10

Conclusion

The overview of French administrative law in this book has shown that it is currently shaped by multiple influences. This short conclusion will draw out four of those influences: path dependence, the constitutional turn, the European environment and social change. No legal system remains the same, nor does it remain distinctive in the same ways as in the past. What UK scholars like Dicey or Hamson saw as distinctive in 1885 and 1954 is not the same as what will strike the reader of 2021. This is particularly true for the UK reader of 2021, since her administrative law has changed radically in the intervening years and so the vantage point for comparison is different. But this will also be the case for the Dutch or German or Scandinavian reader of this work.

10.1 PATH DEPENDENCE

Bell has suggested that

> established legal approaches from the past to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future. Legal development is explained not simply by the effect of social and economic pressures operating on the law from the outside at the current time, but also by the internal dynamic of the law, the pressure of established ways of dealing with issues.[1]

This is very clear in French administrative law. A number of features of current French administrative law are only explicable by reference to the historical tradition of French institutions.

[1] J. Bell, 'Path Dependence and Legal Development' (2013) 87 *Tulane Law Review* 787.

The most obvious example is the separation between public law and private law. As explained in Chapter 5, Section 1, France has distinctive historical reasons why there is a clear separation between administrative courts and ordinary courts. That separation as a matter of policy was established even before the Revolution and was restated at the beginning of the 1789 Revolution, of the 1799 consulate and of the Third Republic. It has now been confirmed as a constitutional value in a way that is very unusual in Europe. The consequences have affected both institutions and substantive law. As was seen in Chapter 3, Section 3, there are distinct judicial institutions from those involved in judging criminal and civil matters. They are staffed by individuals whose training has become more and more distinct, especially since the creation of Ecole Nationale de l'Administration distinct from the Ecole Nationale de la Magistrature since 1945. Whereas once administrative judges had degrees from law faculties, now they have a different profile. The subsequent career is different because of another distinctive feature of the French system – the close connection between the judges of the administration and administrators. The fact that individual civil servants can move between administrative, judicial and political activities in the course of a career is very different from the career of ordinary judges and even more different from the experience of judges in other career judiciaries in Europe, let alone from the common law countries. These different judicial institutions have developed their own distinct procedure for deciding cases. This has some similarities with the procedure in the ordinary courts and there is an attempt to align the two. But all the same, there are distinct features, such as the power to order the administration to produce information.

Path dependence is shown especially in two aspects of substantive law. In judicial review, the grounds of review were broadly established by Laferrière in 1887 and they have remained very similar ever since. The influence of the Law of 28 pluviôse An VIII in relation to public works on the ideas behind state liability in France put French administrative law on a path different from that of private law and also from other countries. That is not to say that there are not similarities and cross-influences, but the framework of concepts is distinct.

This distinctiveness of substantive law is reinforced by the distinctiveness of French public law scholars. Those who have written on and shaped French administrative law have been either members of the Conseil d'Etat giving courses preparing students for entry into the civil service or have been professors at universities in specialist public law chairs. The separateness of the competition for public law professorships in France, especially since the rules of the *agrégation* established in 1895 ensures the distinctiveness of scholarly

thought enshrined in the law faculties having distinctive paths after two years of common studies. Those who teach public law do not teach or research subjects in private law.

These aspects of path dependency have reinforced the special character of French administrative law for more than two hundred years. This did not arise at once, but the features just mentioned show how French administrative law has accumulated distinctive features particularly in the course of the nineteenth century. But although French public law has been set on a distinctive path, the dimensions of the Constitution and of Europe have radically altered its course during the Fifth Republic and have created new path dependencies arising out of new existential commitments.

10.2 THE CONSTITUTIONAL TURN

Core French public law teaching used to be divided between a rather doctrinal course on *droit administratif* and a course on *droit constitutionnel et institutions politiques* (as it was called from 1954). Since it was re-established as a first-year subject in law faculties in 1889, the focus has been on the description of constitutional institutions and the principles underpinning them. But it was very much a *droit politique*, not really hard law. This was reflected in the status of the Comité consultatif constitutionnel of the Fourth Republic of 1946, which was effectively a committee reporting to Parliament on constitutional issues. But the decision by the Conseil constitutionnel in 1971 to treat fundamental rights as legally enforceable and the change in those who could make references to the Conseil constitutionnel to include members of Parliament in 1974 altered the situation. The emphasis in the courses and in the scholarship moved to the legal character of constitutional law, with a particular focus on the case law of the Conseil constitutionnel.[2] This led in 1997 to a relabelling of the basic course as simply *droit constitutionnel*. This reflected the emerging place of constitutional law within public law, a position entrenched by the constitutional reforms of 2008, especially the introduction of QPC.

