Port described French administrative law, discussing the theories of Hauriou, Jèze and Duguit.[7] He then used French categories to describe American administrative law. Even if neither he nor the other main UK writer on administrative law at the time, Robson,[8] subscribed to Dicey's approach to administrative law, they retained his idea that France was the primary reference point for conceptual ideas, a point supported by the content of contemporary journal articles and by the contributions of Robson and Laski to the Donoughmore Committee.[9] This continued after the Second World War with the work particularly of Hamson in his Hamlyn lectures in 1954[10] and of J. D. B. Mitchell in Scotland.[11] But it would be fair to say that the apogee of French *droit administratif* as the benchmark of a developed administrative law was reached in 1956 when the Vice President of the Conseil d'Etat was invited to give evidence to the Franks inquiry into the control of ministers' powers. But that committee did not choose to recommend any features of the French model.[12] The American model, especially as it developed with the Administrative Law Procedure Act 1945, became too alluring for the common lawyer.[13] Nevertheless, the publication of a textbook on French administrative law by Neville Brown and Jack Garner provided the English-speaking lawyer with

6 F. J. Port, *Administrative Law* (London: Longman, Green & Company, 1929).

7 He cites Duguit's works translated in English: 'French Administrative Courts' (1914) *Political Science Quarterly* 390 ff., and *Law in the Modern State*, translated by F. and H. Laski (London: Allen and Unwin, 1921). He also cites J. Brissaud, *A History of French Public Law*, translated by J. W. Garner (London: John Murray, 1915).

8 W. A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, 1st ed. (London: Macmillan, 1928).

9 See A. Mestre, 'Droit administratif' (1929) 3 *C.L.J.* 355; Committee on Ministers' Powers, Cmd. 4060, London, 1932.

10 J. Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (London: Stevens, 1954).

11 'The State of Public Law in the U.K.' (1966) 15 *International and Comparative Law Quarterly* 133.

12 Report of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218;1957).

13 See already W. I. Jennings, W. A. Robson and E. C. S. Wade, 'Administrative Law and the Teaching of Public Law' (1938) *J. S. P. T. L.* 10 and B. Schwartz, *Law and the Executive in Britain* (New York: New York University Press, 1949) before the publication of the first major textbook, J. A. G. Griffith and H. Street, *Principles of Administrative Law* (London: Pitman, 1952). Also later authors such as P. P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Oxford University Press, 1990); I. Harden and N. Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (London: Hutchinson, 1988).

a good insight into *droit administratif* just as administrative law was beginning to take shape in Britain.[14]

The theme of the twentieth-century works on French *droit administratif* were both that France had a sophisticated and effective set of legal principles to review the exercise of power by the executive and that it was distinctively French in terms of its organisation and sources. No doubt this theme was encouraged by the talks and writings of members of the Conseil d'Etat and French academics. Indeed, that distinctiveness may well have been the reason why the American model was more attractive to the British common lawyers (apart from the linguistic accessibility of its judicial decisions and scholarly writings).

The theme of this book is different. In the long period since Hamson, Brown and Garner wrote their works, France has changed, and French administrative law has changed. The most important change has been the active participation of France in the European Union (EU) and in the Council of Europe with its European Convention on Human Rights. France helped to found the European Coal and Steel Community in 1951, and it ratified the Treaty of Rome founding the European Economic Community (EEC) in 1957, which was opposed by the Gaullists who came to power in 1958 and created the Fifth Republic. Arguably, France was not reconciled to the EEC until at least De Gaulle's abdication of power in 1969, if not until the election of Giscard d'Estaing as President in 1974. France did not ratify the European Convention of 1950 until 1974 and did not allow direct petition until 1981. But once France did ratify these treaties, the primacy given to treaties over national legislation under the Constitutions of the Fourth and Fifth Republics gave a strong impetus to the influence of these agreements on subsequent French domestic law, including administrative law.

The relationship between French administrative law and principles of EU or European Convention law has not always been easy. Two topics illustrate this point: the recognition of the supremacy of EU law over national law and the right to a fair trial as it affected long-established procedures in the administrative courts. These topics will be discussed in some depth in Sections 5 and 6 of this chapter.

