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French Constitution, *Droit Administratif* and the Civil Code

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Abstract

Droit Administratif *in France is a separate branch of law that exists in parallel to the civil and criminal law. The law has been developed from the concept of separation of powers that is ingrained in the French constitution. Its concepts derive from the Code civil that is implemented in France since its inception in the Napoleonic era and this has undergone reform that has made the role of the judges more interventionist. The highest administrative court is the* Conseil d'État, *which is at the apex of the machinery of administrative courts that are an important part of public law's discourse and there is a hierarchy of courts that consider appeals and regulate the norms of conduct of state officials towards the citizens. The judges receive induction and training before taking on the role of occupation and that has been inculcated in the French administrative court judges. This article looks at the separate system of administrative law and its success in preserving the necessary checks and balances in the constitution, which it is intended to protect. This is an examination of the developing concept of French justice, the doctrine of separation of powers and civil procedural changes that enable the grievance of citizens against officials to be heard more expeditiously.*

Keywords: Droit Administratif, Civil Code, Conseil d'État, public order.

A Introduction

The French constitution enshrines the concept of a separation of powers between the executive, legislature and judicial branches. This is based on a written framework that is inherent in the philosophy of Montesquieu, and its preamble is "Liberte, Egalite, Fraternite", formulated in 1789. It is essentially a procedural document and the Fifth Republic since its proclamation in 1958 retained a strong executive, and an independent and a highly specialized judiciary. The main distinction with the English legal system is that there is a separate branch of admin-

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istrative law, or *Droit Administratif*, that exists as a distinct body of law.[1] It differs from the English common law system in which the administrative law is integral to the legal system and which binds officials in the ordinary courts.[2] The issue is to what extent the separate system has been successful in maintaining the independence of the judiciary in France in the administrative courts.

The judicial branch in France consists of two distinct court systems, which are the judicial and administrative, unlike the single (judicial) court system in England, which has review powers over administrative tribunals. The French judges are specially trained and pursue a judicial career, whereas in common law systems the judges are appointed from among experienced barristers, and, more recently, solicitors, to the bench. The *Conseil d'État* is the highest court in the judicial hierarchy of the Administrative Courts established in 1799 as an advisory body that was similar to the Privy Council in England, but in 1872 it became the apex of the system of administrative tribunals, or the *Tribunaux Administratifs*, which were given power to issue decisions binding on the hierarchy of administrative courts.

There are separate judicial courts with authority over criminal, civil, commercial, social or criminal cases are first of all tried in courts of first instance (*tribunaux d'instance* and *tribunaux de grande instance*, commercial courts, employment tribunals [*conseils de prud'hommes*] ...). It depends on the monetary value of the dispute whether decisions from these courts are either deemed to be rendered at last instance if they involve minor claims or, as in the majority of cases, at first instance. Thereafter they may be appealed before a court of appeal that re-examines all the factual and legal aspects of the case. The decisions rendered at last resort by first-level courts and decisions delivered by courts of appeal may themselves be appealed to the Court of Cassation, which is at the apex of the pyramid, and exists as one single court for the whole Republic.[3]

In 1987, further reforms were made in administrative court structure when eight administrative courts of appeal or *Cour administratif d'appel* were created as a tier between the administrative tribunals of first instance and the *Conseil d'État*. The *Conseil* has the power to settle appeal cases arising from administrative tribunals, whereas their own judgements may be challenged before it when acting as a "juge de cassation", i.e. in charge of legal review. The administrative courts paral-

1 Administrative law is: "the branch of internal public law which includes the legal rules, the organization and activities of the authorities, colleges and services responsible for satisfaction of public interests and how to resolve disputes arising from this activity". This is a classic definition given by Professor Léon Moureau and notably by J. Dembour (*Droit administratif*, Liège, Faculté de Droit, 1978).

2 AV Dicey contrasted *droit administratif* with the rule of law by stating that it not adequately safeguard the rule of law. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens from the jurisdiction of the ordinary tribunals; there can be nothing really corresponding to the "administrative law" (*droit administratif*) or the administrative tribunals (*tribunaux administratifs*) of France. *Introduction to the Study of the Law of the Constitution*, 10th edn., MacMillan & Co, 1959, pp. 202-203.

3 <https://www.courdecassation.fr/about_the_court_9256.html>.

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lel the judicial court jurisdiction in having a first (original) degree and a second (appellate) degree of jurisdiction with supervisory bodies of last resort.[4]

The hierarchy of administrative courts consists of 42 administrative tribunals, 8 administrative courts of appeal from disputes between individuals and public authorities (the state, local authorities, independent administrative authorities and public institutions). There is a right of appeal against Title VIII disciplinary decisions of the *Conseil Supérieur de la Magistrature* to the *Conseil d'État*, but on questions of law, only the one that affirms the principles underlying the administration of justice, which include equal and free access to justice, to be a public service, the objectivity, independence and neutrality of the judges, the secrecy of deliberations and the unity of the judicial corps (sitting and standing judges).

