

JUDICIAL CONTROL OF THE ADMINISTRATION IN FRANCE AND IN ENGLAND

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In continental countries it is an established practice to delegate extensive legislative powers to the executive government. Under the various French constitutions since the revolution and other European constitutions modelled on or suggested by those of France, the executive government has and freely exercises a power of making decrees and similar orders and regulations which supplement the action of the legislature. In England there has been a marked inclination on the part of Parliament to make the executive a law unto itself and a judge in its own cause. The delegation of legislative powers by Parliament is not an ultra-modern device of a certain country. It has appeared in many countries from time to time all through history, whenever the stress of legislation has been great.

Down to the end of the Hundred Years' War the governments of France and England were of the same kind, that is to say they were political governments whose power was limited by the remnants of feudal decentralization. In the sixteenth century the idea of a feudal monarchy was displaced both in France and England by that of a unified state which centralised powers in the hands of the sovereign. In both countries new conception led to political conflicts during the seventeenth century. In France the nobility and the *Parlements* stood together against the growing power of the *Conseil du Roi* and its intendants in the provinces.

But whereas in England the victory remained with the Parliament and the courts of common law, and the jurisdiction of the Council was abolished, in France the King finally triumphed in 1661. Here then begins that divergence between France and England which has led to such difference in theory and practice as regards administrative law.

In France judicial power anciently lay with the *Parlements* and a bitter struggle continued throughout the seventeenth and eighteenth centuries between the *Parlements* and the instruments of the new administrative power, namely, the intendants nominated by the *Conseil du Roi*. There were no less than twelve of these local *Parlements* in 1775, and they were too strongly entrenched to be reformed, particularly as the magistrates were the owners of their offices. The only method of reform was to starve them by transferring jurisdiction to an entirely new power. As a result in France in the eighteenth century a centralised administrative power develops as an instrument to insure unity of law and administration. So was formed in the State a new power which appeared at the revolution in its true character, at once governmental and administrative. This power is characterized by the fact that it endeavours to ensure both public order and the rule of law by police measures and by the fact that it executes its own decisions.

The assemblies of the French Revolution entertained a conception of the separation of powers which they thought they found in Montesquieu. An especial feature of this version is the place attributed to the judicial power. At the beginning of the famous sixth chapter of Book XI of the *Esprit des Lois*, Montesquieu had written : " In every State there are three kinds of powers, the legislative power, the executive power that deals with matters depending on the law of nations and civil law... By the third The Prince punishes crime or adjudicates the controversies of individuals. This last will be termed the power of judging" In Montesquieu's mind, accordingly the judicial power had to do solely with the repression of crimes and the determination of controversies between individuals, or private suits. Precisely the same character is attributed to this power in the laws passed by the National Assembly of 1789, in the constitutions of 1791 and of the Annee

III, and in the laws adopted under these constitutions. During the revolutionary period the minds of the French were still filled with the notion of the opposition of the judiciary to all projects of reform. Thus with the recent example before them of an administrative body exercising jurisdiction they naturally followed it. The constitution of 1791 declared that, "les tribunaux ne peuvent rien entreprendre sur les fonctions administratives" and the constitution of the Année VIII created the *Conseil d'Etat* and gave this body the power *inter alia* of settling such difficulties as arise in administrative matters. In 1806 a judicial committee, the *Commission du Contentieux* was established with power to submit to the *Conseil* in general assembly, reports on administrative disputes. This was really the beginnings of the *Conseil d'Etat* organised as a court, though the committee exercised only that limited power known as *justice retenue*, and its decisions were given in the form of advice and were legally the decisions of the *Conseil d'Etat*.

In England during the Tudor and early Stuart periods there were signs that judicial control of government might be superseded by the administrative control of the council, the Star Chamber and the Provincial Councils, and the control exercised by the itinerant judges at that period was still as much administrative as judicial. As the controversy between King and Parliament developed under Charles I, it gradually became clear that those who upheld the cause of the prerogative must take a step further and claim that it was the sovereign power in the State. The attempts made by the House of Commons to criticize the government were met by dissolutions. The claim to impeach the King's ministers was met by assertions that not only the King's ministers but even his humbler servants, were not amenable to the law in respect of acts done under the authority of the King. And it is clear that this immunity was the main cause of the rapid development of the system of administrative law under the Tudors¹. For though the servants of the Crown were withdrawn from the juris-

1) Sydney and Beatrice Webb, *English Local Government, The Parish and the County*, p. 110.

Holdsworth History of English Law, vol. IV, pp. 72.80.

diction of the common law courts, they were always amenable to the Great Rebellion and the Revolution was to end this administrative control, and to make the system of judicial control in effect the only curb to which the organs of local government were subject. Justices could be made to perform their duties and could themselves make the subordinate officials and units of local government perform theirs, only by proceedings in the courts of law. Hence during the eighteenth century the judicial control of all the organs of local government was elaborated, and this elaboration resulted in the development of special bodies of law connected with local government.

The most effective control to which the autonomous units of local government were subject was that exercised by the courts of common law, and principally by the court of King's Bench. It is true that the lesser units of local government such as the parishes and the parochial officers were subject to the administrative and the judicial control of the justices sitting in quarter sessions. But, this apart, it was the continuous control exercised by the courts of common law over all the units of local government from the lowest to the highest, which was the principal factor in securing the regular working of these units within their appointed spheres and in determining their relation to the central government.

In many places the justices assumed power to give orders as to the jurisdiction of the petty or special sessions of the justices and as to the procedure. On all matters relating to rating, to licensing, and to the poor law, the justices issued edicts which were legislative in character. The control was almost entirely judicial in its character and it was always applied through the machinery of judicial forms. Though the courts were able to exercise a control of an administrative character by means of the prerogative writs, as well as by means of indictments, informations and civil actions, it was always exercised by means of litigation in which the parties were publicly and orally heard; and the courts were unwilling to interfere with purely administrative decisions of the justices where the law had given them a free discretion. One can see that the manner in which the relations of the local to the central government were determined by

the action of the courts, sheds a considerable light upon the nature and working of the eighteenth century constitution.¹

During the eighteenth century, therefore, local government was centralised no further than in quarter sessions² The justices of the peace were the most important organs of local government. Originally it had been created as a criminal court of law, and when it received administrative functions to perform it was natural that, it should follow the procedures which it had inherited from the Tourn. Thus in administrative matters such as poor law, rating, highways, bridges, goals, sewers, the licensing of ale houses, trade, and the fixing of wages, quarter sessions acted in the same manner as it did in truly judicial matters. In theory, therefore, quarter sessions, even in the manner in which it dealt with administrative work, followed judicial procedure. In fact, however, in the later eighteenth century this formalism broke down.³ Quarter sessions could take independent action on many of these matters, and in some cases, e.g. in relation to rating, could hear appeals.⁴ The result was that partly because of the necessity of the case and partly by reason of pressure from the central government the sessions of the justices began to be differentiated. After the judicial work was finished the justices adjourned into private meeting for the discussion of 'the county business', as their administrative work was called.

