

3

Courts and Judges

3.1 HISTORICAL CONTEXT

As has been noted, one of the distinctive features of the French administrative justice system is that it has general courts that are separate from the general courts dealing with civil and criminal matters, and that the judiciary working in them is also separate. Indeed, it has become more separate in the past one hundred years. Whereas the great founder of administrative law scholarship, Edouard Laferrière, was first Vice President of the Conseil d'Etat and later *Procureur-Général* at the Cour de cassation, such a career in both judiciaries would be very rare today.¹

The separateness of administrative justice has its roots in the battle between the French kings and the *Parlements*. The unification of France under Henry IV beginning in 1589 was carried through by measures that centralised power. In the 1620s, Louis XIII and his minister Richelieu appointed royal officials as *intendants* to represent the king in local areas and, among other things, to receive complaints from citizens on taxation and later on public works. Appeals from his decisions lay with the Conseil du Roi, renamed the 'Conseil d'Etat' around the end of the sixteenth century. The king also legislated by way of decrees, which were also challenged in the Conseil du Roi. These actions brought about a conflict with the twelve regional *Parlements* which, like the English House of Lords at the time, both voted legislation (*lois*) and were courts adjudicating on (regional) law. At that stage, before the Revolution of 1789, there was no uniform French private law, but a set of regional laws made and adjudicated upon by the regional *Parlements*. As the Stuart kings found at the same period, unifying a country with different laws, different parliaments and different courts generated conflict. But,

¹ See P. Gonod, *Édouard Laferrière, un juriste au service de la République* (Paris: LGDJ, 1998).

whereas the British outcome was victory for Parliament, the French victory (if there was one) was for the king, and the persistence of distinct administrative courts and judiciaries is testimony to the distinctive political history of France.

The separate character of administrative justice was definitively set out in the Edict of St Germain-en-Laye of 1641, building on the edicts of earlier kings. In it, Louis XIII set out the claims of absolute monarchy and reserved the right to take the advice of the *Parlements* as and when he thought it good for his service. As part of this, he prohibited the *Parlements* from judging matters other than those between subjects and ‘in relation to all matters which concern our state, administration and government, we reserve to our person alone and to our successors as king’.² Even if it created a new start with new institutions of government, the Revolution of 1789 fundamentally continued this approach. It abolished the *Parlements* as enshrining the privileges of the aristocracy and replaced them with a body of national courts, headed by the Tribunal de cassation. But the law of 16–24 August 1790 set out the separation of powers in such a way as to prohibit the civil judges from interfering with the administration. Article 13, which is still in force alongside arts. 10 and 12, provides:

Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.³

This prohibition was reinforced by the law of 7–14 October 1790 regulating conflicts between the civil courts and the administration, which gave the final say to the king and is the origin of the main remedy before the administrative court, the *recours pour excès de pouvoir*. The Constitution of An III (1795) repeated this prohibition. During the Revolution, the task of handling complaints was left to the administration itself, giving rise to many concerns about its fairness.⁴ The creation of the Conseil d’Etat in 1799 and of the *conseils de préfecture* in 1800 did mark a significant step towards judicial handling of complaints against the administration. But it was a slow process. At first, a complaint was referred by a minister to the Conseil d’Etat and the decision

² On the history of administrative law, see J.-L. Mestre, *Introduction historique au droit administratif français* (Paris: Presses Universitaires de France, 1985) and id., ‘France, the Vicissitudes of a Tradition’ in P. Cane, H.C.H. Hofmann, E.C. Ip and P.L. Lindseth (eds), *Oxford Handbook on Comparative Administrative Law* (Oxford: Oxford University Press, 2021), pp. 23–51.

³ Translation from M. Weston, *An English Reader’s Guide to the French Legal System* (Oxford: Berg, 1991), p. 141.

⁴ G. Bigot, *Introduction historique au droit administratif depuis 1789* (Paris: Presses Universitaires de France, 2002), nos. 21 and 22.

on the handling of a complaint was formally made by a head of state. Only in 1806 was a formal separation of judicial and administrative functions made within the Conseil d'Etat. Napoleon recognised the need for this: 'I wish to create a *corps* that is half administrative and half judicial, which will regulate the use of that portion of necessary arbitrariness in the administration of the State.'⁵ The result was a decree of 11 June 1806 which divided the Conseil d'Etat into sections, with one specifically identified with the task of adjudication, the Commission du Contentieux (relabelled Section du Contentieux in 1849), although decisions still required a signature by the head of the state. However, the Commission rapidly gained *de facto* independence to a point that Napoleon once declared 'I am only a signature' (*'je ne suis qu'une griffe'*). From then on, the citizens addressed their complaints against a minister directly to the Conseil d'Etat. The distinctiveness of the litigation function was emphasised by the reform of 1849 under which the decisions of the (then) Section du Contentieux did not require approval by the Assemblée Générale of the Conseil in the same way as decisions of the administrative sections. That would otherwise give the impression that the administrators would be able to outvote the judicial members of the Conseil on the outcome of individual cases. This law was also the response to the criticism raised in the 1830s by pro-democratic thinkers against the Conseil d'Etat to a point which could jeopardise its very existence. So its members managed to spread the idea that the Conseil d'Etat was a result of the French conception of separation of powers such that ordinary courts cannot have jurisdiction over the executive. The idea was so deeply rooted in the twentieth century that in 1987, the Conseil constitutionnel endorsed it, despite the demonstration made in the 1970s by Professor Jacques Chevallier that it was largely a rewriting of history.⁶

