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THE STRENGTH AND WEAKNESS OF FRENCH ADMINISTRATIVE LAW

PROSPER WEIL ¹

It is often said that the French system of judicial control of the Administration is one of the best existing today. The French have no difficulty in believing this, and although Common Law jurists have long been influenced by Dicey, who wrote at a time when Administrative Law was different from that which we know today, they, also, are becoming aware of the merits of the work of the French *Conseil d'Etat*: Professor Hamson is in no small way responsible for this change of attitude. Moreover, the adoption of the French Administrative Law techniques by the European Communities and their introduction, albeit hesitantly, into the Law of International Organisations have also contributed towards increasing its reputation. Yet, at the very moment when it seems to have become an excellent product for export, the merits and the efficacy of French Administrative Law are causing considerable doubts among the French themselves. It has become fashionable to criticise what was unreservedly praised, and one wonders if adulation will give way to systematic denigration. The answer, not surprisingly, is to be found between the two extremes. The French system comprises elements both of strength and of weakness. This lecture is an attempt to evaluate these elements.

It is impossible here to outline the gigantic work accomplished over the last century in the field of Administrative Law. The techniques brought into use have certainly been an important factor in the progress of the judicial control of the Administration: in particular the notion of appeal against an act rather than against the person who performs the act, a type of appeal which allows the administrative judge to examine, more and more narrowly,

¹ M. Weil was professor at the Faculty of Law of Nice when, in March 1965, he delivered this lecture at Cambridge. He has since then been translated to Paris.

The annotation was added at the Editor's request, who particularly desired that reference be given to Long, Weil et Braibant: *Les Grands Arrêts de la Jurisprudence Administrative*, 4th ed., 1965 (abbreviated as G.A.). This case-book, with its analysis and discussion of authority, will be found specially instructive by the common law student.

The abbreviation "Rec." refers to the *Recueil Lebon*, the annual volume in which the decisions of the Conseil d'Etat (C.E.) are published in chronological order. The date is accordingly an integral part of the citation. The cases cited can also normally be found in the Sirey and Dalloz collections. [Ed.]

the regularity of administrative decisions. The determining reason for the success of the system has, however, been the influence of the *Conseil d'Etat* and the place it has been able to win for itself in the French public life. There is no doubt that the ordinary tribunals, which unfortunately do not enjoy the same prestige in France as they do in England, would never have been capable of going so far in the legal and judicial control of the Administration.

Does this mean that the *Conseil d'Etat's* work is over, and that it is enough to sit back satisfied and contemplate the results achieved? That would be to forget that, like Sisyphus with his rock, Administrative Law is engaged in a continual struggle against opposing forces which try to crush or at the least to neutralise it. Administrative Law is in fact not like other laws. Civil Law creates individual rights and obligations from the outside by using the State's power of coercion. In Administrative Law, it is the State itself which is the object of the rules of conduct and the prohibitions; but the State, as it has emerged from feudalism, is *imperium* or power—and it is not easy to tame power with laws and judges. As Brierly so truly remarked ²:

“The fundamental difficulty of subjecting states to the rule of law is the fact that states possess power. The legal control of power is always difficult, and it is not only for international law that it constitutes a problem.”

Administrative Law is public law, a law affecting sovereignty; and therefore it is not surprising that there is more than one feature common to it and International Law. One might even say that Administrative Law is the other face of International Law: one is aimed at restricting the internal sovereignty, the other tries to discipline the external sovereignty of the State. The progress of Administrative Law has certainly been more rapid than that of International Law, but this is due to the fact that, in the internal legal order, the concentration of the power in the hands of the state has spared Administrative Law the No. 1 problem of International Law, *viz.*, that of the dispersal of power among numerous sovereignties. With this difference admitted, many of the difficulties encountered by modern International Law have been equally evident in the short but rich history of Administrative Law. And one may suppose that when the international society has in its turn solved the problem of the concentration of power and has thus progressed beyond feudalism (the attempts towards international organisation are best understood from this point of view), International Law on more than one point will follow the lines of the evolution of French Administrative Law.

² *The Law of Nations*, 6th ed., 1963, p. 48.

