French Administrative Law

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IN a time of rapid economic and social change the historical separation of powers tends to become blurred and indistinct. Notwithstanding the social necessity for breaking down this incident of the natural law of the eighteenth century, it has survived in the United States to an extent unknown in other countries, possibly in part because of the indigenous nature of one of its sustaining causes, namely, the unwillingness of the United States Supreme Court to exercise jurisdiction in any but the most pressing of cases, with the consequent undue limitation of the concept "judicial." But the facts of life defy dogmatic verbal classification. With the growth of the industrial era, with the necessity for expert regulation which a Congress or Parliament is unable to supply, and with the necessity for governmental control and supervision of much private enterprise, there has come into being a sphere of governmental activity known as administration, which embraces all three of the traditional aspects of governmental powers. Two of its significant characteristics are its extraordinary growth and the concomitant necessity of the individual for protection against it. That protection in the United States is found mainly in a written Constitution as interpreted by the courts, a protection which is the greater because of its very flexibility, for "due process of law" like "natural justice" supplies a formula in which to clothe the judicial view of what is fair and just in the light of the time and circumstance. But in turn, the attempt to reconcile this necessity for delegating governmental power to officers and administrative bodies who enter intimately into the daily life of the individual, with the traditional

1 Cf. Porter v. Investors' Syndicate, 286 U. S. 461 (1932). If the state regards the function as judicial, the Supreme Court should not undertake to call it administrative, though practically the result of the decision in the Porter Case, requiring the complainant to exhaust his state remedies before invoking federal relief, may be approved. On rehearing, 287 U. S. ---, 53 Sup. Ct. 132 (1932), the Court seems to conclude that the grant to a state court of the power to review the decision of an Investment Commissioner under the "Blue Sky" law, revoking a permit, with power to set it aside, modify or confirm it "as the evidence and the rules of equity may require," may yet be sufficiently judicial not to infringe the separation of powers provision of the state constitution. When it is administrative for one purpose and judicial for another, the distinction becomes rather unconvincing.
views concerning the separation of powers, has placed a severe strain on the intellect in following the purported distinctions of the courts between functions "judicial," "quasi-judicial," "executive," "legislative," "quasi-legislative," and now "administrative," a term which is finally winning a place. The very term "administrative law" was but a generation ago deemed exotic, although the necessity for subjecting to control the arbitrary use of discretion by administrative authorities as a protection to the individual against corrupt and misguided administrative action had with growing frequency been reflected in judicial decisions. The reluctance to admit any special rules of law for the control of the official organization and of its relations with the citizen led Dicey to inveigh against the "droit administratif" of the French law. 2 He might as well have protested against maritime law, constitutional law, ecclesiastical law; and his assumption that English law in its judicial protection of the subject was superior to the French law could hardly have been founded on any clear appreciation of what the French law actually accomplished. Perhaps he permitted alien method to conceal substance. Prejudices when ostensibly sustained by formulae are hard to overcome.

Whether the individual is effectively protected against the administration, whether the individual has adequate safeguards for his freedom against the group, depends not on the name of an institution or a tribunal, but on the mores of a particular community as reflected in the political instruments it creates. Starting from varying historical foundations and premises, the German, French, English, and American systems developed in the beginning of the nineteenth century different forms of control over those who wielded governmental powers. Encroachments upon individual liberty were in all these systems designed to be kept, in principle, within the limits of social necessity. Yet, who was to draw the line? Who was to be the judge whether the line had been appropriately drawn? Here indigenous history and tradition determined the answer. In one country the suspicion of the Executive, in others suspicion of the legislature, and in one, France, suspicion of the courts produced varying institutions for achieving control over the governmental machine. Even with but a limited parliamentary control, as in the case of Prussia, the mores of an uncorruptible administration implanted by Frederick the Great, combined with the development of the theory of the Rechtsstaat, the state under

2 "Droit administratif in Modern French Law," 17 L. Q. Rev. 302 (1901).
law, had assured the German people an administrative system designed to insure the public advantage while avoiding improper encroachments on the freedom of the individual. It is even now, I think, an open question whether this protection is better assured in judicial courts, which alone control the administration in several of the states of the Reich, or in the administrative courts, which have been instituted in other states. Possibly the establishment of a federal administrative court, now under consideration, may turn the protective machinery into the administrative channel.