The distinctive features of the French judiciary are its special training, and their knowledge of the principles of the Civil Code. Its genesis was in Baron Montesquieu's *The Spirit of the Laws*, which was constitutional theory that heralded the doctrine of the separation of the powers. He found that conditions for political liberty existed in the English constitutional arrangements that separated and balanced executive and legislative powers (the powers of the king and his ministers from those of the parliament) and that separated the judicial power from both executive and legislative powers.[5]

The traditional focus of the English administrative law is on the execution of laws enacted for the departments of state that regulates in particular the distribution of competences between different powers that govern the UK. The internal public law in France consists, on the one hand, of the right of Constitutional law and, on the other hand, administrative law, that will be called not only to regulate the organization but also of the various public authorities (including the judiciary and the legislative power) and also to manage relations between public authorities and the executive powers with the citizen. It is necessary to examine the Code

4 In 2001, a new administrative justice code was issued in order to simplify the rules of procedure being followed by all administrative courts in the country and aimed at developing urgent and provisional measures to be taken by judges, before a case is settled as a whole. It was issued after two decrees in the National Assembly May 2000. The Code de Justice administrative is divided into nine books. It is considered by the Commission de Codification as a "remarkable illustration of the merits of codification". *See* P. Gonad, *La codification de la procedure administrative*, AJDA, 2006, p. 489.

5 Montesquieu reflected in *The Spirit of the Laws* on the propensity of English judges to make rather than state the law approved of the judicial power being exercised, English style, by a jury of peers as the power of judging, was "so terrible among men" that it should not be exercised by a permanent body such as the executive or the legislature. *Ibid*., p. 158. Judges would not then be "continually in view" and the power of judging would become "invisible and null". *Ibid*., p. 163. Judgments should never be anything but "a precise text of the law" as judges are "only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour.". The notion that judges should be no more than the "mouth of the law" was seized upon by the revolutionaries and has been deeply entrenched in France ever since. *See* B. Montesquieu, *The Spirit of the Laws*, translated and edited by A.M. Cohler, B.C. Miller & H.S. Stone, Cambridge, Cambridge University Press, 1989, pp. 14-25, and Cohler, 'Introduction', *in ibid*., pp. xiv-xv. *Also see* R. Shakleton, *Montesquieu: A Critical Biography*, Oxford 1961, pp. 286, 298 and 300.

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Civil under which the French legal system is governed and which forms the *corpus juris* of its laws.

B Civil Code and Administrative Law

The French legal system has a strong academic basis and it stems from the concept derived from the Enlightenment. In the eighteenth century, the belief in the power of reason led scholars to turn to codification of the laws on the continent.[6] After the French revolution had issued the Declaration of Rights of Man and Citizen 1789 as the basis for legislation, it was the platform for further legislation that restricted the power of the executive in favour of the legislature. The post-revolutionary period was heralded by Napoleon, who embarked on the promulgation of the written Civil Code as the law of jurisdiction in France.[7] The initiative was deemed as a step in which there was a uniform and coherent system of jurisprudence modelled on the framework of the ancient Roman tradition conceptualized in Justinian's Institutes, which synthesized the various bodies of local law into one coherent structure.[8]

The European intellectual tradition was in a state of ferment and in the process of codifying national laws and the historical school of jurisprudence existed as a separate concept of law that identified the traditions of the state. In Germany, the evolutionary historical school of jurisprudence served as the basis for Friedrich Karl Von Savigny, who opposed the concept of natural rights in composing his organic theory of law in opposition and he was responsible for creating the institutions of the law based on the Volk. This was premised on "Volksgeist" (spirit of the people) that denoted law that stemmed from the cultural origins of the people.[9] Savigny was the progenitor of the legal science (*Rechtswissenschaft*) that set forth the vision of a united Germany, which was not regulated under a single law, but rather an "organically progressive legal science which may be common to

6 In the ancient regime, customs existed alongside the decree of the Monarchy with Catholic edicts of the Church based on papal authority. The customary law was divided into two systems, the *l'ancien droit* that prevailed in the south of the country with approximately two-fifths of French territory practicing the Roman written law (*droit écrit*), while in the north of the country there was *droit coutumier*, which interpreted the will of the lords of the manor in disputes. The *Coutume de Beauvaisis*, compiled by Phillipe de Remy, had a long-lasting influence on French law. Others, the *coutumes locales*, upwards of 300, were in force in specific towns and villages. In some areas, the French law, such as marriage and family law, fell under the canon law of the Catholic Church. T. Humberg, 'The Civil Code: An Overview', available at: <www.napoleon-series.org/research/government/code/c_code2.html>.

7 The Napoleonic vision of the state saw the judiciary as strong and respected but subjected always to the Chief Executive. Thus the emergence of the judicial functionary and a judicial hierarchy similar to the other services of the state. *See* R. Badinter, 'Une Si Longue Défiance', *Les Juges Pouvoirs*, Vol. 74, 1995, pp. 8-9.

8 'The Code of Justinian, The Basis for Civil Law in Western Europe (529-533)', available at: <www.historyofinformation.com/expanded.php?id=21>.

9 F. Karl von Savigny, *On the Vocation for our Age for Legislation and Jurisprudence (1814)*, 2nd edn., Berlin, 1840. The first edition was translated by A. Hayward as *On the Vacation of our Age for Legislation and Jurisprudence* (1830), reproduced edition, New York, 1975, pp. 64-65.

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the whole nation." This approach was termed "pandectist", and it was based upon a concept that jurists were suited to develop an internally consistent and logical system of rules.[10]

In the period of Enlightenment, the philosopher J-J. Rousseau conceived of government as an administrative entity, a new body within the state distinct from both the people and the sovereign; a body charged with the execution of the laws and the maintenance of freedom, both civil and political. He entrusted to government what he called the executive power, the power of acting in accordance with the construction of the general will. Rousseau developed the conception of the state administration in two important respects. First, although like his predecessors and many of his contemporaries he failed to distinguish between executive and judicial powers.