I. SUCCESSFUL REACTION TO PRESSURE

That heavy pressure should have been applied throughout its history to slow down the development of Administrative Law is more easily understood if one remembers that the French tradition, as it was established under the Monarchy and under Napoleon, had forged an eminently centralised and authoritarian State which only nominally accepted local government and which always undermined the forces which might have formed outside it. The work of the *Conseil d'Etat* constitutes a victory, won with patience, against constant resistance. This resistance has indeed been stronger at some moments than at others: judicial control operated more smoothly under the Third and the Fourth Republics than under the Vichy régime. But this resistance has never been absent, because power dislikes being controlled by law and always wishes to keep a brake on the invasion of law into political life. From certain points of view, even the existence of Administrative Law constitutes a miracle. The wisdom of the *Conseil d'Etat* has consisted in understanding that it could not do everything at once. At any one period there was an optimum point beyond which any advance would be illusory for a certain time, and would even have risked compromising the results already achieved. Advance slowly but surely: this seems to have been the guiding principle of the *Conseil d'Etat*. Consequently, the *Conseil d'Etat* has, for example, had the good sense, since the nineteenth century, not to enforce against the Administration the Civil Code principle which states that every fault must be compensated. The Conseil prefers to admit that State liability is neither general nor absolute and that it varies according to the needs of the service.³ Starting from this cautious position, the tribunals have been able, step by step, to draw level with, and even to surpass, the present day Civil Law liability. Likewise, the Administrative judge has realised that to annul administrative decisions is an attractive business, but redoubtable in that the political power does not easily admit that its decisions be reduced to nothing by a judge who would set himself up as a sort of hierarchical superior of the Administration; and only very slowly has the judge constructed the edifice, still unfinished at present, of the *recours pour excès de pouvoir*.

It is in this evolutionary perspective that one must assess the victories won by the *Conseil d'Etat* during the last few years. From

³ C.E. December 13, 1957, *Trottier*, Rec. 681. Cf. Trib. confl., February 8, 1873, *Blanco*, Rec. 61; G.A. (*Les Grands Arrêts de la Jurisprudence Administrative*, by Long, Weil and Braibant, 4th ed., 1965, No. 1). See de Laubadère, *Traité élémentaire de droit administratif*, 3rd ed., Vol. I, 1963, Nos. 1162 and 1163; Vedel, *Droit administratif*, 3rd ed., 1964, p. 238 *et seq.*; Rivero, *Droit administratif*, 3rd ed., 1965, No. 272 *et seq.*

this angle also should be measured the exact dimensions of the dark patches which remain, and the hopes that can reasonably be entertained of seeing these patches fade away in their turn in the foreseeable future.

(a) Social and economic pressure

For about twenty years, the political, economic and social development of France has raised considerable problems for the *Conseil d'Etat*, which has been able to resist the pressures resulting from the increase in powers of State as well as those which come, especially since 1958, from a disguised but firm determination on the part of the Government to remove certain of its decisions from any judicial control whatsoever.

The gravest dangers for the development of Administrative Law stem from phenomena which may be described as natural, because they are to be found in every country and are provoked by the evolution of our societies which increases the powers of the State and leads to a "new despotism." Formerly concerned only with national defence and public order, the State now intervenes in practically every economic and social domain. In addition, the imperatives of planning and interventionism have led the Parliament to attribute more and more discretionary powers to the Government, which remains free to act according to its own judgment of the situation. In fact the Government can no longer be considered today as a simple executive organ. More widely spread and stronger than formerly, the Administration's powers have also become dangerously scattered. Thirty years ago, the administrative action controlled by the *Conseil d'Etat* was only that of State services and local authorities. Today the State acts more and more through private bodies which are charged with functions of public interest, and on which the State confers privileges formerly reserved for the Administration proper: for example, professional bodies, companies for constructing and running motorways, anti-cancer centres, etc. Finally, it must not be forgotten that the troubled period France has lived through for a quarter of a century has helped to increase the spreading and intensification of the Administration's powers and at the same time to multiply the attacks on personal liberty. After the Occupation and the Vichy régime followed the Liberation and the political "épuration." Then came the events in Indochina and Algeria. The change of régime in 1958 has not weakened, on the contrary it has further strengthened, the dominance of the Government in French life.

Nevertheless the *Conseil d'Etat* has been able to deal with the

majority of these dangers. We shall name only the most characteristic of the numerous mechanisms which have enabled it to accept the challenge.

(i) The first consists of *restricting the discretionary power* of the Administration. If an Act of Parliament confers a power on the Administration the exercise of which is made dependent on the fulfilment of a condition, the *Conseil d'Etat* decides in the case of a dispute whether the condition has been fulfilled or not. In this way it can give notions such as urgency or public utility a strict and precise meaning. The *Conseil d'Etat* verifies, in the case of expropriation, for example, that the subsequent construction is of public utility.⁴ It decides if the film which the mayor has banned is really immoral,⁵ if a publication banned for children is really pornographic,⁶ if a requisition of public servants is indispensable,⁷ if the banning of a meeting is really the only way to maintain public order.⁸ But the *Conseil d'Etat* goes even further, and often limits the force of a statute by which a wide discretion is given to the Administration. The best known, though not the only, example is the Act allowing the Prime Minister to decide which candidates should be allowed to sit the entrance examination of the "Ecole Nationale d'Administration."⁹ The Act attaches no condition to the Prime Minister's power of decision. However, the *Conseil d'Etat* held that the Prime Minister should not rely on incorrect facts and should avoid favouritism or personal animosity. He can exclude a candidate only in the interests of the service, for example because he may have taken part in an open rebellion against the Government; but political convictions or party membership have no connection with the interests of the service.