The two limiting features of this process on the judicial character of the Conseil needed to be addressed. First, justice was delivered at the instigation of the administration – the idea of *la justice retenue* that harked back to Louis XIII. The other feature was that the decision was rendered in the name of the minister, retaining the idea that the minister was judge (the concept of the *ministre juge*). Like the British Privy Council, the judicial decision used to be in the form of advice to the head of state, rather than a judicial decision. Despite the gradual movement towards the *de facto* independence of the administrative courts, only in the Third Republic (1870–1940) were these relics of the past abandoned, and administrative justice became more apparently

⁵ Quoted in *ibid.*, no. 35.

⁶ J. Chevallier, *L'élaboration historique du principe de séparation de la juridiction administrative et de l'administration active* (Paris: LGDJ, 1970).

independent. Indeed, it was in the Third Republic that administrative law as a distinct legal discipline really took off.

The Law of 24 May 1872 empowered the Conseil d'Etat to make decisions in relation to complaints against the administration in its own name and without recourse to the form that it was merely offering advice to the head of state. But the requirement of a request first to a minister to rectify a problem which would then be challenged took longer to change. There were allegations that complaints which might compromise senior officials or politician were rejected without judicial investigation.⁷ The idea became no longer necessary in some areas of litigation, such as the *recours pour excès de pouvoir*. Finally, this formality was removed altogether by the Conseil d'Etat's decision in *Cadot* in 1889.⁸ In that case, the town council of Marseille abolished the post of technical director of highways and waterways. The post holder brought a damages action in the civil courts, but they rejected the complaint because it was an administrative contract. The *conseil de préfecture* rejected the complaint because it had no competence over employment contracts. The Minister of the Interior rejected the complaint because it was a matter for the Marseille council. *Cadot* then appealed against the decision of the minister to the Conseil d'Etat, which accepted jurisdiction even though the case had not been referred to it by the minister. It was the existence of a dispute between the citizen and the state, not the prior decision from a minister, that gave the Conseil jurisdiction.

Other aspects of a judicial character to the work of the administrative courts came earlier under the July Monarchy. In 1831, the Commission du Contentieux of the Conseil d'Etat began to hold a public hearing at which the parties were represented and after which the Commission published its decision. As we will see in Chapter 4, the procedure is largely written and the formal, public hearing is largely perfunctory compared with a common law judicial hearing. Nevertheless, the principle of public justice was established. The waiver of court fees for certain types of litigation, notably judicial review of decisions (the *recours pour excès de pouvoir*), in 1864 was a marker that administrative justice was genuinely available to all, alongside the gradual extension of standing for action.

So, by the last quarter of the nineteenth century, a structure that is very recognisable as an administrative law judicial system was established in France, well ahead of other European countries. By contrast, the United Kingdom had no coherent shape to its administrative law judicial system

⁷ See E. Poitou, *La liberté civile et le pouvoir administratif* (Paris: Charpentier, 1869), chapter 9.

⁸ CE 13 December 1889, *Cadot*, no. 66145, Leb. 1148 concl. Jagerschmidt.

much before the last quarter of the twentieth century. But the contemporary structure of courts and judicial careers in France has evolved markedly since then, in both the range and the numbers of institutions and personnel.

3.2 ADMINISTRATIVE COURTS

Administrative courts have a long history in France. But, unlike the private law courts, it has been easy to restructure them to meet contemporary needs. As a result, today they are located regionally in convenient centres of population. The present three-tier structure of the general administrative courts dates from 1987, but a number of additional courts have also been created over the years. In particular, some specialist administrative courts have been created to deal with some of the largest areas of judicial work. Most of these are called *commissions* and they deal with particular types of litigation. If we compare the distribution of work between the general courts and the specialist courts, then there is clearly far more work undertaken by general courts in France than by the High Court in England and Wales. That is because the latter is concerned with only a small, supervisory element of administrative court work. First-instance work and appeals relating to the facts of complaints against the administration are heard in the United Kingdom by tribunals. Complaints about the liability of public authorities and public contracts are heard by the ordinary civil courts. It is therefore very difficult to compare the work of French administrative courts with judicial work in the United Kingdom, and this will generally be avoided here.