Rousseau conceptualized government as centrally important and distinct and an agent or instrument of the general will. He suggested its peculiar importance and centrality in relation to the rest of the state by comparing the executive power to the brain commanding the limits of the body. The principle of political life dwells in the sovereign authority. The legislative power is the heart of the state, the executive power is the brain, which sets all the parts in motion. Second, Rousseau anticipated subsequent developments by attributing to government qualities that later he used to justify special legal consequences. Although he conceptualized the general as infallible, he regarded government as a threat to liberty. He argued against that the enlargement of the state and concluded, "Whense it follows that the more the state is enlarged the more freedom is diminished."[11]

10 K.A. Mollnau, 'The Contribution of Savigny to the Theory of Legislation', *American Journal of Comparative Law*, Vol. 37, No. 1, Winter 1989, pp. 81-93; *see also* R. Zimmermann, 'An Introduction to German Legal Culture', *in* W.F. Ebke & M.W. Finkin (Eds.), *An Introduction to German Law*, 1996, p. 4. This framework was carried over in 1873, when a German Commission was established to implement a uniform civil code in the newly unified German state. The comprehensive *Bugerliches Gesetzgebuch* (*BGB*) was approved in 1896, and it went into effect on 1 January 1900. The basic structure of the *BGB* was as follows: Book I: General principles, definitions, prescriptive periods, and classification of legal acts; Book II: Contracts and torts; Book III: Real and Personal Property; Book IV: Family law including marriage; and Book V: Law of succession, wills, etc. These codifications of the substantive aspects of Civil Law were later matched with similar efforts in procedural matters, as well as substantive and procedural areas of criminal law. <www.iuscomp.org/gla/statutes/GG.htm>.

11 *See* J.J. Rousseau, *The Social Contract*, M. Cranston (trans.), Harmondsworth, 1968, Ch. 1, pp. 102 and 105.

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The French Civil Code promulgated in 1800 was composed as the *Code Civil des Francais* (a.k.a. the *Code Napoléon*) in 1804[12] and it consisted of three books, which contained in excess of 2,000 articles. The basic structure of the Code Napoléon is as follows: General Principles: Publication, application, and effect; Book I (Arts. 7-515): Status of persons, marriage, divorce, and paternity; Book II (Arts. 516-710): Real and personal property; and Book III (Arts. 711-2281): Contracts, torts, and security Interests. The Code enshrined the separation of powers doctrine framed by Montesquieu, and Appellate courts with full powers of review were reinstated and referral of cases to the executive by the courts was abolished.[13] Article 5 of the Civil Code of 1804 forbade the judges "to make pronouncements by means of general and regulatory provisions on the cases submitted to them," which is in relation to cases preventing a rule used to establish legal precedence in the case law. This prohibition was encapsulated by Article 1351 of the Civil Code, which provides that "[t]he authority of the matter adjudged only relates to that which has been the object of the judgment."

The current French legal framework is composed of two types of codes: (1) the Napoleonic codes (Civil Code, Code of Civil Procedure, Commercial Code, Penal Code and Code of Criminal Procedure) the purpose of which was to unify the law of the nation, and (2) the "modern codes", which resulted more from administrative necessity than any ideological stance. These successive commissions have collected legislative and administrative texts in specific areas and published them in codes. The original Civil Code has been either extensively amended or re-drafted through parliamentary legislation or through administrative compilations in their application to the jurisdiction.[14]

12 The Civil Code, comprising 2,281 articles (120,000 words) has a Preliminary Title of six articles and three books. The Preliminary Title was intended by Portalis to be a longer, 39 article, "philosophical" consideration and justification of the Code. Book One, entitled "Of Persons," contains Articles 7 through 515, and deals with the status of aliens in France, marriage, divorce, paternal power, guardianship, emancipation, incapacities, the family council, etc. Book Two, entitled "Of Property, and the Different Modifications of Property," contains Articles 516 through 710, concerns the ownership property, usufruct, servitudes, etc. Book Three, the longest, is entitled "Of the Different Modes of Acquiring Property," contains Articles 711 to 2281. This book covers successions, gifts and wills, obligations, contracts, matrimonial property systems, liens, mortgages, etc. *Code Napoleon; Or, the French Civil Code. Literally Translated from the Original and Official Edition, Published at Paris, in 1804, by a Barrister of the Inner Temple*, translation attributed to George Spence (*cf.* Cushing's *Anonyms: A Dictionary of Revealed Authorship* and Halkett & Laing's *Dictionary of Anonymous and Pseudonymous English Literature* and in the *Dictionary of National Biography*), London: published by William Benning, Law Bookseller, 1827, xix, 627 pages.

13 J.P. Dawson, *The Oracles of the Law*, 1968, Chapter IV, "The French Deviation", p. 379.

14 The *Direction des Journaux Officiels* publishes the provisions of the code but no commentary or references are attached to them. There is no comprehensive official system of reports of judicial decisions in France. The decisions of the *Conseil d'État* are published in the *Recueil Lebon*, by a private publisher and are considered semi-official. The decisions of the Court de Cassation are published in official reports in two series: *Bulletin des Arrêts de la court de cassation rendus en matière civile* and *Bulletins des arrêts de la Court de Cassation rendus en matière criminelle*. This means that about two-thirds of the cases are reported, the decision to publish being left to the president of the chamber. The best sources for courts' decisions are the *revues juridiques générales* (legal reviews), various websites, or paid databases. <www.loc.gov/law/help/legal-research-guide/france/php>.