[14] L. N. Brown and J. F. Garner (with the help of N. Questiaux), *French Administrative Law*, 1st ed. (London: Butterworths, 1967). The most recent edition of this work is L. N. Brown and J. Bell (with J.-L. Galabert), *French Administrative Law*, 5th ed. (Oxford: Oxford University Press, 1998).

1.2 WHAT IS '*DROIT ADMINISTRATIF*'?

In many ways, Dicey understood *droit administratif* very well. He wrote:

> Droit administratif, as it exists in France, is not the sum of the powers possessed, or of the functions discharged by the administration, it is rather the sum of the principles which govern the relationship between French citizens, as individuals, and the administration as the representative of the state.[15]

There are clearly two dimensions. On the one hand there is the internal dimension of administrative law as the principles which govern the division of tasks within the administration, whether this be civil service employment, or the power to delegate functions, or the supervision of the functions of specific administrations by a ministry or a prefect. On the other hand, there are the external relations of the administration towards citizens (or, as the French more correctly call them, 'the administered'). As Dicey rightly saw, the French believe that the relations between the citizen and the state should be governed by different principles from those governing relations between citizens. The state is acting in the public interest and so is given special powers to achieve that objective, whereas private citizens act in their own interest and have less justification for interfering with the interests of others.

So the distinctiveness of *droit administratif* does not lie in the distinctive character of the judges, their formation and careers (which will be seen in Chapter 3). Nor does it lie in the procedure which has been aligned increasingly to that in private law and in other European Convention countries (as will be seen in Chapter 4). Instead, the distinctiveness lies in the powers and responsibilities which attach to the state in its relationship with the citizen. The mission to fulfil the general interest (*l'intérêt général*, as the French put it) confers on the state extraordinary powers (*pouvoirs exorbitants*) which no citizen could exercise over another – for example, expropriating the property of an individual to build a new TGV line. Furthermore, unlike the private individual, the state has the authority to act without consent (*un pouvoir unilatéral*) – for example, to impose a curfew or to terminate a contract. On the other hand, the state has special responsibilities. The first is that it has to justify its actions in a way a private individual does not. The state has to show that its actions are authorised (the issue of *compétence*), that they will lead to a permitted objective, and that they are not excessive in the burdens they impose (absence of *mesure excessive*: see Chapter 7, Sections 1.5.3 and 1.5.4).

[15] Dicey, *Comparative Constitutionalism*, p. 304.

A private individual can buy a house on a whim and need not give reasons why they do not wish to continue negotiations (unless the conduct is in very bad faith). The state cannot act on a whim because that would be an abuse of power (*un détournement de pouvoir*). It has to act for lawful reasons and, these days, it has to provide those reasons to the person affected. As a result, distinctive rules apply to public procurement that do not apply to private procurement (see Chapter 9). Despite the emphasis of Dicey, the state is not subject to the same rules of contract as private individuals. Furthermore, the rules of competition that apply to private individuals are weaker. The private individual is required not to make agreements with others that distort competition and not to abuse a dominant position. The state is almost assumed to be occupying a dominant position and is strictly controlled in the way it chooses its contracting partner. As regards liability to private citizens, the Revolution recognised the principle of the equality of public burdens in art. 13 of the Declaration of the Rights of Man, and so where one citizen suffers an excessive detriment from a policy, then the state has to compensate them (see Chapter 8). This is different from a private individual who normally only has to pay compensation for a *wrongful* harm. The state also has to pay when it has done a wrong. But the fault of the public service extends to a failure to deliver the service which should be expected by the user – for example, the failure to provide lessons in particular subjects at school. This would be treated in England more as maladministration than fault. This is in addition to liability to compensate citizens for excessive detriments suffered as a result of (lawful) public policies. The distinction between public and private law is difficult to make in some instances (see Chapter 5), but the overarching idea that Dicey spotted is that the state is not just one subject of the law like any other subject of the law. In the French sense, the state under law (*l'Etat de droit* or *le Règne du droit*) means that the actions of the state are governed and controlled by law. But, unlike Dicey's conception of the rule of law, that does not mean that the state or its officials are subject to the same rules as the private individual. The scrutiny of whether an act is lawful is more stringent, and the rules of liability to compensate are more extensive.