All this development was entirely free from any central administrative control, for the judges of assize confirmed themselves almost entirely to their judicial work. Thus the central government, though it could advise the justices and call their attention to particular parts of their duties, lost its powers of control. Mainly for this reason the justices came, in the course of the eighteenth century, to be permanent officials. But apart from the legislative powers of Parliament, there did exist some form of control, exercised by the court of King's Bench. Also, the courts were, with a little assistance from the legislature, re-

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- 1) Cf. Holdsworth ; op. cit., vol. IX, p. 29.
 - 2) Ibid.
 - 3) Ibid.
 - 4) Op. cit., vol. X, p. 185.

ducing to some sort of system the common law and statutory rules regulating the duties and powers of the officials and bodies responsible for the working of local government, and by their action were laying the foundations of the modern English administrative law. The supervision exercised by the courts over the conduct of local government indeed played no small part in adjusting the relations between the separate parts of the eighteenth century administration. In the first place the courts upheld the autonomy and independence of the organs of local government. They refused to interfere with the exercise by the justices of any discretionary power entrusted to them by the law provided that such discretion was honestly exercised. This principle was applied both to judicial and to administrative discretions. In the second place the courts were prepared to give procedural advantages to the Crown and its servants¹. This procedural rule enabled the Crown to protect its officials from proceedings in the inferior courts. And in the third place, the courts always laid the greatest stress on the need to protect the liberty and rights of the private citizen.

We have seen that both quarter-and ended petty-sessions exercised functions which were legislative, executive and judicial. Some of the *ad hoc* authorities, such as the commissioners of sewers and the poor law unions exercised a similar variety of functions. There is little separation of powers in local government. Yet there is still a sense in which there was a separation of functions in the eighteenth century system of local government. For during that time all organs of local government were independent autonomous bodies, not subject to any continuous supervision by the central government, but only to the legislative power of Parliament, and to control by the courts if they infringed the law defining their powers and duties. Each to some extent, therefore,

1) There was a well - established rule, that, though a defendant should not get a writ of " certiorari " without showing some grounds for its issue, on the application of the Crown the writ was issued as of course, even though it was moved for by the Crown on behalf of an individual or defendant.

acted as a check upon the others, and prevented them from using their powers tyrannically.

The powers of the central government rested mainly upon the prerogative. They were exercised through a number of councils, ministers and departments of state, composed of the King's servants, who, according to the theory of the constitution, advised the King as to the exercise of his prerogative¹. In fact the King's servants often acted in their own discretion. And all through the eighteenth century, right down to the reforms of that following, these councils, ministers and departments of state were the component parts of a governmental machinery of extraordinary complexity. The autonomy of each unit enabled them all to develop in many different directions. Each of them derived its authority not from particular powers defined by statute or the common law, but from the wider and more indefinite prerogative of the King. They were subject to the control of the King, and they were subject to the control of the law as interpreted by the courts, both these forms of control leaving them a wide sphere of autonomy. But there was of course a danger that rules resulting from the practice of a particular department might gradually whittle away the liberties of the subject. And this was guarded against by the existence of the right of appeal to the courts. Both the danger and the efficacy of the safeguard are illustrated by the case of *Entick v. Carrington*².

The year 1832 brought into English history a new order of things. The first Reform Bill which put the House of Commons on a wider and more democratic basis inaugurated an era of active political and social reform. As the legislative activities of the House of Commons multiplied, most of the conditions which gave rise to the delegation of legislative powers began to appear. Though many important political and social reforms were carried out during this period, individualism and *laissez-faire* still dominated mid-Victorian thought. The domination of these doctrines continued because of the series of conservative governments.

1) Holdsworth, *op. cit.* vol. X, pp. 336, 649, 651, 652.

2) (1765), 19 S. T. 1030.

But some extensive powers were delegated to the government departments. The age of large scale delegated legislation did not begin until after 1906, when the liberals were returned with great majority in Parliament¹.

In England, it is admitted that the power of making laws belongs to Parliament, of putting laws into execution to the King and to the judges. So public departments as well as private affairs are under the control of the same courts of justice, subject only to the rule that the King can do no wrong. In France ordinary justice is usually reserved for private affairs. Public departments are independent of the courts of justice to such an extent that some authors consider that there are not only two powers in the State, but three: legislative, executive and judicial². Some do not accept this way of analysing the facts. They say that there are only two powers : legislative and executive ; and they add that executive power is divided into two branches : administration and justice. They think that justice and administration must be independent one of the other. This means that the officials whose functions are to maintain order and peace in the country and to render the services that the subject has a right to expect from the State must not interfere in the carrying out of justice. Conversely, ordinary judges must, not interfere with the activity of the administration. For this reason in France, after the creation of the Third Republic, by the law of May 24, 1872,

1) Cf. Dicey, *Law and Opinion in England*, pp. 64-9, for the view that the doctrine of "laissez-faire" declined in influence somewhat earlier.

2) Admittedly in England and the United States also it is commonly said that the supreme power is or should be separated into three : legislative, executive and judicial. But the Anglo-Saxon conception of the separation of powers is based exactly upon the analysis of Montesquieu, which envisages the executive merely as an external one possessed of the "puissance executrice des choses qui dépendent du droit des gens". This scheme does not contemplate an internal executive at all, a circumstance to be explained by the state of affairs actually observed by Montesquieu in the England of his time, namely the exclusively judicial control of local government and the liability, if ever the agents of central government to judicial control.

the Assembly reorganized the *Conseil d'Etat* and conferred upon it 'delegated judicial power' that is the right of independent decision in matters requiring adjudication. It conferred upon this body general and supreme competence by a provision which should be cited in full: 'The *Conseil d'Etat* has power of final decision in administrative controversies and in all suits to annul (as in case of acting in excess of powers) the acts of the various administrative authorities'.

Thus the Third Republic, like the Empire, the Monarchy, the Republic of 1848 and the Second Empire, upheld the system of administrative jurisdiction. The movement for its suppression was a complete failure. There were many reasons why it could not succeed. In the first place there continued to be a strong feeling that every administrative act is a manifestation of executive power, and that the ordinary courts cannot be permitted to interfere with the action of the government. In addition to this, there was making its way unconsciously into the public mind the concept of the public service. The close connection between administrative action and the management of the public service was coming to be realized and there was increasing unwillingness to permit the ordinary courts to interfere with such management.

While the movement aiming at the suppression of administrative jurisdiction thus failed to attain its direct aim, it nevertheless achieved one important result. In 1872, as has already been indicated, the *Conseil d'Etat* was empowered to render independent decisions in matters of dispute and thus became a court of last instance. Today it is universally recognized as the ordinary law court in administrative matters.

According to the Ordonnance and Décret of July 31, 1945 the present *Conseil d'Etat* is composed of Councillors (*Conseillers*, Master of Requests (*Maitres des Requêtes*) and Auditors (*Auditeurs*). An élite of some 150 men mostly selected by examination. The Councillors decide, the Masters of Requests and Auditors prepare the judgements or opinions. The *Conseil* is divided into administrative and judicial sections. It sits in sections, in combined sections and in general assembly. Only the

most important matters are dealt with in the general assembly to which they go after examination by one of the sections or by two or more sections in joint session.

The *Conseil*, besides its judicial functions has also functions which are both legislative and administrative. Its administrative functions are, however, very important. In the first place the advice of the *Conseil d'Etat* must be asked in regard to all ordinances and decrees concerning public administration. When it is remembered that it is the habit of the French legislature to put into statutes only very general principles and expressly to delegate to the executive the power to regulate details by ordinance, it will be seen what an important function the *Conseil d'Etat* discharges in working out as it does, the details of almost all statutes. Its advice is nearly always asked as to the exercise of the central control which the executive authority possesses over the actions of the localities, as to the grant of charters, and as to many matters of financial administration. Indeed it may be said that what in England is done by means of special and local legislation is in France done by the decrees of the president or orders of the ministers issued after taking the advice of the *Conseil d'Etat*.