The legal character of constitutional law and its status in relation to administrative law can be seen especially in the work of the Conseil constitutionnel. Its members do not have to have a legal qualification, but this has become increasingly the case. Its judicial workload is significant. The Conseil

[2] See J. Chevallier, 'Droit constitutionnel et institutions politiques: les mésaventures d'un couple fusionnel', in M. Amellier, P. Ardant and J.-C. Bécane, eds., *La République. Mélanges en l'honneur de Pierre Avril* (Paris: Montchrestien, 2001), pp. 183–99, esp. p. 190.

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constitutionnel gave 319 decisions on electoral matters in a major electoral year (2017–18) and had 160 cases pending at the end of that year.[3] It deals with disputes on referendums and presidential and parliamentary elections, whereas the administrative courts deal with local and European elections. Not only can it prevent laws being signed by the President and annul existing laws, the Conseil constitutionnel can lay down how laws are to be interpreted both by the administration and by the courts. Since the 1980s, these *réserves d'interprétation* have become a very significant part of the decisions the Conseil constitutionnel has handed down in relation to challenges to the validity of legislation.[4] It was, of course, a technique borrowed from the Conseil d'Etat.[5] As was seen in Chapter 4, Section 6, the administrative courts deal with many requests to refer an issue to the Conseil constitutionnel by way of QPC. Nearly half of the references for a QPC come from the Conseil d'Etat. So, although the administrative courts are a major filter for requests, the Conseil constitutionnel is the lead decision maker on major questions of public law concerning the validity and interpretation of legislation passed by Parliament. The Conseil d'Etat has a complementary if less glamorous role in relation to legislation made by the government. Particularly in the area of fundamental rights, the Conseil constitutionnel has become the pace setter.

Even if the administrative courts are no longer the lead institution in relation to constitutional matters, it is worth remembering that this has come about by the expansion of public *law*. Situations treated as *legal* issues in 2021 are more numerous and important than what was considered a *legal* matter in 1958. The administrative courts have not lost any powers in that period. Indeed, they have gained them. The illustrations throughout this book from the Covid-19 pandemic, especially in Chapter 4, Section 3, show just how far the administrative courts are now able to give orders to the Prime Minister to change legislation within a very short deadline. Their work is at the operational level of the Constitution, but in terms of ensuring that powers are exercised and fundamental rights are protected, their actions are very

[3] Conseil constitutionnel, *Rapport d'activité 2018* (Paris, 2018), p. 14.

[4] A. Viala, *Les réserves d'interprétation dans la jurisprudence du Conseil constitutionnel* (Paris: LGDJ, 1999).

[5] On the *retrait du vénin*, see, for example, CE 4 January 1957, *Syndicat autonome du personnel enseignant des Facultés de droit*, RDP 1957, 673 note Waline: a ban on the holding of international conferences without the permission of the Minister was upheld provided it was interpreted as applying only to conferences requiring financial support from the administration.

powerful. In many ways, the prestige of the Conseil constitutionnel has been reflected onto the other courts.

Fundamental rights are not the only values enforced in public law. As seen in Chapter 7, Section 4, principles of good administration have been developed significantly in the past fifty years both by the legislator and by the administrative courts. This is not an area in which the Conseil constitutionnel plays a major role, but is part of the overall operation of constitutional institutions in France.

10.3 THE EUROPEAN ENVIRONMENT

In the course of the Fifth Republic and unlike the United Kingdom, France made two existential and not merely instrumental commitments to Europe. After De Gaulle's hesitancy, France became a fully committed member of the European Union. A few years later, it ratified and embraced the European Convention on Human Rights. Those two commitments have led French administrative lawyers to treat Europe as both a natural partner in dealing with issues of administration and as a benchmark for the best standards of administrative law. These two dimensions of current French administrative law have created their own path dependence within French law.

The significance is shown by the fact that the words 'Europe' and 'European' occur nearly three hundred times in the Conseil d'Etat's annual report in relation to its work and that of the administrative courts for 2020.[6] The major administrative law journals regularly have updates on EU law and the European Convention and their presence in discussions in articles is pervasive. Significantly, these aspects of French law give a new status to both administrative and ordinary courts, since they, not the Conseil constitutionnel, are the primary institutions enforcing the laws of the EU and of the Convention. They are the institutions which can strike down domestic legislation because it is incompatible with these supranational norms.

As was seen in Chapters 1 and 4, the Convention affects procedure, especially through the requirements of art. 6 on a fair trial. As seen especially in Chapter 7, Section 3.2, the Convention affects the understanding of fundamental rights. There are topics, such as privacy and the right to a family life, which are not clearly covered in the formal French constitutional texts, so the Convention is the primary source of certain fundamental rights. Bjorge suggests that, until the 2000s, the Conseil d'Etat's interpretation of the

[6] Conseil d'Etat, *Rapport public 2020* (Paris, 2020). Most of the uses relate to the European Union.

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Convention was rather restrictive, but that, since then, it has adopted the 'living instrument' approach of the Strasbourg court.[7] In that way it has not only decided to follow the interpretation of that Court in relation to specific provisions, but to embrace its approach to the Convention as a whole.