In economic and social questions judicial control meets more difficulties but is nonetheless exercised. All intervention by the Administration in economic and social matters is subject to the condition that the provision made by private enterprise is defective. Otherwise, the *Conseil d'Etat* considers that the Administration's action constitutes an illegal competition. In a recent decision,¹⁰ for example, the Conseil had to decide whether the setting up of a municipal dental surgery was justified by the number of persons of

⁴ De Laubadère, *op. cit.*, Vol. II, Nos. 403 and 413, and the cases there cited.

⁵ C.E. December 18, 1959, *Société Les Films Lutetia*, Rec. 693; G.A., No. 108.

⁶ C.E. December 5, 1956, *Thibault*, Rec. 463.

⁷ C.E. February 24, 1961, *Isnardon*, Rec. 150; October 26, 1962, *Le Moult*, Rec. 580.

⁸ C.E. May 19, 1933, *Benjamin*, Rec. 541; G.A., No. 56.

⁹ C.E. May 28, 1954, *Barel*, Rec. 308; G.A., No. 98.

¹⁰ C.E. November 20, 1964, *Ville de Nanterre*, Rec. 563. Cf. C.E. May 30, 1930, *Chambre syndicale du commerce en détail de Nevers*, Rec. 583; G.A., No. 52. See Waline, *Droit administratif*, 9th ed., 1963, No. 540 *et seq.*; de Laubadère, *op. cit.*, Vol. I, Nos. 1016-1017.

modest income in the commune, and by the number of dentists charging moderate fees. It held that the town could not limit access to the surgery to a certain category of persons without violating the principle of equality in the user of public services. The town could however fix a scale of charges varying with the status of the patient as a wage-earner within the social insurance scheme.

As can be seen, the *Conseil d'Etat* substitutes its own judgment for that of the Administration and acts as the latter's hierarchical superior. This attitude has enabled it to keep within reasonable bounds the ever-increasing powers attributed to the Administration in these days of economic and social interventionism.

(ii) Another method employed by the *Conseil d'Etat* is the use of the *doctrine of the general principles of law*.¹¹ Since about 1940 the decisions of the *Conseil d'Etat* allude to the general principles of law which every administrative authority is bound to respect. Among these principles, which constitute a bridge between natural justice and law, may be mentioned: equality of citizens in the eyes of the Administration,¹² freedom of commerce and industry,¹³ the right of every citizen threatened with a sanction to know the charges against him and to defend himself,¹⁴ the right to question the regularity of any administrative act before a judge.¹⁵ Some of these principles are to be found in the *Déclaration des Droits de l'Homme* of 1789, but the *Conseil d'Etat* prefers to consider them as valid principles independent of all texts, because in this way their fate is not tied up with that of constitutional texts. The Constitutions of 1946 and 1958 referred to the *Déclaration* of 1789 but the Constitutional Acts of Vichy did not, and nothing assures us that the next Constitution will not once more omit all reference to the text of 1789. The *Conseil d'Etat* can in this way conserve a liberal ethic throughout the changes of régimes and can consider the attacks made here and there against liberties as a simple violation of the immutable principle of liberalism. Under Vichy for example, the *Conseil d'Etat* continued to act as if the republican principles remained valid, and since 1958 it continues to hold that governmental decisions have less legal force than statutes voted by Parliament.

(iii) These two mechanisms are the best known. There are,

¹¹ Rivero, *op. cit.*, No. 73 *et seq.*; Waline, *op. cit.*, No. 762 *et seq.*; Vedel, *op. cit.*, p. 199 *et seq.*; de Laubadère, *op. cit.*, Vol. I, No. 379.

¹² C.E. March 9, 1951, *Société des concerts du Conservatoire*, Rec. 151; G.A., No. 87.

¹³ C.E. June 22, 1951, *Daudignac*, Rec. 362; G.A., No. 88.

¹⁴ C.E. May 5, 1944, *Dame Veuve Trompier-Gravier*, Rec. 133; G.A., No. 71.

¹⁵ C.E. February 17, 1950, *Dame Lamotte*, Rec. 110; G.A., No. 84.

however, others. In particular should be mentioned the increasing tendency of the *Conseil d'Etat* to consider as administrative acts subject to its jurisdiction decisions made by *bodies which are not part of the Administration*, but through which a part of the State's authority passes. Medical associations for example do not belong to the Administration: however a decision of an association to refuse to allow a doctor to enrol as a member will be treated as an administrative decision and may give rise to a *recours pour excès de pouvoir*.¹⁶ Control over administrative action is exercised wherever the latter takes place and whatever the form it may adopt. The Administration cannot escape the censure of the *Conseil d'Etat* by acting indirectly through corporations or associations of a more or less private nature.¹⁷ As a last example there is the case law, interesting and full of promise, by which the Administration can be held responsible for special and serious damage incurred by a citizen as the result of a perfectly legal administrative measure.¹⁸ Thus the *Conseil d'Etat* can allow the Administration to carry out acts necessitated by the increasing interventionism of the State, while at the same time ensuring that the victims of this action are compensated.