The organization of the *Conseil d'Etat* as a court is quite distinct from that of the *Conseil* as an administrative body. All the purely administrative elements are excluded both from the general assembly and from the separate sections that hear and decide cases. The *Conseil d'Etat* is thus in reality a court that affords every guarantee of knowledge, independence and impartiality. It is composed of members who are described as administrative judges : judicial officers from the point of view of their virtual permanence of tenure and their independence, administrative officers as regards the source from which they are drawn. Because they are by training administrative officers, they are familiar with the problems of administration ; they understand its difficulties and its needs. For the same reason they do not arouse in the governmental mind the distrust or jealousy which of the ordinary courts might inspire; and on the other hand they confront the government without that timidity which is not infrequently displayed by the ordinary judges.

It is well here to mention the subordinate French administrative tribunal, the *Conseil de Préfecture*, which does duty in the provinces. France is divided into departments, each of which is an administrative district. In each of these departments is an officer called the *Préfet*, who is appointed and removed by the president of the republic, on the proposal of the minister of the interior. The prefect is at the same time the representative in the department of the central government and the executive officer of the purely local administration of the department. That is to say he is a central and local officer. Each prefecture has a council called the Council of the Prefecture, whose members are appointed and dismissed by the president of the republic. They are professional in character. This body is at the same time an administrative council and an administrative court. Like the *Conseil d'Etat* it has both an administrative and a litigious side, the latter being restricted to matters allotted to it by statute.

In connection with the administrative courts of France it should be noticed that the *Cour des Comptes* examines the whole of the accounts of the national revenue and expenditure. It may call for evidence, impose penalties on accounting officers who delay in presenting their accounts, surcharge officials and authorise prosecutions. It reports annually to the president and the Chamber, and makes any suggestions for reform which occur to it.

Its members are appointed by the president for life. It thus resembles the office of the Auditor-General in England, whilst partaking also of some of the functions of the English Public Accounts Committee.

Administrative courts, especially the *Conseil d'Etat* on the judicial side stands on a similar legal basis to that of the civil courts. Where civil and administrative courts are running side by side many cases naturally arise where it is doubtful to which jurisdiction they are properly assignable. For this reason a special tribunal to determine the conflicts of competence between the administrative and judicial authority exists. This *Tribunal des Conflits* goes back to the period when distrust of administrative jurisdiction was still very strong. What was intended was to constitute

a court, affording every guarantee of independence and of impartiality, to decide conflicts of competence.

We have seen that in France, there is a uniform system of administrative courts, but that in England this is not the case. Disputes between citizens and officials are normally decided by the ordinary courts. There are neither special courts nor a special procedure applicable exclusively to members of the executive. The Crown itself and all servants of the Crown, are liable to proceedings, if at all, in the ordinary courts by the ordinary law of the land. In France, if a government servant is accused of wrongdoing in the discharge of his official duties, the action lies in a special administrative court, with ultimate recourse to a special court of appeal, the *Conseil d'Etat*. The whole of this jurisdiction forms a separate and technical branch of the law, and its activity is immense. In England, however, Parliament has given jurisdiction over many particular kinds of disputes to a variety of authorities. In some cases it has conferred powers of a judicial nature upon ministers individually, in some cases upon persons or bodies appointed by ministers.

As to the powers conferred on ministers themselves, judicial and quasi-judicial functions must be distinguished. Both presuppose an existing dispute between two or more parties but there is a substantial difference in the mode of settling them. In the case of a judicial decision the minister has to apply the law to the ascertained facts and to decide accordingly while a quasi-judicial decision is an administrative act based on public policy. The minister empowered to make a quasi-judicial decision is by no means constrained to rely on legal considerations, but is free to exercise an unfettered discretion. An example of the confirmation of a judicial power on a minister is to be found in section 161 of the National Health Insurance Act, 1936, which entrusts the minister with the determination of various questions e.g. whether any employment within the meaning of the Act, as to the rates of contributions and whether a person is or was the employer of an employed contributor. Such questions are to be determined by the minister in accordance with regulations made for the purpose. A quasi-judicial decision was for example, the confirmation of an improvement or reconstruction scheme under the Housing Act, 1925, Sections 35 - 40, since re-

pealed by the Housing Act, 1930. Such schemes were prepared by local authorities for the improvement or reconstruction of unhealthy areas. The scheme having been prepared, the local authority had to advertise it in a newspaper, to serve notices on the persons affected and to present a petition to the Minister of Health that an order might be made confirming such scheme. The Minister considering the scheme had to take into account the objections of the dissentient landowners and to see that the scheme was in accordance with the provisions of the Act. Being satisfied that it was so within the Act, the Minister had still a discretion to confirm the scheme absolutely or subject to conditions or modifications or to refuse to confirm it altogether¹.

The term administrative tribunal in English legal system refers to tribunals which do not normally conform to judicial standards². These standards require that courts be composed of persons trained in the law, that such persons be independent and not subject to external pressure or influence, that both parties be given a hearing, that proceedings be public, that evidence be given in open court, and in the presence of the parties, that witnesses be subject to cross-examination, and that the person giving the decision be known³. It is obvious that where judicial powers have been conferred upon Ministers or departments or persons who are under ministerial influence the tribunals so constituted is unlike a court of law in its make-up, and it has been laid down by the House of Lords, that administrative tribunals are under the obligation to follow the procedure of ordinary courts⁴. Two well-known cases settled the right of an administrative agency to choose its own way of coming to a decision. In *Board of Education v.*

1) **Wade and Phillips**, Constitutional Law, 3rd ed., p. 273.
C. K. Allen, Law and Orders, pp. 68-73.

2) "A body of men who combine official experience with legal knowledge, provided that they are entirely independent of the government of the day" **E.C.S. Wade**, Introduction to Dicey's Law of the Constitution, 9th ed., p. LXXXII.

3) **Wade and Phillips**, op. cit., p. 273.
C. K. Allen, op. cit. p. 168.

Robson, Justice and Administrative Law, 2nd ed. p. 90.

4) **Robson**, op. cit., p. XIII.

*Rice*¹, which came before the House of Lords on appeal in 1911, that court was called upon to interpret a provision of the Education Act, 1902, which empowered the Board of Education to decide questions that might arise between local education authorities and managers of private schools. It held that the department, in so deciding a dispute over which parliament had given it jurisdiction, need not conform in its procedure to the rules binding upon a court of law, and that it had power to make a final and conclusive judgement without appeal to the courts, on question of law as well as of fact.

Of even greater importance in the case of *Local Government Board v. Arlidge*², decided by the House of Lords in 1915. A borough council, acting under a provision of the Housing and Town Planning Act, 1909, made a closing order with respect to a house on the ground that it was not fit for human habitation. The owner, after having some repairs made, applied to the Council to terminate the order. The Council refused to do so, and the owner, under of another provision of the same Act, appealed to the Local Government Board. The Board dismissed the appeal. By writ of *certiorari* Arlidge brought the order of the Board dismissing the appeal before the King's Bench division to be quashed on the ground that the appeal had not been determined in the manner provided by law. The principal grounds of his complaints were that the order of the Board did not disclose who had decided the appeal, that the procedure adopted by the Board was contrary to the natural justice in that he had not been given the opportunity of an oral hearing before the Board and that he was not permitted to see the report of the inspector, who had conducted the inquiry. The King's Bench division thought that the Board had acted legally, that there had been no violation of natural justice in its procedure, and refused to quash the order. Arlidge appealed to the Court of Appeal, which reversed the decision of the King's Bench division, two of the three lords justices holding that the procedure of the Board contrary to natural justice. The case finally came before the House of Lords which re-

1) (1911) A. C. 179.