1.3 THE SHAPING OF *DROIT ADMINISTRATIF*

As will be seen in Chapter 2, the general principles of *droit administratif* – the review of administrative decisions, liability in contract and extra-contractually, and administrative procedure were not codified at the same time as private and criminal law were in the Napoleonic period. As a result, *droit administratif* was largely the creation of the administrative judges, who were, for the first 150

years, just the members of the Conseil d'Etat. They shaped the subject not only through judgments, but also through the arguments of the *commissaire du gouvernement* (now called the *rapporteur public*) and through the textbooks and scholarly articles which individual members wrote extrajudicially. In that way, it was more like the common law in which case law, rather than statute, has set out major principles for judicial review of administrative action, contract and tort. In many ways, one of the high points of this process of developing administrative law occurred just after the Liberation in 1944. In the absence of binding legal statements of fundamental rights, the Conseil d'Etat developed a set of legally binding 'general principles of law' which bound the administration, even if they could not limit the sovereignty of the legislature, except by way of interpretation (see Chapter 2, Section 6.3). These principles consolidated the understandings of democratic liberal principles as developed in the Third Republic (1870–1940) and taken forward in the Fourth Republic (1946–58).

The full importance of the administrative judiciary and scholarly writers in shaping the French *droit administratif* will be explored in Chapter 2. But it is important to understand that contemporary French public law is shaped not only by the administrative judges and scholars. Since 1958, three sources of influence have emerged which are very significant in shaping the general principles and sometimes the rules that govern the relationship between the state and those it administers. The first is purely internal – the Constitution and the Conseil constitutionnel, which has emerged as a constitutional court. The second and third are shared with other European countries, but also have a direct influence on domestic administrative law through provisions within the 1958 Constitution – membership of the European Union and the ratification of the European Convention on Human Rights. Certainly, until after the second edition of Brown and Garner was published in 1973,[16] the Conseil d'Etat with its *droit administratif* was supreme in shaping public law in general and the law relating to the administration in particular. But since the 1970s, first the Conseil constitutionnel, then the Court of Justice of the European Union (CJEU) in Luxembourg and the Court of Human Rights in Strasbourg have exercised influence over the general principles of administrative law, and sometimes over its detail. We therefore need to be aware of these other factors which create the climate in which *droit administratif* now operates.

[16] *French Administrative Law*, 2nd ed. (London: Butterworths, 1973).

1.4 THE INFLUENCE OF FRENCH CONSTITUTIONAL LAW

In Chapter 2, we will look in more detail at the place of constitutional law among the sources of French law in general and of administrative law in particular. The Constitution of the Fifth Republic in 1958 did not set out any new constitutional principles relating to fundamental rights and did not create a constitutional court. It is quite clear that the provisions on fundamental rights mentioned in the Preamble to the 1958 Constitution were originally intended to be conventional, not legal. When asked specifically whether the provisions of the Preamble were to be of constitutional value, the *commissaire du gouvernement*, Janot, replied, 'Certainly not!' They were to be binding on the Government, but not on Parliament.[17] In other words, they would be legally enforceable on the Government by the administrative courts, but only politically enforceable on Parliament, a solution which some found unacceptable.[18] As art. 5 of the Constitution made clear, the President of the Republic, not the Conseil constitutionnel, was to be the guardian of the Constitution, much as had been the role of the President in the Third and Fourth Republics. On this view, the President is not amenable to legal sanction for his interpretations of the Constitution, but these therefore fall into the area of conventional constitutional obligations, rather than legal obligations.[19] This initial understanding of the Constitution has changed radically. It is very clear that it contains legally binding principles which affect the administration.

In the middle of the twentieth century, there was a dispute between two of the titans of French public law at the time, Vedel and Eisenmann, as to whether there were constitutional foundations.[20] Vedel argued that 'the Constitution is the necessary foundation of the rules which together make up *droit administratif*'.[21] The actions of the executive in exercising special

[17] Comité consultatif constitutionnel, *Travaux préparatoires de la Constitution du 4 octobre 1958: Avis et débats du Comité consultatif constitutionnel* (Paris: La Documentation Française, 1960, hereafter '*Avis et débats*'), p. 101. See generally F. Luchaire, *La protection constitutionelle des droits et des libertés* (Paris: Economica, 1987), pp. 14–16.