The attempts outlined above are of course limited and all is by no means perfect in the domains mentioned. Considerable progress has been achieved on some points, while on others the situation remains less satisfactory. Judicial control does not advance at the same speed in every domain. The essential is however that it does advance and that the *Conseil d'Etat* is able to control the pressures with which the evolution of modern society menace the harmonious development of Administrative Law.

(b) Political pressure

There exists however another threat, more serious because it is purely political, and against which the *Conseil d'Etat* is not so well armed. It would perhaps be helpful here to recall that in France the distinction between legislative power and executive power depends not so much on a classification of functions of the State as on a division of the attributes of sovereignty between two bodies, Parliament and the Executive. The distinction between a legislative and an executive act is essentially political and organic. An Act of Parliament is not subjected to judicial control because it is passed by Parliament which has been elected and expresses the

¹⁶ C.E. December 12, 1953, *de Bayo*, Rec. 544.

¹⁷ C.E. July 31, 1942, *Mompeurt*, Rec. 239; G.A., No. 68; January 13, 1961, *Magnier*, Rec. 33. See Weil, *Le droit administratif*, 1964, p. 36 *et seq.*

¹⁸ C.E. January 27, 1961, *Vannier*, Rec. 60; February 15, 1961, *Werquin*, Rec. 118.

common will. A governmental order can always be criticised in front of an administrative judge because it emanates from the Government which is supposed to be of a purely executive nature. Parliament is trusted because it is considered incapable of oppression. But one is wary of the Government because of the fear of abuse of power. It is true that the Constitution of 1958 wished to reduce the power of Parliament but nevertheless something remains of the revolutionary mystique of the statute. One would be tempted to say that if Parliament is no longer trusted, the Act that it passes still is.

The Government, realising that the whole category of legislative acts or statutes benefit from complete jurisdictional immunity, has tried to obtain the right to pass laws by itself in order to escape the censure of the *Conseil d'Etat*. Several techniques have been employed to this end, one of which leaves the *Conseil d'Etat* completely powerless, the others having been neutralised by the administrative judges.

It is obvious that when the Constitution itself expressly gives the Government the power to make decisions having "*force de loi*," i.e., benefiting from the jurisdictional immunity reserved in principle for Acts of Parliament, the *Conseil d'Etat* is helpless. This has happened on several occasions in recent times, but fortunately limited to periods of crisis and transition. It occurred under the Vichy régime, during the period from 1944 till the election of the first Parliament of the Fourth Republic and finally during the four months which followed the promulgation of the Constitution of the Fifth Republic. Throughout these periods the Government was able without the slightest difficulty to escape the control of the *Conseil d'Etat*. Naturally everyday decisions still kept the form of administrative acts and fell within the jurisdiction of the *Conseil d'Etat*, but all important measures could be passed in the form of statutes, thus rendering judicial control quite impossible. More serious, however, is the famous Article 16 of the 1958 Constitution which enables the President of the Republic, in cases of grave crisis, to take all "the measures which the circumstances require." This article was applied for a few months in 1961 after the putsch in Algiers and enabled the President to take numerous and serious measures. In the course of various appeals the *Conseil d'Etat* considered ¹⁹ that these decisions were of a legislative nature if the measure taken fell within the domain of statute law. Therefore as soon as Article 16 is in force the

¹⁹ C.E. March 2, 1962, *Rubin de Servens*, Rec. 143.

President of the Republic can exercise legislative powers without the slightest judicial hindrance.

On the other hand the Government has often managed to obtain not from the Constitution but from Parliament itself the power to act in matters which normally are considered as being legislative. It maintained that the legislative power which would give its decisions "*force de loi*," viz., jurisdictional immunity, had been delegated to it. On this point, the *Conseil d'Etat* found the necessary reply.²⁰ All it needed to do was to rely on the classic organic criterion: whatever emanates from Parliament is legislative, and whatever emanates from the Government is administrative. The materially legislative character of the orders is without relevance in view of their organically governmental origin. Henceforth the Government can of course continue to rely on delegation by Parliament but its acts, although having the same content as Acts of Parliament, remain administrative acts subject to judicial control.

This attitude was firmly maintained throughout the Third and Fourth Republics. The impotence of Parliament led to its delegating powers more and more frequently to the Government. This delegation was carried out by what were called Acts of full powers, or of special powers, giving the Government the right to act in matters normally considered legislative. Each time, the *Conseil d'Etat* judged that the measure taken was of a purely administrative nature due to the fact that it emanated from the Government.