2) (1915) A. C. 120.

versed the judgement of the Court of Appeal and restored that of the King's Bench division.

In England administrative tribunals of the most developed and specialised type include the Railway and Canal Commission, the Railway Rates Tribunal, the Special Commissioners of Income Tax and the Board of Referees. In addition to these there exist some of more informal character, as for example, the Pensions Appeal Tribunal. There are many other special or professional tribunals but the most significant examples of English administrative tribunals are to be found in connection with the judicial functions exercised by the great departments of state, or by tribunals closely connected therewith. The actual administration of numerous state activities is performed by the local government authorities. Where there is a department in whitehall covering particular activities such as the Board of Education or the Ministry of Transport, the local authorities are subject to the control thereof. In the residue of matters control lies with the Ministry of Health. The result is that the Ministry of Health exercises judicial powers over a wide variety of matters, including sewers and drains, water supplies, isolation hospitals, burial grounds, housing, town planning, nursing homes and nurses, superannuation of local government officials, and disputes between local authorities¹. In addition to these there are, in England, many other special or professional authorities dispensing administrative justice, the London Building Tribunal, National Health Insurance Tribunals, Tribunals for Unemployment Insurance, Pensions Tribunals, the Area Traffic Commissioners, the Patents Appeals Tribunal, Tribunals for Industrial Disputes, Professional Courts and the Registrar of Friendly Societies. Many government departments including the Board of Trade, Board of Education and Ministry of Transport exercise judicial functions².

The discussion on the establishment of separate administrative courts, still continue and the future of administrative justice in England is still uncertain. Up to know the orthodox point of

1) Hart, *Local Government and Administration*, and also Jackson, *Machinery of Justice in England*, p. 209, and Robson, *op. cit.* 101.

2) Hart, *op. cit.* p. 202.

Robson, *op. cit.* p. 90.

view has prevailed, as can be gathered from the report of Ministers' Powers which absolutely rejects the setting up of a system of administrative law or jurisdiction on the French model¹, on the other hand, an ever increasing number of writers point out that the French citizen is better protected against officials than is the British subject².

The control of the administration by the courts, what the French call the *contentieux administratif* has been worked out in France by the administrative courts themselves in their decisions, although the actual administrative matters over which they have this jurisdiction are prescribed in statutes. The *Conseil d'Etat* in particular, as the supreme administrative court, has since the beginning of the last century developed a remarkable body of case law affording the individual virtually complete protection against arbitrary administrative action. The jurisdiction of the French administrative courts is in complaints made by individuals against the non-political acts of the administrative authorities, of special as distinct from general application, whose immediate effect is to violate the rights of individuals acquired by virtue of some statute, ordinance or contract. The act complained of must be nonpolitical in character in order that the administrative courts may examine it. What is a political act it is difficult to say. Neither in France nor in England has it so far been defined by the legislature, and its nature must thus be discovered from the decisions of the courts themselves. It has been asserted that any act performed by the government or by a subordinate administrative authority in compliance with an order of the government, is wholly exempt from attack, however flagrant its illegality, if the purpose for which the act is performed is political³. The following are, according to the decisions

1) M. P. R., p. 118.

2) Cf. C. J. Hamson, *Rule of Law in France* : I — The *Conseil d'Etat* and the Executive, II — Form and Function of the *Conseil d'Etat*, *The Times*, February 20-21, 1951.

3) It is admittedly difficult to define " *actes de gouvernement* " in French law. Hauriou defines them as, 'celui qui figure dans une certaine énumération d'actes politiques dressée par la jurisprudence administrative, sous l'autorité du Tribunal des Conflits'.

of *Conseil d'Etat* and *Tribunal des Conflits* accepted as *actes de gouvernements* :

- 1 — Acts of the President of the Republic in the exercise of his power of pardon.
- 2 — Certain measures of discipline in the army.
- 3 — Annexation of territory.
- 4 — Diplomatic protection of the French citizens in foreign countries.
- 5 — Refusal of an appeal by a French citizen for diplomatic protection in a foreign country.
- 6 — Instructions to diplomatic agents.
- 7 — Treaties and official interpretations of treaties (the interpretation of treaties is within the exclusive power of the foreign minister and not of the administrative tribunal).
- 8 — Reparation to a French citizen in respect of an injury at the lands of a foreign state.
- 9 — Acts done in implementing a treaty.
- 10 — Declaration of war.
- 11 — Internment, reprisals, destruction as a result of military operations, military requisitions in enemy territory.

In England, no less than in France, certain matters lie outside the normal sphere of law. The following are accepted as Acts of State in English law¹ :

- 1 — Any act committed against an alien on land or sea outside British territory which is authorised or adopted by the Crown.

1) In English law, Act of State means, "an exercise of sovereign power which cannot be challenged, controlled or interfered with by municipal courts; its sanction is not that of law but that of sovereign power, and whatever it be, municipal courts must accept it as it is, without question". Cf. Act of State in English Law, E. C. S. Wade *British Year Book of International Law*, 1934, p. 98 Wade and Phillips, *op. cit.*, p. 176, and Chap. 9.

- 2 — The annexation upon conquest or otherwise, or occupation of foreign territory by order of the Crown.
- 3 — Any act done on British territory in time of war against an enemy alien e.g. in case of imprisonment of such an enemy he cannot claim upon *habeas corpus*.
- 4 — A friendly alien is not so debarred, unless perhaps the Crown has formally withdrawn its protection because of his treasonable activities.
- 5 — The declaration of war and making of peace (the determination of existence of a state of war).
- 6 — The recognition of foreign governments or states.
- 7 — Treaties.
- 8 — Reprisals.
- 9 — The delimitation of State immunities (immunities of heads of states, diplomatic and consular immunity, immunity of public property of a foreign State).
- 10 — The determination of the status of foreign states and governments.
- 11 — The determination of entitlement to diplomatic status.

From this tabulation it may be seen that the categories of acts which lie outside the scope of normal judicial control, are virtually the same in both countries. And the present tendency of the courts of both is to restrict the conception of Acts of State¹.

1) The theory of "actes de gouvernement" has occupied an important place in French administrative law, and there is an extensive literature dealing with the subject, although the matter is now becoming less and less important because of the increasing disposition of the "Conseil d'Etat" to abandon the distinction between the two categories of acts. Many distinguished French jurists condemn the theory as being arbitrary and contrary to the spirit of modern French law. There are not, or should not be, they maintain any acte du gouvernement. Such is the view of Berthelemy, Jeze, Laferriere and Hauriou. Professor Jeze remarks that the distinction between 'governmental' and 'administrative' acts is most regrettable and is contrary to the spirit of modern French positive law. 'There should be no acte de gouvernement which are free from judicial control and against which no recourse is allowed when they are illegal. It places the government above the laws upon the pretext that its acts are political'.