European Union law affects large amounts of substantive administrative law – for example, tax law, environmental law and immigration law, among others. Chapter 9 showed how radically the French law on administrative contracts has been altered by EU legislation, changing not just its scope and content, but also its ethos. The Conseil d'Etat's annual report has sections specifically on the EU in relation to both its judicial and its consultative work. Certainly since the 1990s, EU principles have been hard-wired into the whole administrative law system.

The influence of the EU on French administrative law is not limited to the specific rules and principles which originate in EU law. The place of European partners as benchmarks for best practice is seen very clearly in the influence of the European ombudsman on principles of good administration, which culminated in the enactment of the CRPA in 2015. That is not to say that Europe was the only influence. Indeed, the French experience fed into the deliberations of the European ombudsman. France administrative law had been moving in this direction since the late 1970s. But the climate created by the European developments provided extra stimulus and reference points for French developments. This is but one example of the 'spillover' phenomenon by which domestic law changes beyond the requirements of EU law. All the same, French developments have been selective. As was seen in Chapter 7, Section 4.6, French administrative law has not adopted the concept of 'legitimate expectations', preferring to keep with the idea of legal certainty and its reduced scope. Similarly, in Chapter 8, Section 4.5, it was seen that French law on compensation for unlawful actions is more generous than that under art. 340 TFEU. For the most part, the identification of spillover is complex. There are French developments and European developments which merge into an overall 'mood music'. The use of proportionality is a good example (see Chapter 7, Section 1.5.4). It is clear that the European concept provides a common language for dealing with issues for which French law previously used different terminology. All the same, there is a clear movement of French administrative law towards the greater level of scrutiny which the concept of proportionality represents.

[7] E. Bjorge, *Domestic Application of the ECHR. Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015) pp. 126–30.

The development of French administrative law in line with the two European laws is facilitated by informal mechanisms of genuine dialogue, as well as by the more formal communication that comes through references from French courts to the European courts and their responses. Not only are members of the Conseil d'Etat judges in the courts, but they are also *référendaires* in the Luxembourg court. Members of the courts hold regular informal meetings where ideas can be exchanged on key topics (and the authors have been present at such meetings). These links between people reinforce the sense that enforcing Convention rights and EU law is a collaborative effort, rather than an external imposition, despite differences of opinion about specific topics.

Overall, it is impossible to think of French administrative law today independently of its involvement in the enterprises of the European Convention and European Union Law.

10.4 SOCIAL CHANGE

France is not an island, and French society is deeply involved in global enterprises at the political, economic and community levels. French society is cosmopolitan. According to French statistics, 8.355 million people (12.85 per cent, out of a population of 65.130 million) living in France in 2019 were born elsewhere, which is very similar to the UK (13.4 per cent).[8] France is a consumer economy drawing in goods and services from across the world. As a consequence, its social expectations of public administration are not defined totally by what France traditionally has on offer.

French society after 1968 has been less deferential to authority and more consumerist in its approach to public services. There has also been a decline in belief in centralised planning and a greater reliance on the market. These trends have changed what is run as a public service and how far people are able to complain. Chapter 7, Section 4 noted that the changes in France are mirrored in other countries in the developed world. Reforms of public administration and the organisation of public services is a common theme of studies by the OECD.

That said, there are distinct dynamics within France. France has a very distinctive approach to secularism (*laïcité*).[9] It also has a specific approach to

[8] Statistica website: www.statista.com/statistics/548869/foreign-born-population-of-france (visited 6 May 2021).

[9] See M. Hunter-Hénin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Oxford: Hart, 2020), chapter 2.

terrorism. As noted in Chapter 1, Section 5, the decision of the Conseil d'Etat in *La Quadrature du Net* carefully negotiated the French policy of wishing to have access to mobile telephony data in the fight against terrorism with the EU legislation on data retention.[10] Guided by a reference to the CJEU, it found lawful most of what the government wished to ensure for its antiterrorism policy, but required the retention to be reviewed more frequently than the government planned.

The dynamics of contemporary public law are shown by the case in that the administrative courts are coming to the final decision under the influence of both domestic constitutional law and EU law.

France also has a distinctive balance between centralised power and local administration. Much of the structure of this balance has been laid down for centuries, but, as Chapter 2 explained, changes in the past forty years have moved France to a different set of arrangements than are found in the United Kingdom, Belgium, Germany or Italy. In many ways, globalisation has led to greater attention to the way power and influence can be exercised at the local level. In this topic, as in many others, France has a distinctive way of handling issues which are common to many developed countries.

10.5 *RENVOI*

This book has provided an introduction to French administrative law. The dynamics identified in this chapter explain why that law is always on the move, whilst retaining much of its distinctive and recognisable shape. Enduring elements were laid down by the Revolution and Napoleon's legal and administrative reforms, by the early years of the Third Republic, and by France's more recent commitments to the EU, to the European Convention and to legal constitutionalism. At the same time, society and ideas about public administration change, and the law will reflect these movements.

[10] CE Ass. 21 April 2021, *La Quadrature Net*, no. 393099.