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The Civil Code does not apply the principle of *stare decisis* by the prohibition on "regulatory provisions" sanctioned by Article 127 of the Penal Code of 1810. This has rendered liable to "forfeiture and civic degradation" the office of judges "who intermeddle in the exercise of legislative power … by regulations that contain legislative provisions … ."[15] However, the reform to the contract and commercial code in 2016 has made substantial changes to the judges' role in in this process. This in particular focuses on the judicial precedent developed by judges and grants it recognition by statute.[16] This has reinforced power of the judge (and of arbitrators) to modify the content of contracts, initially, and the judge has the power to control the balance of rights between the parties at the time the contract is formed.[17] The interventionist role of the judge is augmented by Article 1110 of the Civil Code, which defines contracts of "adhesion" very broadly as contracts entered on the basis of general conditions predetermined in advance by one of the parties.[18]

Until the new Articles 1171 and 1110, the French courts may invalidate the clauses of their agreements as a contract of adhesion, even in a non-consumer context. The judge may also interfere during the performance of the contract under Article 1195, which grants the judge the power to terminate the contract or revise its clauses if it is established that there is an unforeseeable change of circumstances that renders its performance too burdensome for a party. This article provides that the escape clause does not apply in respect of risks that have been assumed by the complaining party and there may be an apportionment of risks in the performance of the contracts. While such a global clause, expressly excluding Article 1195, would, in principle, be valid and enforceable, it cannot be fully ruled

15 In cases that determine a constitutional question, the integrity of the judiciary has a higher premium and they can be regarded as more independent in determining questions of executive powers than is the judiciary that interprets a common law doctrinal system. The advantages of such a system are that it is in conformity with the tradition of *legal positivism*, the law is viewed from a "scientific" perspective by learned scholars, usually law professors, whose views of interpreting law is considered an authoritative source of interpretive material. S.N. Carlson, 'Introduction to Civil Law Legal Systems, INPROL Consolidated Response (09-002)', Integrated Network to Promote the Rule of Law, May 2009, p. 6, available at: <https://www.fjc.gov/sites/default/files/2015/Introduction%20to%20Civil%20Law%20Legal%20Systems.pdf>.

16 Contracts under French law entered into after 1 October 2016 will be subject to a new legal regime, after the Ordinance of 10 February 2016 (the "Ordinance") made significant substantive and structural changes for the first time in more than 200 years to the Title on Contracts and Obligations (Articles 1100 to 1386) of the ancient 1804 Napoleonic Civil Code. The new Articles of the French Civil Code are more than a mere facelift. They codify certain rules that had been established by case law over the last two centuries. French Ordinance n° 2016-131 of 10 February 2016 reforming contract law and the general regime and proof of obligations.

17 Article 1170 provides that contractual clauses that contradict a party's main obligation so as to deprive such obligation of substance shall be deemed null and void. Article 1171 excludes clauses that create a "significant imbalance" between the rights and obligations of the parties from contracts of adhesion.

18 Such contracts are a common practice in the construction industry, including (but not only) in contracts preceded by a tender process. This includes text confirming that the contract has been freely negotiated, which may therefore be advisable to mitigate the risk of this provisions from being applied, but it is uncertain whether such wording will be given effect if evidence shows that only one of the parties drafted the conditions of the contract.

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out, however, that if contained in a contract of adhesion, such a clause may nevertheless be seen as creating a significant imbalance and deemed as null and void pursuant to Article 1171.

The academic basis of the civil code is hierarchical in terms of the composition of laws and there is a dual system in place regarding its laws. There is one branch of the system, known as *droit public*, which defines the principles of operation of the state and public bodies, and the other branch, known as *droit privé*, or private law, applies to private individuals and private entities. The legal system is defined vertically rather than horizontally and the tiers are based on the *loi organique* (institutional acts akin to the Constitution); *loi ordinaire* (ordinary acts that have been voted on by parliament regarding matters specifically left within the purview of parliament by the Constitution) and ordonnance (measures taken by the government in matters that would be normal and relevant to keep the country operating).[19]

C Checks and Balances in the Constitution

In the 1958 Constitution, which created the Fifth Republic, there was a realignment of the balance among governmental powers that had generally prevailed under the four previous Republics. These bodies had tried to maintain the Revolutionary ideal of a pre-eminent, popularly elected legislature, a subordinate executive and a judiciary whose function was to logically apply the legislative texts to particular cases, a function that hardly denoted a third governmental power.

The Constitution has raised the authority of the executive, through the office of a popularly elected president, to a power that is equal to, but separate from, the authority of the legislature.[20] It also strengthened the relative position of the judiciary in the scheme of government by the Title VIII of the 1958 Constitution, which deals with “Judicial Authority”,[21] the French legal system in such matters as the place of judicial power in the scheme of governmental powers, the order of the administrative courts and judicial accountability. The Administrative courts are responsible to the Ministry of Justice, which is the overseeing body in their hierarchy.

The president of the republic is the guarantor of the independence of the judiciary and judges (*du siege*) who have security of tenure,[22] and who are to be

19 There are also regulations that are issued by the executive power. Regulations are known as *règlements* and can be further broken down into *décrets* (for the prime minister and the president) and *arrêtés* (for the executive branch members who are not the president or prime minister). All *lois, décrets*, and important *arrêtés* are published in the official gazette (*Journal officiel de la République français*).