The 1958 Constitution was to present the *Conseil d'Etat* with a very difficult problem on this point. Under this Constitution Parliament legislates only on certain limited matters which are enumerated. Everything else can be dealt with by governmental orders. Ought not these orders to be considered true "*lois*," benefiting from the same privileges as Acts of Parliament? That would have been logical enough since the framers of the Constitution wished to weaken the Parliament and strengthen the Government.²¹ But the *Conseil d'Etat* has acted as if unaware of this wish and has continued to consider only parliamentary laws as deserving judicial immunity, while governmental orders must, as in the past, remain under the jurisdiction of the administrative judges. There remained of course the question of determining the content of the judicial control of these orders. By their very definition they are not obliged to conform to Acts of Parliament. How then can the judge attack them? This crucial problem was

²⁰ C.E. November 24, 1961, *Fédération nationale des syndicats de police*, Rec. 658. Cf. C.E. December 6, 1907, *Compagnie des chemins de fer de l'Est*, Rec. 913; G.A., No. 20.

²¹ Vedel, *op. cit.*, p. 35 *et seq.*

resolved in 1959 by an extremely important decision²² of the *Conseil d'Etat*. It was held that though the Government could act without being limited by any Act of Parliament, it must respect the general principles of law. It cannot therefore escape judicial control in cases of excess of power, nor derogate from the "rights of defence" or the principle of equality, nor pass retroactive measures. Thus, in maintaining under the Fifth Republic the organic criterion of the administrative act, based on the subordination of the Government to Parliament, the *Conseil d'Etat* has saved the very existence of Administrative Law.

Constitutional practice has led to an additional technique for increasing the powers of the Government. In April 1962, General de Gaulle asked the French people in a referendum to approve the Evian agreements which put an end to the Algerian war and to authorise the President of the Republic to take all necessary measures for the application of the agreements. One of the leaders of the O.A.S. appealed against the decision to create a *Cour Militaire de Justice*, one condemnation to death having already been pronounced and executed. In a famous decision²³ in the *Canal* case, in October 1962, the *Conseil d'Etat* fell back on its traditional reasoning, *viz.*, what is done by the Government is administrative. The order in question did not respect certain general principles, in particular by excluding the *recours en cassation*; and it was therefore annulled.

It will therefore be seen that the *Conseil d'Etat* has been able to counter the insidious attempts to withdraw a part of governmental action from the category of administrative acts. It has been able to demand that the Government respect a minimum of guarantees and to forbid it to withdraw itself from judicial control. After the *Canal* case, the Government, extremely displeased, had let it be understood that it was going to undertake studies for a profound reform of the *Conseil d'Etat* itself, in order to rid the Government of such embarrassing judge-made laws. During some time the most pessimistic rumours flew around concerning the fate of the court. A study commission was set up. In actual fact, in July 1963, the Government carried out a reform almost exclusively technical, satisfactory as a whole, and in no way dangerous²⁴ for the *Conseil d'Etat*. The storm had died down, and the future of the *Conseil d'Etat* and Administrative Law was assured as never before.

²² C.E. June 26, 1959, *Syndicat général des ingénieurs-conseils*, Rec. 394; G.A., No. 107.

²³ C.E. October 19, 1962, *Canal*, Rec. 552.

²⁴ Décrets du 30 juillet 1963. Cf. Drago, *La réforme du Conseil d'Etat*, *Actualité juridique* 1963, p. 524 *et seq.*

II. DEFECTS AND LACUNAE

It is not without utility to recall these results at a time when French lawyers have a growing tendency to criticise the weaknesses of Administrative Law. These weaknesses are indisputable and it would be abnormal for it to be otherwise; for that would signify the end of the evolution and the final peaceful coexistence of the political and the judicial, which is obviously not the case today. Among the weaknesses is one of a purely technical nature: the really excessive technicality of the rules which govern the division of jurisdiction between the civil and the administrative courts in cases of administrative action. It is necessary to mention this problem here but long explanations would be required to treat it in any detail. However, other weaknesses in the French system are more important and go to the root of the problem of the submission of the Administration to Law. Their existence indicates the limits at present reached in the conquest of the Administration by Law, and with their help we can trace the frontier between the political and the judicial in the contemporary French society. Thus their study is instructive not only for a knowledge of Administrative Law as such but also in the realm of political theory. It is interesting to measure the real gravity of these weaknesses and to estimate their possible lines of development.

(a) Acts of State

The most apparent weakness of the French system is probably the survival under the name of *Actes de Gouvernement*²⁵ or acts of state, of a category of administrative decisions which cannot be appealed against on the grounds of illegality and for which the State is not liable. The fundamental idea of this theory is that in a given political society there are acts which are so important from the point of view of the preservation and defence of the society that they should not be limited by legal considerations. Once more we come across the idea that law is a hindrance to political action and that at a certain level the latter should be able to be exercised free from any interference by the law and judges. It is therefore, as has been said, a survival of the "reason of State." Under various forms and in various terms, this idea that *de maximis non curat praetor* is to be found in numerous legal systems, in particular in International Law where it has inspired the distinction between judicial and non-judicial disputes as well as certain reservations

²⁵ Waline, *op. cit.*, No. 357 *et seq.*; Vedel, *op. cit.*, p. 220 *et seq.*; Rivero, *op. cit.*, No. 155 *et seq.*; de Laubadère, *op. cit.*, No. 412 *et seq.*; Auby and Drago, *Traité de contentieux administratif*, 1963, Vol. I, No. 61 *et seq.*

on the part of States in accepting the jurisdiction of international courts.