[18] See Coste-Floret, *Avis et débats*, p. 102.

[19] See R. Romi, 'Le Président de la République, interprète de la Constitution', *RDP* 1987, 1265.

[20] X. Magnon, 'Commentaire sous les bases constitutionnelles du droit administratif, la controverse G. Vedel/Ch. Eisenmann', in W. Mastor, P. Egéa and X. Magnon, eds., *Les grands discours de la culture juridique* (Paris: Dalloz, 2017), n° 68. The key articles were G. Vedel, 'Les bases constitutionnelles du droit administratif', *EDCE*, 1954, no. 8, pp. 21–53; G. Vedel, 'Les bases constitutionnelles du droit administratif', in P. Amsalek, ed., *La pensée de Charles Eisenmann* (Paris: Economica, 1986), pp. 133–45; and C. Eisenmann, 'La théorie des "bases constitutionnelles du droit administratif"', *RDP* 1972, 1345–1441.

[21] Vedel, 'Les bases constitutionnelles du droit administratif', p. 21.

public powers that exceeded those of private individuals was acknowledged in certain constitutional texts, especially those of the Fourth and Fifth Republics, and in certain case law of the Third Republic. The texts conferring powers on the President of the Republic and on the Prime Minister presupposed that there was a domain in which the executive exercised sole competence. Furthermore, the 1958 Constitution specifically gave autonomous legislative powers to the executive in art. 37. This seemed to confirm the areas of sole administrative competence. Eisenmann took the view that no constitutional text clearly set out the powers of the executive. In any case, the consequence of administrative law being grounded in the Constitution would be that it could vary from one constitution to another, whereas the experience of the Conseil d'Etat was of a continuity of administrative law principles despite changes in the Constitution, particularly in 1946 and 1958. He saw administrative law as grounded in the sovereignty of Parliament. By that he meant that the powers the Constitution granted to the state were to execute the laws enacted by Parliament and the courts had the function of giving the correct interpretation of the powers given to the state. In essence, Vedel was keen to argue that the Constitution conferred a special position on the state to exercise extraordinary and unilateral powers to fulfil its mission. This included legislative powers, as is shown by art. 37 of the Constitution and by the First World War case law of the Conseil d'Etat on the inherent powers of the President to maintain public order and to manage the public service.[22] (We see here echoes of the discussion in the UK of the nature of the prerogative over the civil service in *CCSU v Minister for the Civil Service*.[23]) On the other hand, Eisenmann argued that the scope of executive action depended on what Parliament authorised the executive to do.

To an important extent, Vedel had the final word, not as a scholar, but as a judge of the Conseil constitutionnel. As a former President of the Section du Contentieux of the Conseil d'Etat and himself a leading administrative law scholar, Bernard Stirn, remarked 'through its case law, the Conseil constitutionnel has enriched "the constitutional sources of administrative law"'.[24] In the period up to 1970, the Conseil d'Etat had been central in shaping the protection of fundamental rights through its notion of 'general principles of law', often based on the Declaration of the Rights of Man of 1789, itself not seen at the time as having legally binding status. But it refused explicitly to

[22] See, for example, CE 28 June 1918, *Heyriès*, no. 63412, S. 1922.3.49 note Hauriou.
[23] [1985] A.C. 374.
[24] B. Stirn, 'Constitution et droit administratif' (2012) Nouveaux Cahiers du Conseil constitutionnel no. 37 (*Le Conseil constitutionnel et le droit administratif*), p. 1.

challenge the legality of legislation. Vedel was reporting judge for two key decisions of the Conseil constitutionnel which gave constitutional force to key principles of administrative law. In 1980,[25] the Conseil constitutionnel endorsed the independence of the administrative courts as a fundamental principle recognised by the laws of the Republic. In 1987, it found that the judicial review of decisions of bodies exercising executive power belonged to the administrative courts, thereby consecrating the separation of administrative and ordinary courts by way of a fundamental principle recognised by the laws of the Republic (even if the best statement was in a law of the Bourbon monarchy in 1790).[26] So a law conferring such powers on the ordinary courts was unconstitutional. Rather than focusing on the rules concerning the powers of the administration, these decisions focus on the control of administrative powers, appealing to the idea of the separation of powers, rather than the rule of law (as UK courts would have done). It is the control of the administration that was the object of constitutional attention in 1641, 1790, 1799, 1872 and 1945, albeit not all in texts that are these days considered legally binding.