3.3 GENERAL COURTS

The general administrative courts started with the creation of the Conseil d'Etat in 1799. At that time, it was the principal body to which complaints against the administration were brought. The creation of the local *tribunaux administratifs* in 1953 and the creation of the regional *cours administratives d'appel* in 1987 were designed to reduce the workload of the Conseil d'Etat. In large part, the reforms have been successful in that they have allowed for a large increase in complaints brought to the courts without the Conseil d'Etat being swamped. In 2018, the *tribunaux administratifs* decided 209,618 cases. The average time for a decision was nine months and fifteen days. The *cours administratives d'appel* decided 32,854 cases. The average time for a decision was ten months and twenty-three days. The Conseil d'Etat

decided 9,583 cases. The average time for a decision was six months and seventeen days.⁹

The way the courts work is shown in videos which have been produced for the general public and which are available from the websites of the different administrative courts. This is part of a long effort to explain how citizens can make complaints against the administration.

3.3.1 Tribunaux administratifs

The *tribunaux administratifs* were created as general courts in 1953. Previously, the *conseils de préfecture* had been established in 1800 to assist the prefect of the *département* with litigation on specific matters. The Law of 26 pluviôse An VIII (17 February 1800) gave them competence in relation to claims by individuals on direct taxation, the maintenance of public works (including roads and canals) and matters relating to the highway and public property. The first two areas of competence had been given to the directorates of *départements* when these were created by the Law of 6, 7–11 September 1790 (and, even earlier, this had been the competence of the *intendants* in the 1620s, the pre-Revolutionary predecessors of the prefects). Especially in the later years of Napoleon I, further areas of jurisdiction were added. These *conseils* of limited jurisdiction were composed of three to five officials sitting without the presence of the prefect, and their decisions were treated as executory without the prefect's intervention. As a result, there was already a clear separation of judicial and the administrative activities.¹⁰ In 1865, the jurisdiction of the *conseils de préfecture* was extended to cover all matters within the competence of the prefect (which obviously excluded, inter alia, education and matters under the direct control of the national government). The qualifications of the members of the *conseils* were also professionalised to require either a law degree or long administrative experience.¹¹ So, at this point, the *conseils* were effectively local courts of limited jurisdiction with a professional judiciary. Reforms of 1926 then regrouped the existing eighty-six *conseils de préfecture* at the level of a *département* into twenty-six *conseils* covering several *départements*.

Despite the increasing workload taken on by the *conseils de préfecture*, the Conseil d'Etat faced overload. The task of 'purifying' the administration after the Liberation in 1944 (*l'épuration*) led to a surge in appeals which went

⁹ Conseil d'Etat, *Rapport d'activité 2019* (Paris, 2019), pp. 31–2.

¹⁰ See Bigot, *Introduction historique*, nos. 18, 36–8.

¹¹ *Ibid.*, nos. 93–4.

directly to the Conseil d'Etat. By 1953, the Conseil d'Etat had a backlog of twenty-six thousand cases awaiting decision. The solution was to turn the *conseils de préfecture* from courts of limited jurisdiction into courts of general jurisdiction (*juridictions de droit commun*) – to become the first tier in a judicial hierarchy and thus the normal judge of more than 80 per cent of the caseload that was then starting in the Conseil d'Etat. It was at this point that they were relabelled '*tribunaux administratifs*'.¹² This reform cemented the place of local administrative justice and the existence of a separate *corps* of lower-tier administrative judges.

Looking at the *tribunaux administratifs* today, they are the principal administrative court for most complaints against the administration. Indeed, there are a large number of matters on which they are judge at first and last instance – for example, social assistance to the unemployed or in relation to housing, access to public documents, local taxes, the removal of driving licences and civil service pensions (see generally art. R811-1 CJA). They are locally based much more than the 'tribunals' in the United Kingdom, which are still not general courts. As will be seen in Section 3.1 of this chapter, they are staffed by a large body of specialist judges. In addition, there is a body of support staff in the court office (*le greffe*). To take an example, the *tribunal administratif* of Montpellier has six chambers, each with a senior judge as president. Each chamber then has two or three less senior judges as assessors and a *rapporteur public*. The President of the whole court sits as *juge des référés*, deciding alone on urgent matters, a process discussed in Chapter 4. The court is middle-sized with 6,551 cases decided in 2018. There are a number of very big courts, such as Paris with 19,954 cases, more than ninety judges and eighteen chambers. There are also some small ones, like Limoges with 2,126 cases, nine judges and two chambers. This enables justice to be delivered locally, but also for specialisations to be developed. There are thirty-one *tribunaux administratifs* in metropolitan France and eleven in the overseas territories and *départements*, which have very small numbers of cases and which often share judges.