As to France, any person has the right to appeal to the *Conseil d'Etat* against any act other than an *acte de gouvernement* of any administrative authority, on the ground that such authority has in the performance of the act complained of, exceeded its power or violated the law. The body of the case law relevant to this matter which was worked out by the administrative courts, has been given the sanction of statute by the law of May 24, 1872 which provides that the *Conseil d'Etat* shall decide finally on all claims to annul acts of administrative authorities on grounds of excess of powers. The rules relate to two principal matters : (I) *Ultra vires* acts (*excès de pouvoir*), and misuse of power (*detournement de pouvoir*) ; (II) the liability of the administration to individuals (*recours de pleine juridiction*). The *Conseil d'Etat* hold that there is an excess of powers where an administrative authority (a) encroaches upon the competence of some other authority, be it legislative, judicial or again administrative ; (b) disregards from prescribed by the law as necessary ; (c) though acting within its competence and observing necessary forms, uses its discretionary powers for purposes other than those for which it is granted.

The remedy of appeal to the courts on grounds of excess of powers differs considerably in its character and effects from the *recours de pleine juridiction*. For while in the exercise of the administrative jurisdiction, the administrative courts may review and revise the order complained of, even if this involves the consideration of questions of fact and expediency, the *Conseil d'Etat* may, when

What has here been said is certainly true of France. It is also true, so far as England is concerned, in relation to substantive law. But it is, however, relevant to remark that one of the most notable and curious features of English law in this last century has been the increasing tendency of the courts to defer to the executive decision, and even to seek it, in relation to the field of Acts of State. Examples of this process are to be found in relation to such matters as the determination of the existence of a State of War, the existence of consideration of public interest rendering the admission of evidence inadvisable, etc. For a full list of the matters in regard to which the courts will so accept the executive decision see *Oppenheim's International Law*, 4th ed., by Sir A. D. Mc Nair, vol. I. p. 647, note 2. See also the cases of *Duncan v. Cammell Laird Co. Ltd.* (194) A. C.

recourse is made to it on the ground of excess of powers, merely annul the act or order complained of and may not amend it, and will necessarily consider none but question of law. The remedy is thus very like the *certiorari* of English common law. It likewise serves much the same purpose as the prohibition or injunction of English common law. For while mere appeal to the *Conseil d'Etat* is not suspensive, i.e. does not prevent the official whose act is complained of from going on to enforce it, the *Conseil d'Etat* may, if it sees fit declare that proceedings in a particular case shall have suspensive effect, or may transmit the papers in the case to the appropriate minister and call his attention to the plea of the plaintiff that the proceedings shall be suspensive. Such minister may then order all administrative measures to be held in abeyance.

In *ultra vires* proceedings the complaint is against the unilateral act of an administrative authority, high or low. But the acts of judicial authorities, including administrative acts are of course immune from question. The same is true of the acts of the legislature, even when, exceptionally, the latter is exercising an administrative or judicial function. There is, however, no other authority in France whose acts are not subject to the judicial control of the *Conseil d'Etat*. The President of the Republic himself is thus placed under its control. And the *Conseil d'Etat* sitting as a court, does not hesitate, to quash acts of the head of state when it finds therein any violation of law. The act in question must of course be one which the president has performed in virtue of his administrative authority.

When the head of the state performs individual act, when, for example, he issues a decree of appointment or of removal he has always been regarded as an administrative authority, and such acts have always been open to attack as *ultra vires*. But as regards so-called regulative acts the same doctrine was evolved and applied only with some difficulty. In particular the *Conseil d'Etat* formerly refused to regard as being capable of being *ultra vires* general administrative regulations; that is to say regulations issued by the head of the state with the advice of the *Conseil d'Etat* deliberating in general assembly, and on the invitation of the legislature. Despite this development, however, it must be remembered that the presi-

dent of the republic does not act always as an administrative authority, and that acts performed by him in other capacities are immune from attack in the Conseil d'Etat on the ground of *ultra vires*. This is the case where he exercises the powers which the constitution gives him, regarding the legislature, when for example, he determines the date of parliamentary elections, calls the chambers together in extraordinary session, adjourns them, announces the closing of the parliamentary session, or dissolves the chamber of deputies. In such cases he is not acting *qua* administrative authority, and his acts are subject to the exclusive control of the parliament. It is of course inconceivable that any court whatever should be entitled to interfere in the relations of the two political organs. Again the president of the republic does not act as an administrative authority when he exercises his diplomatic functions.

But in spite of these reservations it is clear that the field within which acts may be attacked as *ultra vires* is very wide. It is the wider because more than half a century ago the Conseil d'Etat and the Tribunal des Conflits definitely rejected a conception which at an earlier period was held in great respect, that is to say the *acte du gouvernement*.

All administrative action is thus subjected to judicial control, involved chiefly by application for the annulment of acts as *ultra vires*. Such application may be made by an interested party. The applicant is not required to prove the existence of a right alleged to be infringed by the act attacked. He has to show only that he has an interest in the annulment of the act in question and a mere moral interest, even indirect, is sufficient. In the assessment of such interests the Conseil d'Etat displays great liberality. For instance it permits any taxpayer to subject to the consideration by a municipal council, of an undertaking which is not within its competence and which accordingly may burden the locality with an irregular expenditure. It also permits any individual qualified for nomination to a public office to attack any irregular nomination to such office. And it permits professional associations of public officials to attack any nomination, promotion, removal, suspension or transfer to an inferior position alleged to be in violation of the law governing the branch of the public service in question.

In weighing the sufficiency of grounds for annulment, the Conseil d'Etat again takes a very broad and liberal view. It admits recourse against acts as ultra vires, not only when a law determining competence has been violated or when the proper forms have not been observed, but also when there has been any violation of the general substantive law. It was formerly held that recourse could be held, on this last ground, only when there was infringement of a vested right. Today, however, this restriction has wholly disappeared, and whatever be the ground of recourse the conditions on which it is admitted are the same.

In England it is the ordinary courts which measure administrative acts against the doctrine of ultra vires. The essence of that doctrine is this¹ : All subordinate legislation is subject to the rule of ultra vires. Any person affected by delegated powers has the right to complain if those to whom they are entrusted exceed their charter, and it is then for the courts to decide, as a matter of law, whether the measure impeached falls within the terms of the relevant authority, which is usually a section of a statute. Thus, if a company is incorporated by statute to manufacture railway carriages, it cannot engage in the construction of railway systems. Even a public officer must defend the legality of his action, and cannot cover himself by asserting that he was acting in the public interest. The rule of law requires the public officer, no less than the private citizen, to justify his acts as lawful².

The Conseil d'Etat has also evolved a doctrine of misuse of power, something analogous to which can be found in the decisions of the English courts. The term *détournement de pouvoir* is used in French administrative law to denote the performance of an act by an administrative agent for a purpose other than that which the law had in view when it bestows the power to do it, which he purports to use. The conception and its development involve an examination of the motives promoting official action and have resulted in the subjection to judicial investigation of most administrative acts, discretionary in character which could not formerly be

1) Wade and Phillips, op. cit., Chapt. IV.

2) *Johnstone v. Pedlar* (1921) 2 A. C. 262.

examined even by the Conseil d'Etat nor be annulled by any court even though the end to which they were directed might be illegal. It is an offshot of the *recours pour excès de pouvoir*¹ which covers also the more particularly defined ultra vires acts already mentioned.

The doctrine of the misuse or misapplication of power has served to round off in a very happy fashion the protection in France of the individual against arbitrary administrative action. In accordance with it the courts may annul the acts of administrative authorities not only when they involve a technical violation of a law, but also when, although contravening no express legal provision they are performed for a purpose other than which the law had in view when it authorized them. As a result of this development, there is a tendency concerning administrative 'discretion' in France : the motives determining the action of the administrative authorities may always be subjected by interested parties to the judicial control of the Conseil d'Etat.