The survival of this political reservation in French Administrative Law may indeed seem scandalous, and numerous writers have urged the abolition of this anomaly, so much so that, practising auto-suggestion, some of them teach that the theory of acts of State already belongs to the past.²⁶ For myself, I consider that the theory of acts of State, such as it is understood today, in no way constitutes a scandal, and that in addition its disappearance is neither possible nor desirable at the present time.

Are acts of State really a consistent limitation on the judicial control of administrative action? They certainly would be if the definition of an act of State did not come within the jurisdiction of the judge and were imposed on him from without, and if these acts were decisions threatening individual liberties. But such is not the case. Since 1875 it is the judge himself who decides, in entire freedom, whether a decision ought to come within his jurisdiction, and it is therefore the judge and not the Government who traces the boundary between the political and the legal.²⁷ Moreover the courts have drawn the boundary line in such a way as to leave few decisions, really dangerous to individuals, outside the reach of the law. Today scarcely all that remain in this reserved domain are the decisions taken by the Government in its relations with Parliament (*e.g.*, convocation or dissolution of the National Assembly) and matters of International Law (*e.g.*, ratification of treaties, bringing diplomatic protection into operation).

On the other hand, it seems that it is necessary at the present time to limit law's conquest of the Administration. Law certainly constitutes one of the most precious mechanisms regulating social life but it would be a serious error to suppose that it can regulate all the tensions. However wonderful a tool it may be, it cannot serve all purposes. There are certain relationships which cannot, in the present state of society, be regulated by exclusively legal mechanisms. I am thinking in particular of the relations between employers and employees and of certain relations between States. For these reasons, it would also be unrealistic to suppose that a government authority in France could accept the jurisdiction of the courts in decisions of so purely political a character as that of the dissolution of the National Assembly by Mr. Edgar Faure in 1955, or General de Gaulle's decision to apply Article 16 of the Constitution after the putsch in Algiers in 1961, or the holding of a referendum in autumn 1962 on the project of revision of the Constitution.

²⁶ Vedel, *loc. cit.*

²⁷ C.E. February 19, 1875, *Prince Napoléon*, Rec. 155; G.A., No. 3.

It is perhaps fortunate that this safety valve remains for the pressure of Administrative Law, otherwise the whole apparatus laboriously set up over the last hundred years by the *Conseil d'Etat* would risk an explosion. The essential is that the breach remain narrow and the *Conseil d'Etat* can be trusted to keep the theory of acts of State within reasonable limits.

(b) The enforcement of decisions

At present the critics' fire is concentrated upon another point on the front. The *Conseil d'Etat* exercises certainly an admirable control over the Administration but it has perhaps neglected to ensure a real efficiency for this control. The problem is obviously a serious one, because what is the use of possessing so fine a tool for controlling the Administration's action if the judges' decisions are not executed by the Administration and if the judge has no way of enforcing execution? Judicial control of the Administration would be simply beating on air and would become, to all intents and purposes, inexistent.²⁸

These criticisms should be particularly striking for English lawyers, who must find it difficult to understand the very idea that a party condemned by a court could escape sentence.

There are two different aspects of the problem. The first concerns the judge's incapacity to pronounce an injunction against the Administration. He can annul an illegal decision, or order the payment of compensation, but he goes no further. In annulling the dismissal of a civil servant the judge will not order his reinstatement. In annulling a refusal of a permit, the judge will not force the Administration to grant it. Even less will he order the Administration to discontinue a harmful activity, or to demolish a road or a pylon which have been illegally constructed. In actual fact, there is nothing to force the judge to be so cautious. In theory he could advance another step in the direction of control of administrative action, and he is indeed urged to do so by various writers.²⁹ However, it is not clear whether such a development is to be encouraged at present. The Administration is fully aware of what it should do after an annulment and, if it fails to act, that there will be further annulments or orders to pay damages. If the Administration agrees to execute, and this is the most common case, an injunction is superfluous. If however it decides to brave the *res judicata*, an injunction from a judge will not change the situation one iota. From another point of view it is perhaps not

²⁸ See Rivero, *Le système français de protection des citoyens contre l'arbitraire à l'épreuve des faits*, Mélanges Dabin (1963), Vol. II, p. 813 et seq.