20 Dawson, 1968, p. 411.

21 For a countervailing view of French judicial discourse in fuller socio-political terms, although internal and unofficial, *see* Lasser, ‘Judicial (Self) Portraits: Judicial Discourse in the French Legal System’, *Yale Law Journal*, Vol. 104, 1995, pp. 1335-1336.

22 The prime minister shares executive power with the president, a situation described as the “double-headedness” (*bicéphalisme*) of the Executive: P. Ardant, *Les Institutions de la Ve République*, 1995, p. 14.

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irremovable.[23] The president is to be assisted in ensuring the independence of the judiciary by a Superior Judicial Council (*Conseil Supérieur de la Magistrature*).[24] This Council, since 1993, is composed of 16 members, a majority of whom are elected by the judges, and is presided over by the president of the republic or the minister for justice.[25] The functions of the Council are (1) the nomination of senior judges and the approval of the nomination of all other judges (nomination includes advancement, as to both of which see later), and (2) deciding upon disciplinary measures to be taken against judges.[26] The disciplinary measures are provided for in a law enacted in 1958, soon after the adoption of the Constitution, dealing with the status and regulation of the judiciary. This specifies the disciplinary measures available in the case of judicial "fault". They are a reprimand recorded in the judge's file, transfer to another position, being relieved of certain functions, downgrading, enforced retirement, being relieved of all functions, dismissal with or without pension rights.[27]

There is a general prohibition of political activity by judges[28] who are prevented from holding political or administrative offices and engaging in public political debate or political demonstrations, or agitation against the principles or form of the government of the republic.[29] These prohibitions have not been fully effective as evidenced by the fact that of the 90 disciplinary decisions taken against judges between 1958 and 1995, most were for public political activity or public criticisms of the justice system.[30]

The Administrative Courts' judges are protected from any potential conflict of interest by not involving the administrative personnel from the judicial courts, although it may be objected that private litigants have thereby lost the protection of an independent judiciary. There have been a number of courts that have been established under the Fifth Republic, with consequences for the "judicial authority" and the separation of powers. The *Tribunal des Conflits* was established to resolve jurisdictional conflicts between the judicial courts and the administrative courts. There are two kinds of conflicts: first, positive conflict where both systems consider themselves competent for the same case and, second, negative conflict where both systems consider that the other system is competent for the case, resulting in a denial of justice.

The composition of the *Tribunal des Conflits* is based upon an equal number of members of the *Cour de Cassation* and the *Conseil d'État*. In case of a stalemate,

23 Something less in some eyes than "Judicial Power." *See*, for example, Troper, Grzegorczyk & Gardies, 'Statutory Interpretation in France', *in* MacCormick & Summers (Eds.), *Interpreting Statutes*, 1993, p. 203.

24 'Sitting' judges, as opposed to 'standing' judges (*du parquet*) or public prosecutors.

25 The history of such a body can be traced back through the Constitution of 1946 to a law of 1883.

26 The Council has two formations, one for (sitting) judges and one for prosecutors. The former is constituted by a majority elected by judges, the latter by a majority elected by prosecutors.

27 When considering disciplinary matters, the Council is presided over by the First President of the *Cour de Cassation* instead of the President of the Republic.

28 "Free" in the sense that judges are remunerated by the state and not the parties, who must still bear legal costs between themselves.

29 *L'obligation de reserve*.

30 C. Barszcz, *Les Juges*, 1995, p. 55.

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the minister for justice has a casting vote and the *Tribunal* also has jurisdiction to resolve conflicts between decisions of the two constituent courts in relation to a common subject matter. In both cases, it will render final judgment on which system is competent.[31] It is for a similar reason that political demonstrations are prohibited for all the magistrats judiciares and for the members of the *Counsel d'Etat*.[32] Although the organization of strikes are strictly prohibited for the magistrats judiciaries, there is no such prohibition for the members of the administrative courts. The texts go even further for the *magistrats judiciaries* since they cannot participate in political debates or reveal any hostility to the peoples or form of government of the republic.[33]

The judges of Administrative Courts are forbidden from occupying another occupation or practising a different vocation. If a judge was tempted by another career opportunity, for instance in the civil service, a public corporation or a private company, various legal provisions authorize him or her to take temporary leave of absence and in all cases to return to their judicial career. This is particularly true for members of the *Conseil d'État* who are often given the opportunity to spend some time in the civil service, or in the managerial positions in public or private corporations. There they are able to gain an insight into the restrictions of the administrative process and industry, which is of vocational benefits. There are three prohibitions that are derived from the power to stay in the *corpse judiciare* or *corps administratif*, but fulfil different functions; secondment is when a person is not in the same corps anymore. However, all the rights of pension are effective and the person will be re-integrated at the end of it; and *mise en disponsibilite*, which is a temporary leave of absence when promotion or pension rights are frozen but the person can return to the corps after the interval.

The role of the parties and the court in relation to the law infers that it is for the court to apply to the facts that come before it, but the parties may be invited to make submissions on the law applicable to their case. The court is restricted to the legal materials cited, the idea of a decision made per incurium (as distinct from legally wrong) is of no consequence in the French context. The difference is the objective of the decision made per incurium in the English context is that it allows an exception to be made to the rules of stare decisis, which has no place in French law.[34] This problem of the function of the parties and the courts as regards the legal clarification or characterization of the facts, which they allege is the "legal grounds" (*moyens de droit*) of their claim. The question that arises whether the court is bound to apply the rule of law that applies to the legal classi-

31 There are over 6,000 judges, including prosecutors, in France (for the figures, see later), less than half are unionised.