In France, prior to 1789, the parlements were courts of justice as well as administrative bodies. The French citizen had learned to distrust the parlements and the Royal "intendants," who acted as judges in the provinces. This is given as one of the reasons why the French have never been willing to allow their courts, even after the constitution of 1790, to assume the power to declare legislation unconstitutional. But while courts were separated from the administration, the administration was also largely removed from any control by the courts. To allay the dissatisfaction resulting from the inability to challenge the validity of administrative acts, Napoleon, about 1800, granted to citizens the right to complain before the Council of State (Conseil d'État), in its special committee known as the Comité du Contentieux, who at first gave only advice to the government as to how to deal with the complaint. Gradually, however, the Comité du Contentieux has evolved into a court as judicial in its outlook as the Judicial Committee of the House of Lords or of the Privy Council, or the United States Court of Claims. In 1831, after the second fall of the Bourbons, an oral hearing was granted, and in 1849, with the fall of the monarchy, the Commission du Contentieux, as it was then called, was permitted to give formal judgments and not merely advice. In 1872, the Tribunal of Conflicts, composed partly of administrative and partly of judicial judges, was created to pass upon questions of conflicting claims to jurisdiction by the administrative and judicial courts.

It seems strange, and is explainable only on historical grounds, that when the injured individual sought protection against the administration he had to turn to an administrative body, the Conseil d'État, which was certainly closer to the administration than the judicial courts. It was this fact which unfavorably impressed Dicey. Yet the administrative courts have more than justified the faith reposed in them. The event merely proves that form is not decisive of substance, for the individual secured far greater protection from
the administrative courts than he had ever obtained from the judicial courts, which, within limits, were opened to him. The latter, after 1832, acquired the power to declare administrative ordinances, even certain presidential ordinances, "illegal," but only after the individual had violated them and been prosecuted. Then they could refuse to fine him. But to challenge the ordinance by a declaratory judgment of illegality for *ultra vires*, without first violating it, the individual had to resort to the administrative courts. They were thus among the first tribunals to exemplify the value of the declaratory judgment in challenging the validity of administrative acts, a system which, if generally adopted in the United States as it has been in England, would simplify judicial relief against administrative illegality and do away with many of the barnacles which have encumbered the writs of certiorari, prohibition, and injunction, not to speak of the speed and inexpensiveness of the new procedure.

Thus, a century ago, there began in France that march of administrative adjudication which has won general encomiums from those interested in the substance of legal control over the administration. The recourse for *excès de pouvoir* (*ultra vires*) was extended from the acts of minor officials to the acts of the President himself, and this notwithstanding the fact that many of his acts had first to be approved by the full Conseil d'Etat. The judicial branch of that body assumed the power to nullify them, first for defects of form, then for *ultra vires*. By a statute of 1872 reorganizing and enlarging the functions of the Conseil d'Etat, all but a few administrative acts were brought under the control of the Conseil, which advanced from case to case in the most approved Anglo-American fashion. And even though the letter of the law had been observed, the tribunal undertook to examine the motives of the administrative officer, thus limiting his discretion by the test of *détournement de pouvoir* (abuse of power). Moreover, the power to review the delegation of legislative power to the President, which first escaped judicial control, and in principle still does, has been greatly extended. The old category of *actes de gouvernement*, which escape review, has been so narrowed as to include only a limited number of the highest state activities, relating mainly to war and diplomacy, which only occasionally directly affect the individual. The growth of the administrative protection has crowded out most of the protection or necessity for protection afforded by the judicial courts, which, in theory, still have a considerable jurisdiction.
That form and substance are distinct is evidenced by the United States Court of Claims, which, though administrative in character, affords, within its limited jurisdiction, an effective relief and protection for the individual against the government.