But, as Stirn pointed out,[27] particularly in the past decade or so, there is a spirit of cooperation between the Conseil constitutionnel and the Conseil d'Etat in developing the constitutional principles that underpin *droit administratif*. The reform of the Constitution in 2008 created the possibility for the first time that laws which had already been enacted could be challenged for unconstitutionality. Previously, the Conseil constitutionnel was only concerned with laws before they were promulgated. Now it is possible for a litigant in a civil or administrative case to challenge the effect of a law on the ground that it is unconstitutional. In this process, the top court in each system acts as the gatekeeper to ensure only serious issues are submitted to the Conseil constitutionnel. The Conseil constitutionnel deals with the constitutional question by way of a reference from the administrative or ordinary courts – hence it is called a preliminary question, the *question préalable de constitutionnalité* (QPC). This innovation has changed the role of the Conseil constitutionnel. In the years since 1 March 2010, when the QPC came into force, the Conseil constitutionnel has typically dealt with references from parliamentarians on between twenty-five and thirty laws a year prior to promulgation, but between seventy and eighty QPC references. Of the references received in 2019, 46 per cent were from the Conseil d'Etat. The Conseil d'Etat

[25] CC decision no. 80–119 DC, 22 July 1980, *Validation of Administrative Acts*, Rec. 46, para. 6.
[26] CC decision no. 86–224 DC, 23 January 1987, *Competition Law*, Rec. 8, para. 15.
[27] Stirn, 'Constitution et droit administratif', p. 6.

can act as gatekeeper. For example, in 2018, it refused to submit a law on terrorism to the Conseil constitutionnel because it did not think the complaint of unconstitutionality was sufficiently serious. In its view, the legislator had provided sufficient safeguards for fundamental rights that no breach of constitutional values was arguable.[28] On the other hand, the decisions of the Conseil constitutionnel on a QPC reference can lead to changes in the way the administration or the administrative courts work. A good example will be seen in Chapter 4, Section 2.7, on the composition of specialised administrative courts (what the UK knows as tribunals). There the decision of the Conseil constitutionnel led to a restructuring of the membership of these bodies and the transfer of much of their work to the generalist administrative courts.

The constitutional principles requiring a hearing before a sanction is imposed is recognised both by the Conseil d'Etat and by the Conseil constitutionnel.[29] That affects the way the administration behaves, as well as how the legislature drafts the powers it confers on the administration.

1.5 THE INFLUENCE OF EU LAW: FRENCH ADMINISTRATIVE LAW AND THE SUPREMACY OF EU LAW

Entry into the European Economic Community (as it then was called) in 1957 was politically divisive in France. Both the communists and the Gaullists were against it. De Gaulle, who returned to power in 1958, blocked much activity through his 'empty chair' policy in 1965 at a time when the EEC had to act by unanimity. It is therefore not surprising that the Conseil d'Etat did not accept the supremacy of EEC law over domestic law when the issue was raised before it in 1968. In *Semoules de France*, there was a clear conflict between an EEC regulation and a French Law.[30] The Conseil held that it had no power to ignore a constitutionally valid law, and so it refused to give effect to the EEC regulation because the law was posterior to the regulation and therefore expressed the last will of the sovereign Parliament, despite art. 55 of the Constitution according to which a regularly adopted treaty must prevail over a law. When a similar issue returned ten years later, the response was much the same with regard to the effect of a directive towards an administrative act. In *Cohn-Bendit*, a German leader, brought up in France, of the May 1968 student protests was subject to

[28] CE 21 February 2018, *Ligue des droits de l'homme*, no. 414827, AJDA 2018, 426.
[29] CC decision no 2011–214 QPC, 27 January 2012, *Société COVED SA* (Droit de communication de l'administration des douanes), Rec. 94, para. 6.
[30] CE Sect. 1 March 1968, *Syndicat général des fabricants de semoules de France*, no. 62814, Leb. 149; AJDA 1968, 235 concl. Questiaux.