32 There is an obligation of reserve on judges, which specifies that judges should always express their political opinions moderately if in public. The judges should not appear to be politically biased. (On the relation between judges and politics, *see* J. Libman, 'La "politisation" des juges : une vieille histoire?', *Pouvoirs*, No. 16, p. 43.

33 Art. 10 of the ordinary no. 58-1273 of 22/12/58.

34 R. Cross & J.W. Harris, *Precedent in English Law*, 4th edn., Oxford, 1991, p. 30.

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fication of the facts alleged, or whether it may or must choose between them or any other that it thinks is legally correct.[35]

D Reform of the Judicial Process

The New Code of Civil Procedure states that the judge must state the exact classification of the facts and legal transactions (actis) as part of the administrative code that are the subject of litigation.[36] All judges must respect two important duties in relation to their functions: first, they must give a judgment even in the absence of any legislative provision, so that any referral for a judge constitutes a denial of justice, which is a criminal offense punished by law. Second, the judges must keep confidential any discussion that takes place with each other before a decision is reached. This requirement of secrecy is important since decisions of French judges are collegiate with one single judgment and the text is a compromise between all the judges.[37]

The more active role of the judge in the French civil process can be defined by the concept of the *juge de la mire en etat*, i.e. a judge who may be appointed to oversee the preparation of the case before it is heard, but it is by no means restricted to this context. Thus, while primarily it is for the parties to put together their own case (Art. 129 and 146 of 2 N.c.pr.civ.), Article 3 of the New Code of Civil Procedure vests the power in the judges:

> The judge oversees the proper running of a case, he has the powers to set periods of time(for preference of procedural acts) and at order any procedural measures. It is for the courts to decide either of its own.

The *Droit Administratif* is designed to protect fundamental liberties and defend public interest, ensuring that public governance is accorded high importance by the judges, and that the administrative courts are required to deal with litigation that is increasing rapidly and diversifying.[38] The constitutional principles enshrine the existence of the administrative justice system, its jurisdiction and its independence.[39] In accordance with these principles, only an administrative court may quash or, on occasion, revise decisions taken by the state, local authorities or public bodies operating under their authority or control. The administrative courts may also order a public legal body to pay compensation, particularly where a wrongful act by that public legal body has given rise to damage or loss. The procedures involves the safeguarding of human rights and civil liberties, in accord-

35 New Civil Code Article 12 al 1, (NCPr.civ).

36 New Civil Code Article 12 al 2, (NCPr.civ).

37 This duty is contained in Article 448 N.c.pr.civ. for the *magistrats judiciares* and is of the *Conseil d'État* for the *juges administratif*: *see* CE 15 Oct, 1965, Manzel JCP 1966. II 14487.

38 J. Bell, S. Boyron & S. Whitaker, *Principles of French Law*, 2nd edn., Oxford, Oxford University Press, 2008.

39 The *Conseil* can issue interim injunction proceedings, which enable the administrative courts to render decisions within very short periods: a few weeks, or even 48 hours in the case of "référés liberté" – petitions for the protection of fundamental liberties.

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ance with public interest and in many employment matters, the legislator and the civil courts provide the standard for the administrative courts, which leads to a convergence of case-law.[40]

The judicial power of administrative courts has also been strengthened as a result of the imposition of the provisions of European treaties (particularly the Treaty of Rome and the European Convention on Human Rights) upon French domestic law and the consequent need of the courts to resolve conflicts between the two. Both the *Cour de Cassation* and the *Conseil d'État* have decided that these treaty provisions override the laws of the French parliament in case of conflict.[41] This has enhanced the powers for the judicial review in the balance between the legislature and the executive.

In France an important reform concerning the independence of the judiciary has been delayed by the incentives of a divided majority government. In democratizing countries, Stephen Holmes has suggested that

> constitutions contain various inducement mechanisms, devices for focussing attention, sharpening awareness of options, mobilising knowledge, involving citizens and guaranteeing their future choices will be made under conditions where alternatives are discussed, facts are marshalled and self correction is possible.[42]

The absence of a critical party system, the constitutional type called semi-presidentialism, contains a set of inducements that preclude alternatives and involve citizens in litigation against the state institutions and increases the prospects that future choices will be made under conditions where compromise with the political class will be necessary. In the light of the necessary but rare conditions for achieving workable semi-presidentialism, it is hard to understand the attraction felt by some scholars and policy makers to borrowing from the semi-presidential constitution, especially in newly democratic countries.[43]

Jean-Marc Sauvé, Vice-président du *Conseil d'État*, has recently made some pertinent criticisms in the manner in which the administrative law system functions in France.[44] He has argued that the system of review could be made more effective by

40 *See* A. Morin-Galvin, *La Convergence des Jurisprudences de la Cour de cassation et du Conseil d'Etat*, Paris, LGDJ, 2013.

41 For these decisions, and generally on these issues, *see* Ardant, 1995, pp. 142-145.

42 S. Holmes, 'Pre commitment and the Paradox of Democracy', *in* J. Elster & R. Slagstad (Eds.), *Constitutionalism and Democracy*, Cambridge, Cambridge University Press, 1993, pp. 195-240, at 237.