It is interesting to observe that the recent English commission which was called into existence as a result, on the one hand, of the challenge of the *New Despotism* (the administrative hierarchy) by Lord Chief Justice Hewart, and, on the other hand, of the demand of Professor Robson for the institution of administrative courts as a cheaper and more expert method of control over the administration at the behest of a complaining individual, has decided to adhere to the conservative English view that the judicial courts are the most reliable means of protecting the individual against the administrative machine. They do suggest that legislative committees watch over the delegated legislative (ordinance) power and help to draft it, and that the administrative determination be final on the facts only, with the right of appeal on questions of law to the judicial tribunals. They place a high value on the control of the administration, in its quasi-judicial functions, so largely a matter of policy, by Parliament and public opinion. The rapid growth of the legislative (ordinance) power by reason of the very complexity of our social organization has made it increasingly important in the life of the individual, so that some centralized control over its substance and form is essential. A somewhat similar control over administrative ordinancees was recommended by the Committee of the Progressive Conference at Washington (1931), over which Senator Cutting presided. Both England and the United States have instituted many administrative commissions and tribunals, some in the United States federal government having most important judicial functions, such as the Interstate Commerce Commission, the Federal Trade, Power, Radio, and Employees' Compensation Commissions, and the Customs Court. But on the whole, their jurisdictional limits are determined by the judicial courts, whereas they are allowed ever greater leeway in the exercise of discretion. It is the slight control of discretion which exposes the weakness of the position of the individual, and it was to remedy this defect that appellate administrative tribunals, such as the Board of Tax Appeals, have gradually been established. Whether this administrative appeal is an adequate protection can only be deter-

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3 Committee on Ministerial Powers, Report presented April, 1932, Cmd. 4060. 138 p.
mined by time and experience. That it is likely to be more expert than courts is very probable. Possibly the American system will profit most by permitting an administrative appeal on questions of discretion and policy and a judicial review of jurisdictional and strictly legal questions. Much could be learned from the decisions of the French Council of State on *excès de pouvoir* and *détournement de pouvoir*.

An excellent article by Professor Garner presents a general outline of French administrative law, an article which relies on the latest French sources and which might have made unnecessary Dicey’s criticism of the modern French law. A comparison of the English and French administrative systems by Professor H. Berthélemy was published in a recent *Bulletin Mensuel* of the *Société de Legislation comparée*. It is a virtue of continental law in general that the decisions of the courts are subject to regular criticism by the most distinguished authorities. The value of the publications of decisions by Sirey and Dalloz in the field of administrative law is enhanced by the critical notes of Professor Hauriou, Berthélemy, Jèze, Appleton, and others, who have aided the administrative courts and the public in general by their informed comments. Professor Hauriou’s notes between 1892 and 1928 have been collected in a work of three volumes. The official decisions of the Council of State have been regularly published since 1821 in the *Recueil des arrêts du Conseil d’Etat*, cited by the names of its erstwhile editors, Panhard, but more generally Lebon. The treatises of Professor Berthélemy and Hauriou, which have gone through many editions, describe fairly fully the administrative organization and its functions. The lower administrative courts (the *Conseils de préfecture*) and the highest (the *Conseil d’Etat*), with the *Tribunal des Conflits*, are the subject of Duguit’s well-known article on French administrative courts; and Professor Garner discusses them in his article on “Judicial Control of Administrative and Legislative Acts.”

Laferrière, formerly Vice-President of the *Conseil d’Etat*, has done much to advance the jurisprudence of the *Conseil d’Etat* by his

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5 Nos. 4-6 (April-June) 1931.
6 Sirey, 1929.
classic Traité de la juridiction administrative. For the modern developments, it has been overtaken for practical purposes by Professor Appleton's Traité... du contentieux administratif.