²⁹ Cf. Rivero, *Le Huron au Palais-Royal, ou: réflexions naïves sur le recours pour excès de pouvoir*, Dalloz 1962, Chroniques, p. 37.

undesirable that the public authorities feel that the execution of judgments is their responsibility, leaving them in this respect, theoretically at least, a margin of choice. It has been pointed out that the decisions of international courts often take the form of declaratory judgments. The fact is that, in a system where the judge's place is precarious, a certain reserve on his part actually increases his strength. The *Conseil d'Etat* can lay down the law with all the more boldness, can raise obstructions in the Administration's path with all the more indiscretion, if it can, at the same time, pretend to respect the independence of the Administration by refusing to seem willing to dictate orders to it.

One must not confuse this problem with that of the impossibility of obtaining satisfaction from an Administration which systematically refuses to execute a sentence. It is in fact true that in France there is no means of execution against the Administration. At the most a refusal to execute will be annulled in its turn, or will render the Administration liable. In the long run, however, nothing can overcome a determined refusal by the Administration to surrender to the judge.

The problem is certainly serious, but must not be overdramatised. Cases of non-execution are extremely rare and are more often due to the real difficulty of upsetting an established situation than to any lack of good will on the part of the Administration. There have of course been systematic rebellions but they raised such a storm partly because they were in fact so exceptional. Different solutions have been proposed, none of which seems entirely appropriate. The reform carried out in 1963 enables a plaintiff, who cannot obtain the execution of a judgment within six months, to bring the matter to the attention of the *Conseil d'Etat*. The latter may then mention the case in its annual report to the Government. The *Conseil d'Etat* may, in addition, on its own initiative, or at the Administration's request, advise the latter as to what steps should be taken following an annulment. In any case it appears difficult to go any further for the moment as the solution depends more on administrative attitudes and the judge's prestige than purely legal remedies. Here, as elsewhere, realism demands that we recognise the existence of a lacuna in the system. This gap, moreover, is very limited, and gives the Government at least the impression of having an ultimate escape from the heavy control of the administrative judge.

(c) Over-emphasis of judicial process

The real weakness in the French system is to be found elsewhere. The attention given to the various elements of judicial control of

the Administration has obscured the fact that French Law accords a perhaps excessive importance to the judicial aspect and neglects other techniques which could ensure the smooth functioning of the Administration and an efficient safeguarding of the citizens' interests. It is striking to realise how little French Administrative Law is interested in what happens before the case comes before the judge, and how much it concentrates on the judicial phase.³⁰ It is more or less uninterested in how the administrative decisions are taken, in the safeguards which may surround them, or in the reasons for these decisions. When one speaks of "administrative procedure" in France, what is meant, in general, is the procedure in the courts. Even the most important books on the subject give only a limited place to administrative procedure outside the courts—i.e., to the procedure in the Administration.

What is the explanation of this phenomenon in which French law differs from so many foreign systems? Here again the answer is to be found in the history and the character of French Administration. It should not be forgotten that the French Administration was for a long time modelled on military lines. The administrative hierarchy closely resembles that of the army. One speaks of *avancement*, *grades*, *corps* etc., in the Administration as in the army. The citizen himself is almost considered as a private who takes no part in making the orders and whose only function is to obey. Like military regulations, Administrative Law wishes decisions to be executory regardless of contestation, and therefore an appeal to the *Conseil d'Etat* does not suspend execution. The relationship between the Administration and the administered is in fact one-sided. The Administration talks and the administered obey. According to the term often used in French administrative texts, the latter are "*assujettis*." These features have certainly been exaggerated here a little in the manner of a caricature, but a caricature is often truer than a portrait.

One gets the impression that judicial control has been stuck onto a structure which is profoundly foreign to it and that it constitutes a sort of excrescence on the Administration. One could even say that France has such a developed judicial control only because the *Conseil d'Etat* has tried, unconsciously, to counter-balance the absence of safeguards for citizens in the actual functioning of the Administration. For this reason one can understand why the man in the street, the average Frenchman, does not feel adequately protected in his relations with the Administration. On the contrary, he feels ill-used, the prey of a thousand and one

³⁰ See note 28.

vexations and often obliged to bow down to ukases which he does not understand. French Administrative Law often appears more aesthetically satisfying to the lawyer than to the ordinary citizen. This is because it comes into operation afterwards, and does not always make its presence felt in the *tête-à-tête* between the Administration and the "*assujettis*."

This situation cannot of course be considered satisfactory. Judicial control, whatever the degree of its perfection, is a control *a posteriori*, with all the disadvantages which this entails. Moreover, this justice remains slow, and even if undeniable progress has been made in this respect, a minimum of time is necessary to examine and judge a case correctly. Yet very often the citizen needs protection immediately, in a few hours or days. Annulment of an administrative act will retroactively invalidate this act and all its consequences, but no human force can prevent its execution in the meantime. Time is never neutral and here it works almost always against the citizen. For this reason more than one citizen prefers to submit passively to an illegal measure rather than to engage in a difficult combat, where, even if he wins, his victory will not always bring effective satisfaction. In spite of its merits and successes, judicial control too often encourages the Administration to practise a policy of *fait accompli*. It must be added that the complexity of social relations makes the law itself more and more complicated. In a litigation one has often as much hope of guessing what decision will be reached several months or years later as the antique soothsayers had of foretelling the result of a battle. Lawyers have the habit of rhapsodising over the wonders of judge-made laws: but one cannot overlook the disadvantages which the uncertainty of this law-making process presents for the security of legal relations.