43 Many countries in Eastern Europe and Latin America have long been attracted to the success of the semi-presidential system in France. A. Stepson & E.E. Suleiman, *The French Fifth Republic*, p. 393.

44 J.-M. Sauvé, Vice-président du Conseil d'État, 'The French Administrative Jurisdictional System: Speech by Jean-Marc Sauvé in Hunter Valley, Australia on March 4th 2010', 17 March 2010, available at: <www.conseil-etat.fr/Actualites/Discours-Interventions/The-French-administrative-jurisdictional-system>.

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> developing our techniques aimed at ensuring that the court rulings are duly executed by public authorities. Important reforms have already taken place back in 1980 and 1995. The administrative judge has since then full authority to give orders to public authorities and, if necessary, to impose a fine on them for not executing its ruling within a reasonable period of time. And I want to go further and develop more explicitly the "roadmap" that should be followed by the relevant public authority in order to meet fully its legal obligations in a given case. Another issue of crucial importance is to develop fully our legal possibilities to take all appropriate, urgent and provisional measures before we settle the case. Since a very important reform introduced in 2001, the administrative judge is now in a position, much more efficiently than he was before, to order certain provisional measures. The most important one is to suspend all legal effects of a decision made by a public authority, whenever such a decision is legally doubtful and raises some urgent concerns for the claimant. In many cases it may not be acceptable to let an illegal regulation or decision being enforced for months, if not years in the worst case, before declaring it null and void. The claimant rightly wishes the legal system to come to his rescue and, provided that such claimant has some strong legal reasons to ask for this, to block the effects of the regulation or decision until the court issues its final ruling on the case.

The *Droit Administratif* is heavily impacted by the market regulations, social and economic factors, environmental law, biotechnologies and the information society. The administrative judge is facing cases with disputes ranging from politics to economics and society, and the judge has to maintain a balance between conflicting, though legitimate, rights and concerns. In this judicial framework, the *Conseil d'État* exists as a bridge among the executive, legislature and the judiciary. It requires, as Monsieur Sauvé stated in his conclusion, that there be "experience sharing" and for that purpose the "*dialogue des juges*" is essential.

E Towards a Public Conscious Agenda

It is necessary to respond to the question of how the judges could adopt a more proactive approach that takes into account the criticisms of Judge Monsieur Sauvé. The French judiciary has the main role in preserving the public order or the *Ordre Public*, which is a key element in the jurisdiction of the republic. It is based on the principle of self-affirmation of the law that is effective in the state, and which provides the certainty in the legal system and the values it upholds for the preservation of the state. This notion has become fixed as a justification for

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preserving its own morality and clarity in understanding that the legal rules that apply exist in all fairness to the national polity.[45]

This is an abstraction of granting rights to a citizen who is a member of a political community and who enjoys the rights and assumes the duties of citizenship.[46] In the 1958 Constitution, which created the Fifth Republic, there was a realignment of the balance among governmental powers from that which had generally prevailed under the four previous republics. These bodies had tried to maintain the revolutionary ideal of a pre-eminent, popularly elected legislature, a subordinate executive and a judiciary whose function was to logically apply the legislative texts to particular cases, a function that hardly denoted a third governmental power.

The nexus between the administrative tribunals and public order has limited focus on the French courts but has a growing role in improving detention conditions. The detention regime and rules applicable in detention centres are established by law and by the public penitentiary administration, under the authority of the Ministry of Justice. This means that the control of detention conditions and rules is the prerogative of administrative jurisdictions rather than judicial jurisdictions.

This law also provides for most policies applicable during detention, regarding searches, or disciplinary punishment for instance. Circular of the penitentiary administration often provides for practical guidelines to the penitentiary personnel on the implementation of the rules. This implies the prerogative of the public penitentiary administration and control by public authorities, which in France is governed by the penitentiary administration. Under the “Conseil d’évaluation” (Art. 5 of 2009 penitentiary law), each detention centre has an evaluation committee in charge of evaluating the centre and suggesting measures for improvement. It has to provide due process to the detainees’ rights, their safety, their access to medical care, and the activities in favour of reinsertion. The council is presided over by the Prefet and made of lawyers, judges, NGOs’ representatives etc. The council submits a report once a year to the Ministry of Justice. There are regular checks carried out during regular visits of the detention centres by judicial, administrative and legal authorities; the detention centres are subjected to external controls:

The European Committee for the Prevention of Torture and the European Commission on Human Rights are admissible in reviewing detention conditions;

45 In France, the term *Ordre Public* refers to the basic structure of the state governed by the rule of law, or in other words a proper democratic republic. This is different from public policy concept used in case law of the ECJ. Public policy may be very important but they would not include the basic structure of the republic nor necessarily the fundamental rights of the citizens. W.J. Veraart & L.C. Winkel, ‘Time, Restitution and the Law’, *in* R. de Lange (Ed.), *Aspects of Transitional Justice and Human Rights*, Nijmegen, Wolf Legal Publishers, 2007, pp. 79-86.

46 This broad definition is discernible, with minor variations, in the works of contemporary authors as well as in the entry “*citoyen*” in Diderot’s and d’Alembert’s *Encyclopédie* [1753]. A. Abizadeh, ‘Democratic Theory and Border Coercion. No Right to Unilaterally Control Your Own Borders’, *Political Theory*, Vol. 36, No. 1, 2008, pp. 37-65. A. Abizadeh, ‘Democratic Legitimacy and State Coercion: A Reply to David Miller’, *Political Theory*, Vol. 38, No. 1, 2010, pp. 121-130.