State responsibility in tort. Possibly the most important of the contributions of modern French law to the development of administrative science is the steady growth in the practice of permitting the state to be sued for injuries arising out of the torts and misfeasance of its officers. This has been a gradual development, and has probably been aided by the fact that it has been detached from the rigid requirements of any code, thus enabling it to expand in the light of social conceptions of the proper distribution of the loss among the individual, the community, and the officer. When an officer, in the performance of his public duties, unwarrantably and by intention or mistake injures a citizen, the question arises as to who shall bear the loss. Anglo-American tribunals in general have believed, with the historical maxims of kings who "can do no wrong" ringing in their ears, that it should be the officer, and they did not trouble to find out whether this was either practical, expedient, or just. And even where the state recognized the injustice of any such purported distribution of the risk of error or misfeasance and by legislation sought itself to assume the burden and risk, the courts threw obstacles in the way. Very recently the Appellate Division of the Supreme Court of New York has unanimously held that a New York City municipal ordinance admitting liability for the error or mischance of a policeman who in pursuing criminals shoots instead an innocent bystander, assumes not a moral or equitable obligation, but makes an unconstitutional gift to a private person.

The flexibility of the French Conseil d'Etat has made it easy to drop antiquated views of this kind and to expand the state's liability from tort to "fault of the service" and finally to cases where no "fault," but sheer accident only, can be discerned, such as the explosion of a munitions dump. This jurisprudence has awakened admiration on the continent and has aided greatly the movement both in England and the United States to admit by statute governmental liability for the torts of officers acting within the scope of their employment.

9 1896, 2 v.
10 1927.
11 Evans v. Berry, 236 App. Div. 334, 258 N. Y. Supp. 473 (1932). Appeal is now pending in the Court of Appeals, who, it may be hoped, will reverse.
The development in France was slow and gradual, accomplished almost entirely by case law. France also began with the conception that the state was not liable for official torts, but only the officer, who could be sued before the regular judicial courts. Even for that, the consent of the Conseil d'Etat was necessary before 1870, because of its possible interference with the administration, and the consent was rarely given. But after the Tribunal of Conflicts had decided in 1872 that a distinction must be made between “official” and “personal” faults, that for the former the state could be sued in the Conseil d'Etat, whereas for the latter the officer alone was liable, the progress of administrative public responsibility became rapid. In 1908, all inferior administrative bodies were made liable for official “fault of the service.” Then the distinctions between “personal” and “official” torts and between governmental (d'autorité) and corporate (de gestion) acts began to break down, and state liability was admitted, within narrow exception, for both. “Personal” torts for which the state was not liable, but the officer alone, became limited to those having no relation to the public service—a development which was aided by the earlier conclusion, that two suits for personal yet “service” faults were possible, one against the officer, the other against the state, with two judgments. Yet the collectibility of both was awkward. Hence from a subsidiary liability of the state, after vain execution upon the officer, the state assumed primary liability, a result which made suit against the officer less and less frequent. This has resulted in the disadvantage that, by the new practice and by the limitations upon the category of “personal” and “unofficial” acts, the officer is in many cases relieved of liability to any one, a fact which weakens the public service. The pending English Crown Proceedings bill (Cmd. 2842) and the Federal Tort Claims bill—which once passed Congress, only to be vetoed by President Coolidge for a technical reason, and which is likely soon again to pass—have avoided this possibility by giving the state the right of recourse against the officer for wil-

12 The reason was that the Comptroller of the Treasury had been given initial authority to pass upon claims and then had reserved to himself the privilege of defending his judgment as counsel for the government in the appeal to the Court of Claims. This seemed to the Attorney General an encroachment upon his prerogative of defending the United States and an improper confusion of the functions of judge and advocate. This defect is cured in the pending Howell bill, which terminates the Comptroller's authority with his decision on the claim. There is some danger in permitting a fiscal officer to become a judicial officer, even in first instance only.
ful acts. But at least the citizen is protected by having a responsible defendant. New York state has made considerable headway in assuming liability for the torts of its agents, but in most of the states the development of the law is hampered by the ancient judicial maxims that the state cannot be sued at all without its consent and, in the matter of municipal responsibility, by the view that torts in the performance of "governmental" functions escape judicial control and liability. The intellectual and social protests against these restrictions may in time persuade more legislatures to break them down. In Prussia and Germany legislation in 1909 and 1910 gave the citizen an exceptionally wide privilege of suit in the judicial courts for money damages against the state when injured by act of an official, even in performing "governmental" functions; for corporate functions, the state had long been held liable under the private-law rules of the Civil Code.