In England the courts intervene to prevent powers being abused or exceeded². Control of the improper exercise of powers is regarded as an application of the ultra vires doctrine. Obviously, the wider the terms of delegation, the narrower the opportunities of restriction, and even more obviously, if the delegation is effected in such a manner that the delegate is allowed complete discretion, anything he does is ultra vires, and control is excluded. With regard to the bye-laws of local and statutory authorities, the operation of the ultra vires principle is wider than in regard to ministerial orders, because the courts in the former field are entitled to examine not only the scope of powers but the reasonableness of their particular exercise. The reasonableness of a ministerial order is never in itself open to question though unreasonableness may be evidence that the order is ultra vires. But when in England the

1) Ultra vires.

2) The courts are prepared to check what is called in the terminology of the French administrative courts " détournement de pouvoir. " The application of this principle can be seen in *Roberts v. Hopwood* (1925) A. C. 578.

doctrine of *ultra vires* is applied, it does not automatically abrogate the subordinate legislation which is challenged but merely decides the individual case which has arisen under it¹.

In France the discretionary act belongs to the past; it has almost no place in the law of today. The Conseil d'Etat is always competent to consider the propriety of the purpose for which the act was done; and it does not hesitate to declare it null if it finds that the administrative agent although he has not overstepped the formal limits of his competence, has pursued an end other than that which the law had in view in giving him such competence. In some characteristic instances, the Conseil d'Etat has applied this doctrine in a very definite way. The following case is a well known example of this²: French law gives to the prefect the right to regulate traffic in the vicinity of railway stations in the interests of public order. To secure regular communication between the town of Fontainebleau and its station a railway company undertook negotiations with a carriage company proprietor. The latter insisted on having a monopoly of the trade, and at the request of the company the prefect issued an ordinance which forbade all carriages but those of the contractor, to enter the station yard. The proprietor of a local hotel who had been in the habit sending an omnibus to meet travellers at the station, sent his omnibus as before and was prosecuted for it. He appeared on the ground that the prefect had made use of the police power to grant a monopoly, and the court annulled the ordinance.

In another case the same court annulled on the ground of abuse of power a decree by which the government, invoking a provision on the municipal law of 1884, dissolved a municipal council in order to secure the correction of irregularities alleged to have accrued in the course of elections. The government can decree the dissolution of a municipal council but only to ensure the proper conduct of the communal administration. Accordingly there was

1) C. K. Allen, *op. cit.*, p. 132.

Wade and Phillips, *op. cit.*, p. 270.

Hart, *op. cit.*, pp. 220, 285, 379, 394.

2) Arrêts du Conseil d'Etat, 1864, Fev. 25, Affaire Lesbats.

Laferriere *op. cit.* vol. II, p. 531.

an abuse of power, equivalent to action *ultra vires* when the government performed an act, which beyond a doubt was formally within its competence, for a purpose which it could not seek to attain by this means.

The court also quashed a decision of the minister of war excluding a grain dealer from tendering for or being awarded contracts for military supplies because the dealer held political and religious opinions which the minister disliked. The court annulled the decision "in view of the fact that the action of the minister of war was based on motives foreign alike to the awarding of such contracts and to the position or professional capacity of the merchant".

In England the rule of law requires that every exercise of discretionary power shall be capable of being questioned in a court of law on the basis of *ultra vires*, and it has been assumed that the judiciary's traditional independence of the executive can be relied upon to check abuses. The usual means whereby the courts secure that the departments shall not abuse their powers is by the issue of the prerogative writs of *mandamus*, *prohibition* and *certiorari*.¹ The prerogative writs were originally addressed by the King to his officers to compel them to carry out their functions properly or to prevent them abusing their powers. But at the present day any private individual may apply to the High Court for the issue of a prerogative writ or order.

When any public authority or official is under an absolute duty to perform a certain function and refuses to do so, any person who has a demonstrable interest in its performance may move the High Court for a *mandamus* to compel the fulfilment of the duty, and the court if satisfied that the application is a proper one will make an order accordingly, provided that there is no other remedy equally convenient, beneficial and effectual open to the applicant². The issue of the order is in the discretion of the court, unless there is no other remedy available. It has been used for instance to compel the hearing of an appeal by a ministerial tri-

1) Wade and Phillips, *op. cit.*, p. 278.

C. K. Allen, *op. cit.*, p. 85.

2) C. K. Allen *op. cit.* p. 62.

bunal and the holding of a local government election. Thus, if, for example, the Commissioners of Income Tax have issued certificates for the repayment of overpaid tax, and the Special Commissioners, believing that the certificates were issued without jurisdiction, refuse to make orders for payment, mandamus will lie to compel them to do so. Mandamus is most frequently directed to the local and public utility authorities. It is rarely issued to ministers or departments which on the face of it, are most likely to refuse performance of duties clearly laid upon them by statute¹.

The order of prohibition is issued by the High Court, to prohibit an inferior court or any body exercising statutory quasi-judicial powers, from exceeding its jurisdiction. It is used not only to keep the justices within their jurisdiction but will be issued, for example, against the Electricity Commissioners to prevent them from holding an inquiry with a view to bringing into force an ultra vires scheme for the supply of electricity².

Certiorari lies to remove a suit from an inferior court into King's Bench division of the High Court³. Any fundamental irregularity of substance or procedure may be the subject of certiorari and none is more vital than excess of jurisdiction. It is commonly said that certiorari is applicable only to judicial proceedings but it is often difficult to draw an exact line between the judicial and the purely administrative or ministerial⁴. Thus prohibition was the appropriate remedy to prevent the Minister of Health from

1) C. K. Allen, *op. cit.* p. 62.

2) R. v. Electricity Commissioners, (1924) 1 K. B. 171.

Wade and Phillips *op. cit.*, p. 280.

3) 'A writ of certiorari is to be distinguished from a writ of prohibition and it does not follow that because the latter lies to an ecclesiastical court the former lies also, because ecclesiastical courts are not inferior courts'. *Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese Ex Parte White* (1947) 1 K. B. 263. For a contradictory opinion see : D. M. Gordon, *Certiorari to an Ecclesiastical court*, L. Q. R., vol. 63, p. 208.

4) 'The writ of certiorari issued not only for the absence of excess of jurisdiction but also for correcting and quashing judgements or order of those courts from which error did not lie.' per Lord Goddard, L. C. J., *Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, Ex parte White*, 1 K. B. (1947) 263.

proceeding to confirm an *ultra vires* housing scheme¹, but *certiorari* was granted by the Court of Appeal when an *ultra vires* housing scheme had already been confirmed by the Minister².

In all these decisions, English as well as French, a rule seems to be taking shape, a rule which will open the door more widely to complaints of abuse of power. Heretofore the complainant has been required to show direct and positive proof of the existence of an extraneous consideration determining the action of the administrative authority. In decisions rendered in recent years it seems to be implied, on the contrary, that it is enough for the complainant to show that the reasons which should exist in order to justify the administrative act do not exist in fact. The complainant has not to prove that the reasons which really determined the action of the administrative authorities was extraneous. It is enough that the reasons which could properly determine such action did not in fact exist. There is here, obviously, no change in the nature of the remedies against abuse of power. But its employment is facilitated, and the judicial control exercised over the active administration by the courts has received a further extension³.

The doctrine of *ultra vires* and misuse of power are not the only means whereby the courts protect individuals against the administration. But the guarantee of reparation for loss or damage which the individual may have sustained on account of the torts of the State or its agents is one of the features of French administrative law, which distinguishes it fundamentally from English law. In England it is a general principle of law that the Crown is not liable to private individuals for damage caused by the tortious acts of its agents⁴. In ge-

1) *R. v. Minister of Health, Ex parte Davis*, (1927), 1 K. B. 169.