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the decisions of a public administration are subject to the control of administrative tribunals. There is an exclusion of any role of judicial jurisdictions in dealing with these issues. Article 225-14 of the French Criminal Code provides that incarceration is not allowed if the conditions are incompatible with human dignity and is an offense punishable by 5 years imprisonment.

In *CANALI v. FRANCE Application no 40119/09 (2013) ECHR 376*, the European Court of Human Rights considered the legal framework of the detention conditions in France concerning an overcrowded prison in Nancy in 2006. It evaluated the prerogative of the public penitentiary administration and the control of public authorities; limited role of judicial jurisdictions in dealing with these issues; increasing role of administrative tribunals and disciplinary regime in detention. The Court ruled that the conditions in the prison amounted to a degrading and inhuman treatment under the definition of Article 3 of the Convention: the over-proximity of prisoners, the extended amount of time spent in such a cell, the dilapidated cell, and the inappropriate walking area amounted to an infringement of the right not to be tortured.

The Court had to decide whether the internal jurisdictions were exhausted whereas the plaintiff had filed a criminal complaint rather than a request with the administrative tribunals as provided by French case law. The Court ruled that the government could not reasonably expect the plaintiff to file a request with another jurisdiction, the administrative jurisdiction, when he had already exhausted the judicial jurisdictions. This highlights a major paradox in the French judicial system. That being said, the Court did not find any violation of Articles 6 and 13 of the Convention, i.e. the plaintiff has not been deprived of an effective remedy since he could have gone to the administrative jurisdictions for compensation.

However, the ECHR ruled that the case was admissible despite the other possible internal remedy, since it was not "reasonable" to expect from the plaintiff to file other requests with other jurisdictions. Nevertheless, on the merits of the case, no violation of the right to effective remedy was found since there still was an option to seize the administrative jurisdictions for compensation. The French administrative tribunals have not effectively controlled the penitentiary administration, its functioning as well as the implemented policies. However, under the above case law many decisions were excluded from any judicial control, on the ground that the decisions were purely dealing with internal public order. The administrative judge has now a broader jurisdiction: over any decision of the penitentiary administration on the functioning of the service. However, many decisions are still qualified with "mesures d'ordre interieur" and are not therefore subject to the judge's control.

The administrative tribunal judge's main role is to maintain the fragile balance between guaranteeing the fundamental rights of detainees and the functioning of a public service that its users do not approve of and for which security standards must be particularly strict. It has only gradually and very recently emerged that the judge has extended his or her control over more administration decisions. Since 2007, the administrative judge has jurisdiction over the administration's decisions depending on the nature of the decision, i.e. its purpose and its

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legal status, and depending on the consequences of the decision, i.e. consequences on the concrete detention decisions. The public order duty of the judges demands that they make decisions that include in the judicial proceedings the merits of transfer, disciplinary punishments, management of detainees' accounts, body searches etc.

The issue is the consistency of the *Droit Administratif* and discretion within the framework of a system based on public order, which implies that within the rulings are based on standard formulations and uniform principles. The outcome should be to deal with the redress of grievances that would satisfy the litigation that is against the abuse of power by the state. It will then merit the fair treatment of claimants that is expected in the private action against the civil liability by the state. The *Conseil d'État* is the highest in the administrative hierarchy and maintains the rule of law in relations between citizens and public authorities.

F Conclusion

There has been considerable reform both in the substantive and procedural law in France in recent times. This has been through the changes to the Civil procedure and the Civil code that has made it possible for judges' role in courts to be examined more thoroughly. The academic strength of the civil code maintains the coherence of the French judicial system and there is no substantive code of written rules of general administrative law. The French judges who adjudicate in administrative tribunals need intensive vocational training in administrative court procedure (code de la justice administrative, dating from 2001 amendment) and they are recruited by separate competitions and are trained either at the *Ecole Nationale de l'Administration* (in Paris and Strasbourg) or by the *Conseil d'État* for those entering from the public sector. However, unlike the members of the *Conseil Constitutionnel*, they are required to have legal training and are not appointed for a fixed term. Their career path is governed under the policy guidelines of the vice-president of the *Conseil d'État*.

The administrative tribunals are upwardly mobile and provide the judges to be adept at interpreting the *Droit Administratif* within the framework of public law that has the objective of preserving public order. This is facilitated by the experience of French judges and advocates general of the Court of Justice of the European Union (ECJ). They have been referred from the *Conseil d'État* or the *Cour de Cassation*. They have the grounding to augment the preparation of European cases by experience of national judging and national law. The *Conseil d'État* has the *Centre de recherches et de diffusion juridiques*, which provide reasons for judgments that flow from the ECJ or the European Court of Human Rights.

The Civil Code has been transformed; it is not enough to consider the new statutory provisions that have been enacted. The fact is well-known: although textbooks in France will always state that the decisions of the courts do not, properly speaking, make the law – they are not a source of legal rules – it is common knowledge that such decisions play a considerable part in the evolution of French law. The *Droit Administratif* is part of the provision by the state and the independ-

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ence of the judiciary that has been specifically guaranteed by the 1958 Constitution allows it to control its own trajectory and it is only the direction that needs to be clarified.

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