Watson's book, The State as a Party Litigant, discusses briefly the evolution of French law. The subject is so fascinating that it has, necessarily, attracted the attention of many French and other scholars, among whom are Duguit, Jèze, Appleton, Berthélemy, and, as authors of significant monographs, Teissier, Duez, Masteau, Trotofas, Marcq, Bourquin, Wodon, Łaski, and Bonnard. The detailed references to this literature may be found in the Guide to the Law and Legal Literature of France. The courts and jurists of continental Europe have been dealing with this question for a century and have undertaken to present a variety of explanations sustaining the theory of community assumption of liability for the torts or malfeasance of its officers. By characterizing the officer as an agent and the state or government or group as the principal—not unnatural view—rules of private law readily supplied a theory of governmental responsibility for wrongful acts of the officer—either an implied negligence in selection or supervision, or the principal's guaranty of the good conduct of his agent, or the rule which imposes automatic vicarious responsibility based on identification or representation. The theory of agency underlies the proposed English and federal legislative reform, above mentioned.

The supposed inadequacy of the private law theories was suggested by those courts and writers who had become impressed with

13 1927, chapter 10.
14 Edited by Professor Stumberg of Texas, and published in 1931 by the Library of Congress.
the intrinsic validity of the classical distinction between "corporate" and "governmental" acts. While private law conceptions were deemed sufficient for "corporate" acts, they were deemed insufficient for "governmental" acts. Responsibility for the latter, indeed, usually depended upon express legislation. These views, based upon "public law" explanations, were strengthened by the decision of the French court in the celebrated Blanco Case, holding that responsibility could not be based on any general rule, but found its explanation in the equitable reconciliation of the interests of the state and of the individual; and as the courts began to assess damages upon the state for many injuries, such as stray shots by policemen and explosions of munitions, without proof that any officer was at fault, many jurists became convinced that the inelastic conceptions of the private law could not fit the new jurisprudence. Possibly they did the private law an injustice. At all events, innumerable legal, political, and philosophical theories were advanced from many quarters to explain or rationalize the new developments. Thus, we were made acquainted with the theories of social contract, social insurance, quasi-contract, which have been either abandoned or else absorbed in the broader legal theories of "administrative fault" or "fault of the service" and governmental "assumption of risk," theories in which the individual officer's tort became either tenuous or fictional or was frankly dispensed with in the greater emphasis laid upon the operative fact of individual injury inflicted by the governmental machine. This is illustrated by the statutes in most of the countries of Europe providing for state indemnity to those innocent persons who have been erroneously convicted in the criminal courts. The cycle from eminent domain had now been practically completed; and while the older tort theories still sustained most of the cases, the new developments concentrated attention upon the effort to find broader political and philosophical foundations to sustain this modern legal structure. So we find advanced the doctrines of "equality" or "equitable distribution of burdens" between the individual and the public, of "vested rights," of "equity" and of "special sacrifice" regardless of tort—all of which are designed to demonstrate that special sacrifices imposed upon or borne by the individual in the pursuit of the common aim, the administration of the public service, should be spread over the community as a whole, instead of resting, as they

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15 Conflits, Feb. 8, 1873, Dalloz Per. 1873, 3. 17.
so often have in earlier Anglo-American practice, solely upon the
injured individual.

This brief sketch of the French system of administrative law will
indicate that the adjustment of the relations between the individual
and the group is recognized as one of the most important functions
of government, and that the method of protecting the individual
against the state, which will, necessarily, vary with time and lo-
cality, is less significant than the substance of protection. The ex-
tent of that protection in the western world, at least, is one of the
sources of public and private confidence in government. The French
system, developed through the progressive views of the members
of the administrative courts, has doubtless aided greatly in per-
petuating the Third Republic, for, with the popular control of legis-
lation through the Chamber of Deputies, it has proved the balance
wheel between the conflicting claims of the individual and the ad-
ministration. It has served its purpose more efficiently, it is be-
lieved, than have the administrative systems of most other countries.

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