2) *R. v. Minister of Health, Ex parte Yaffe* (1930), 2 K. B., 98.

3) E. C. S. Wade, *The Courts and the Administrative Process*, L. Q. R., 63, p. 166.

H. J. Laski, *Discretionary Power*, *Politica*, vol. 1, (1935), p. 274.

H. J. Laski, *The Growth of Administrative Discretion*, *Journal of Public Administration*, 1923, p. 92.

Cf. H. J. Laski, *Law in the Modern State*.

4) At common law the Crown suffered from no disability in proceeding against a subject in respect of torts committed by him against

neral the remedy of the individual in such cases is an action for damages in the ordinary courts against the officer or agent committing the tort. In France too during the greater part of the nineteenth century all the legal writers maintained that in cases in which the administration might be held liable to individuals the ordinary courts were alone competent to pass upon its liability. This was the period in which the administrative jurisdiction was still regarded with distrust. The Conseil d'Etat had not yet received a power to give judgement itself in cases of controversy, and the rights writers endeavored in all possible ways to restrict the field of administrative jurisdiction. They sought to show that, when a question of administrative liability was raised, no review of an administrative act as such was involved, but only the examination of a single act and its consequences. The question to be decided was purely one of civil law, namely whether article 1382 of the Code Civil and the articles following were applicable¹. Consequently the ordinary courts had exclusive jurisdiction. Under the Second Empire two decisions of the Court of Cassation recognized the competence of the ordinary courts to entertain and decide actions in tort brought against the State. In the famous Blanco Case², ho-

Crown property. The normal procedure was by way of Latin information, but the Crown could, if it preferred, proceed by action. Now, by Section 13 of the Crown Proceedings Act, 1947, Latin informations are abolished for all practical purposes, and the Crown must in every case proceed by ordinary action, subject to rules of Court. The change so effected is procedural only, and no alteration of the substantive law is involved. Crown Proceedings **Ronald McMillan Bell** London, 1948, p. 19.

1) The provisions in the Code Civil on which administrative liability is based are substantially as follows : Every one is liable for damages occasioned by this fault (1382). Negligence and lack of foresight constitute fault (1381). For damages occasioned by the faults of servants or employees master and employers are liable, unless it be shown that they could not have prevented the damage (1384). For damage done by animals the owners, or those who are in charge of the animals are liable (1385). For damages resulting from defective construction of buildings or from failure to keep them in repair the owners are liable (1386).

2) Dalloz, 1873, 3, 17 ; Sirey, 1875, 2, 153.

wever, the Tribunal of Conflicts recognized the competence of the administrative judges to hear and decide such a suit against the State. In this case the action was brought to recover damages for the accidental injury of a child employed in the government tobacco factory at Bordeaux. On the first hearing the judges were equally divided. The decision was rendered after a session in which the Minister of Justice participated as president of the tribunal. This decision was upheld by the Court of Cassation. Since that case it has been the settled rule that the administrative courts are competent to hear and decide all suits against the State arising from the operation of a public service. The ordinary courts are competent to pass upon the liability of the State only when the suit arises in the field of private law. It was only after long hesitation the Tribunal of Conflicts recognised the competence of the Conseil d'Etat to determine the liability to individuals of administrative entities other than the State. At last this assimilation was made by a decision of the Tribunal of Conflicts in the Feutry case¹. This decision like that in the Blanco case was rendered after equal division and on a second hearing under the presidency of Mr. Briand, the Minister of Justice. It carried further the development begun in the Blanco case; in that it affirmed the competence of the administrative court to decide a suit for damages brought against a department. The rule finally established marks a distinct advance in French public law. If the decision of suits brought against the various branches of the administration had been assigned, not to the administrative court, but to the ordinary courts, the liability of the public services would certainly not have received the great extension which the decision of the Conseil d'Etat have given it.

The basic principle of French jurisprudence is that the State is liable to the individual not only in contract but also in tort where the tortious act of the agent is not a purely personal act; that is, the State is liable when injury is due to a *faute de service*. The fault may be due to an error, an omission, an act of negligence or even of want of judgement on the part of the agent in his

1) Dalloz, 1908, 3, 49; Sirey, 1908, 3, 97.

personal and unofficial capacity; but if it results from a *faute personnelle*, he and not the State is liable. In the former case the remedy is a suit against the administration before the administrative court, in the latter an action for damages in the ordinary court against the agent. It seems that today the Conseil d'Etat recognizes the liability of the administration even in cases where there has been no fault in the conduct of the public service. It is true that in the decisions there is still mention of *faute de service*. But this phrase is not used to describe a fault which may be imputed to the public service as a fictitious person; what is meant is the fault of which an agent has been guilty whilst engaged in the public service¹. Sometimes faults of this sort are found to exist and the Conseil d'Etat relies on them in giving judgement against the administration. Sometimes again, no such fault appears and yet the court still recognizes the liability of the administration. Then we have something that looks like an insurance of the individual against damage resulting from the operation of a public service, even from its normal operation—insurance against what has been correctly described as administrative risk². It is in matters of police administration that the high court has been induced most frequently to recognize public liability in this manner. In 1905 the Conseil d'Etat applied the principle of State responsibility to the case of damage accidentally done when a shot was fired by a *gendarme* to stop a mad bull in an Algerian town. In 1910 it recognized that the State was responsible for accidental injury inflicted on a passerby by a police agent in pursuit of a malefactor. There was in reality no fault on the part of the agent, who was simply doing his duty. The injury suffered by the passerby was a matter of pure chance. The police service was functioning normally, there

1) It is interesting to compare here the not dissimilar distinction between an act within the scope of a servants employment and an act not so within the scope of such employment which the English courts have arrived at (though not, ofcourse, in reference, to responsibility of the State since the rule that the King can do no wrong still holds.). Cf. *Salmond Law of Torts*.

2) The effect of this development is, broadly speaking, to apply the civil law doctrine of risk, of which the English parallel is the rule in *Rylands v. Fletcher* to the public service.

was no *faute de service* in the primary sense, but nevertheless the administration was held liable.

A French citizen also enjoys another guarantee which is worthy of note. Prior to 1864 he might have been debarred from suing the administration by their mere inaction. In that year, however, a decree laid it down that if an appeal to a minister against a decision of one of subordinates was not decided within four months, the plaintiff could carry the case to the court. This power is no longer restricted to hierarchical appeals to a minister, but applies to all claims against the administration provided only that they have been addressed to the competent authority, notwithstanding that such authority has a discretionary power in the matter to which the appeal refers. In effect a four months silence on the part of the administration is construed as a rejection of the claim, and on that interpretation an appeal can be made to the court either for annulment only or for compensation.

So, in France, the State accepts liability for the acts and defaults of State officials when acting in their official capacity whereas in England no proceedings can be taken against the Crown for the tort of a state servant. A petition of right would not lie for a pure tort, and in such a case, a subject had, until the Crown Proceedings Act, 1947, came into force, no remedy whatsoever directly against the Crown. The rule of the common law was "the King can do no wrong"; for "*qui facit per alium facit per se*", and to hold otherwise would be to hold, in effect, that the King could do wrong. The matter is well put by Blackstone: 'The King can do no wrong; which ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things—first whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would destroy the constitutional independence of the Crown, and secondly, that the prerogative of the Crown extends not to injury.' From this it followed that the King was not civilly liable for the acts or omissions of his servants any more than he was for his own acts, and also that a servant of the Crown could never escape liability for torts which he had com-

mitted in the course of his public duties by pleading the authority of the King.