Thus it would be desirable that individual protection rely less exclusively on judicial control and that the actual process of reaching an administrative decision include safeguards for the citizens' interests. There are some indications that French law has already taken this path. One encouraging sign is the increasing number of all sorts of commissions in which the interested parties can obtain a hearing. While on the other hand the decisions of the *Conseil d'Etat*, with more and more insistence, oblige the Government to allow all persons, against whom it passes a decision of a certain gravity, to know the facts of the case against them, and to defend themselves. The importance which the *Conseil d'Etat* attaches to this safeguard is indicated in its recent decision ³¹ which

³¹ C.E. October 23, 1964, *D'Oriano*, Rec. 486.

annulled a measure taken by the Government against an officer by virtue of a decision of the President of the Republic, in 1961, during the period of application of Article 16 of the 1958 Constitution. Annulment was given on the grounds that the measure had not been accompanied by the necessary safeguards. This decision shows that, even during a temporary dictatorship, when the Head of State holds all the powers, the Administration cannot take certain measures without permitting the interested parties to know what is the case against them and to present their defence.

One should go further. A first reform would consist in forcing the Administration to give reasons for their decisions. At present, the *Conseil d'Etat* admits that, except where otherwise required by law, an administrative decision need not state the reasons on which it is founded.³² This obviously does not mean that there need be no grounds for a decision or that the judge is not supposed to inquire into them. On the contrary: the *Conseil d'Etat* checks, and very closely, the legality of the grounds on which the Administration has in fact relied. How then does the *Conseil* find out the reasons? Quite simply by ordering the Administration to supply them; and if the latter turns a deaf ear, the decision will be annulled. This is the result of the famous decision in the *Barel* case³³ in 1954, in which the *Conseil d'Etat* annulled decisions which barred some candidates from sitting the entrance examination of the *Ecole Nationale d'Administration*. The grounds of the annulment were that the Government refused to give its reasons and it seemed to the *Conseil* that these reasons were probably of a political nature. This question furnishes a striking example of the tendency of French law to attach importance only to the judicial phase. Would it not be simpler and more efficient to require the Administration to state its reasons with the decisions themselves? This would enable the interested party to know where he stands and would speed up judicial action if it proved feasible. This first reform, which could be introduced by the *Conseil d'Etat* itself, should have as complement an increase in the possibilities of consultation and hearing of parties' cases. By substituting for the military Administration what Professor Rivero has called³⁴ a concerted Administration, the citizens, while preserving the irreplaceable aid of judicial control, would benefit from a minimum of safeguards at the very heart of their relations with the Administration. This would avoid, very often, their being forced to choose between unconditional surrender and a battle in the courts.

³² See Auby and Drago, *op. cit.*, Vol. II, No. 1086.

³³ See note 9.

³⁴ Article cited note 28.

CONCLUSION

What conclusions can be drawn from this brief glimpse of present-day French Administrative Law?

Judicial control of the Administration seems to have reached a stage of development which, though certainly not definitive, may be considered the best possible, taking into account the actual state of the French society. It would of course be desirable that the judge could, by injunctions and procedures of execution, ensure, always, the engrafting of the law on to the facts. But the gravity of the lacunae should not be exaggerated. The extent and intensity of judicial control over the Administration are such that it would be unrealistic to hope to overcome the Government's last strongholds. These are in any case so limited and so harmless to the citizen that it would be ungracious for a lawyer to haggle with the Administration over them.

The battle for the progress of Administrative Law should be transferred to another ground. Professor Rivero has unleashed an attack which should be supported by other writers. Judicial control would be all the more efficient if it were not the sole safeguard accorded to the citizens and if the latter felt themselves more fully protected during the actual process of making a decision.

To parody Clausewitz, law is the continuation of policy by other means and the policy of Administrative Law is to protect the citizen while ensuring the smooth working of the Administration. On the Administrative Law front there are weak and strong points. Strategists teach that one should attack from the point where one is strongest. It would seem therefore that, at present, progress has the least chance of being realised in the questions of the consequences of judgments. It would be preferable, this being the case, to bring effort to bear on the actual procedure of reaching decisions in the Administration. The reform will not be easy, as a tradition so solidly anchored is not overthrown in a day. But the very spirit of the development already accomplished gives rise to some hope on this point.

The picture which has just been sketched is, of course, summary, but honest. The elements of strength in French Administrative Law should not be allowed to obscure its weaknesses, as has too often been the case. Neither must its few points of weakness lead us to forget its immense merits.