In early times no distinction was possible between private and public capacities of the King, but the change in the nature of public administration and the immense growth of the functions of the central government eventually compelled certain modifications of this total immunity of the executive from actions of tort, and during the last eighty years a number of acts of parliament have made possible actions against certain departments of State. The position must have become intolerable much sooner but for the personal liability of the Crown servant who actually committed a tort, and the practice which grew up that the Crown should satisfy, at least in most cases, the judgment obtained against its servant. Sometimes it was not easy to indentify any individual Crown servant as the doer of the wrong, and as a further mitigation of the hardships of the common law rule, the Crown consented, in suitable cases, to appoint a nominee who was made defendent in order to make it possible for an issue to be tried. This practice, however, came to an end after the observations of the House of Lords in *Adams v. Naylor*. In that case it was pointed out that the judgment in an action of tort must be based upon the liability in fact of the defendant for the wrongs alleged against him, and that unless the evidence supported the allegations in the statement of claim a verdict against the defendant could not be entered or upheld. National liability has never been recognized by the English courts, and these actions with nominal defendants were really collusive attempts to effect substantial justice. The ruling given in *Adams v. Naylor* was therefore, sooner or later, inevitable ; nevertheless, when it came, it brought to a head the growing dissatisfaction of the public with the State of this part of the law, and was finally responsible for the passing of the Crown Procedure Act in the following year.

This Act has at last introduced a clear distinction between the personal and public capacities of the sovereign. In his personal capacity the Sovereign, by virtue of the common law rule, which is unaltered, continues to be absolutely immune from all process, unless, in certain cases, he chooses to permit the hearing

of a petition of right against him. In his public capacity, in which it is convenient to refer to him as the Crown, the Sovereign is liable in proceedings brought under the Act.

Section 2 of the Crown Proceedings Act, 1947 subjects the Crown to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject :

1. In respect of torts committed by its servants or agents,
2. In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer,
3. In respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property, and
4. In respect of a failure to comply with a statutory duty which is binding also upon persons other than the Crown and its officers¹.

Taking the French system as a whole and comparing it with the English system, can it be asserted that the protection of the individual against the administration is as satisfactory in England as it is in France ? Law is the reflection of social order. France is a republic with a highly centralized administration. Government there assumes the form of a pyramid. If her public officials were as free from judicial control as they are in England these undoubtedly be a great deal of arbitrary action. Wider functions necessitate the employment of more officials and where the government is highly centralized the subordinate officials in the growing army of civil servants must inevitably pass farther and farther from the control of the ultimate power. The system of administrative jurisdiction and administrative courts is thus a counterpoise to centralization.

In England, more than elsewhere, constitutional progress has been the result of social development². Looking at the liberal ins-

1) Crown Proceedings Act, 1947, s. 2 (1).

Cf. **Ronald McMillan Bell**, *Crown Proceedings*, London, 1948.

2) Cf. **Trevelyan**, *Social History of England*.

J. R. Green, *A Short History of English People*.

tutions of England of his time, Alexis de Touqueville said that England has no constitution. Yet in no country were constitutional rights and liberties, speaking generally, better assured. But the last century has witnessed an extension of governmental function on a large scale and the negative State of the past centuries has become the positive State of the twentieth¹. What are reasons for this radical change in the attitude toward administration which has taken place gradually in two generations and has given rise to ideas of administrative absolutism within a decade? One is undoubtedly the changing idea of justice: the problem of adjusting a law shaped by the abstract individualism of three centuries to an ideal of social justice which has been slowly taking shape in the present century. Another is increasing economic unification and consequent specialization; the increasing complexity of social and economic organization and division of labour². It was impossible for the executive to discharge the greatly enhanced and extended functions of government as long as its activities were limited by the old individualistic ideas which prevailed in an extreme form in the courts of law³.

Even the courts themselves have recognized that there is a class of cases which they not so well equipped to settle as would be an administrative body. Such is the statement of Lord Sumner in the case of *Roberts v. Hopwood*⁴; 'The courts often accept the decisions of the local authority simply because they are themselves ill-equipped to weigh the merits of one solution of a practical question, against another. Nobody with any experience of administration would seriously maintain that it should be for the courts to determine every case where there is a dispute between an official and a citizen as to whether a discretion has been properly exercised. The courts cannot say what ac-

1) Cf. Laski, *Law in the Modern State*, A Grammar of Politics, Reflections on the Revolution of Our Time. E. H. Carr, *The New Society*, London, 1951.

2) Cf. Pound, *Administrative Law*
Landis, *Administrative Process*, Ch. IV
C. T. Carr, *Concerning English Administrative Law*.

3) Robson, *op. cit.*, p. 251.

4) (1925) A. C. 578.

tion is reasonable on the facts of every individual case.'¹ But it is also a principle of natural justice that a man may not be judge in a cause in which he has an interest. Can it be said that a minister who is pursuing a vigorous policy in the administration of, say, the Housing Acts, is to be regarded as absolutely impartial in the exercise of a judicial or quasi-judicial function in regard to housing questions ?² It is said that the solution would appear to be the appointment of a ministerial tribunal independent of the minister and his department and consisting of persons specially qualified to deal with matters arising out of the work of the particular administration. To ensure the satisfactory working of such courts and to secure the confidence of the public it is necessary that they should be independent of the government³.

The ultimate aim of administrative justice is to coordinate private interests with the public welfare. 'Social interests cannot be secured or a social policy effected by the application of abstract principles of justice as between man and man,'⁴ and the strict application of the law 'results in the tendency to sacrifice the public welfare to private interests where the latter can lay claim to individual rights.' It has become increasingly recognized in the social scheme that while inflicting as little injustice as can be on the individual, his interests must be made subordinate to the common weal. Herein, then, is to be found the explanation of the paradox which can be the only conclusion of this study. Judged according to the concerns of pure remedial justice and legal formality, in terms of which the lawyer is accustomed to think, the protection against the

1) E. C. S. Wade, *The Courts and the Administrative Process*, L. Q. R. 63, p. 166.

H. J. Laski, *Discretionary Power*, *Politica*, vol. 1, (1935) p. 274.

2) " We have been saying for years that what is wanted is more of the judicial element in the tribunals and more sympathy and understanding of the administrative elements in the law courts " C. T. Carr : *Concerning English Administrative Law*, p. 125.

3) Yet : " We have not and need not reproduce the Conseil d'Etat and the Tribunal des Conflits of the French system ". E. C. S. Wade, *Appendix to Dicey's Law and the Constitution*, 9 th. ed., 1939, p. 491.

4) Robson, *op. cit.*, p. 251.

State afforded by law is clearly less in England than in France. Such is the formal position. But where the relation of subject to State is concerned the rules of remedial justice do not and cannot wholly apply. The sphere of public law is by definition that of distributive justice. And what is distributive justice and when it is pure are questions which can only be answered by reference to a particular society and in terms of its needs. When, therefore, the practical, as distinct from the purely formal, situation in England falls to be examined it is immediately seen that the position of the subject vis-a-vis the State is in fact no less favourable than in France. Indeed, if the unnecessarily high cost of litigation in the former country be discounted, it is probably more favourable. But neither this circumstance nor the explanation of it is to be deduced from the written law.