Because the court is very local, parties can often attend hearings in person, and this gives a different dynamic to the hearing of cases compared with the regional or national courts higher up the hierarchy. Judges themselves are likely to be familiar from personal knowledge with local areas, problems and administrations. In many cases, they will have chosen to be assigned to

¹² See generally Bigot *Introduction historique* nos. 215–16; L. N. Brown, 'The Reform of French Administrative Courts' (1959) 22 *M.L.R.* 357. Brown pointed out that the label '*tribunal administratif*' was taken from the *conseil de préfecture* in Strasbourg which had jurisdiction over Alsace-Lorraine and had carried over its name from its period under German rule before 1924.

a particular court because of personal connections with a particular area of the country. In this sense, they might be seen as more similar to circuit and district judges in England and Wales than to tribunal judges. However, there are incentives to move regularly from one court to another in order to progress in a judicial career.

It is noted in Section 2.4 in relation to specialist courts that some of their work has been integrated into that of the *tribunaux administratifs* in recent years. In significant part, this has been to ensure that the appearance of an independent adjudication of claims against the administration is maintained. Only within the general administrative courts would an adequate body of judges be found, without needing to resort to the use of current administrators as members of an adjudicatory panel.

In addition to the judicial work, the *conseils de préfecture* also had an important advisory role. The significance of the advisory function declined considerably in the twentieth century and is now rare.¹³ It is retained in Art. L212-1 CJA, but the number of requests from a local prefect may be as few as one a year. For example, it was reported on an official website that in the area of the *cour administrative d'appel* of Lyon, which has fourteen *départements* and four *tribunaux administratifs*, there were only five such consultations in 2016.¹⁴ This low number is probably due to the importance of the prefect's prior request to abide by the law, which is usually respected.

3.3.2 Cours administratives d'appel

Although the reforms of 1953 brought considerable relief to the Conseil d'Etat, the increased activity of the state in the 1960s and the increase in the supervisory role of the Conseil *en cassation* over administrative courts of special jurisdiction, notably the (then) Commission des Réfugiés, gradually brought the Conseil d'Etat back to a position of overload. Indeed, on 31 December 1987, it had a backlog of 25,392 cases awaiting decision, a position very similar to that in 1953 – equivalent to more than three years' work. This time the solution was to create a new tier of courts, the *cours administratives d'appel*, by the Law of 31 December 1987.¹⁵ Initially, there were five regional *cours* and, at the time of writing, there are eight: Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes, Paris and Versailles. But a ninth

¹³ See Y. Ladié, 'Les fonctions consultatives des tribunaux administratifs', in CURAPP, ed., *La loi du 28 pluviôse An VIII* (Paris: Presses Universitaires de France, 2000), pp. 249–67.

¹⁴ P. Gérard, *La Juridiction Administrative* (Paris: La Documentation Française, 2017), p. 138.

¹⁵ See L. N. Brown and J. Bell, 'Recent Reforms of French Administrative Justice' (1989) 8 *C.J.Q.* 71.

Cour administrative d'appel will soon be put in place in Toulouse. Their jurisdiction was initially limited to *le plein contentieux* (decisions on law and fact, predominantly contract, liability, civil service and tax). But in 1995 this was extended to cover all matters, except the legality of legislation.

The French legal system normally recognises a right to an appeal (*le principe du double degré de juridiction*). So litigants do not need leave to appeal. The existence of the *cours administratives d'appel* at the regional level implements this. The eight *cours administratives d'appel* decided 32,854 cases in 2018.¹⁶ The workload is more evenly divided between the different *cours* with most having 3,000 or 4,000 decisions a year, with the largest in Marseille (nearly 5,000) and the lowest in Nancy (just below 2,500). In a big *cour* like Marseille, there are nine chambers and forty-nine judges. In a small *cour* like Nancy, there are only four chambers and twenty-four judges. So the dynamics within the *cours* are different. At least being regional, they offer the possibility of litigants coming in person to hearings, though this is less likely than before the *tribunal administratif*, especially as we shall see in Chapter 4 that the proceedings are predominantly written, so there is less the parties or their lawyers can contribute to the public hearing. The requirement to have a lawyer is quite generalised at the *cours administrative d'appel* level.

In terms of workload, nearly half of the appeals lodged in 2018 related to immigration (49.4 per cent), and that is despite the existence of a specialist court dealing with refugees (see Section 2.2). The next highest areas were tax cases (14.1 per cent), civil service employment (8.9 per cent) and planning (6.8 per cent).

Art. L212-1 CJA gives the *cours administratives d'appel* the possibility of being consulted by prefects of their region. But such consultations are very rare.¹⁷

3.3.3 *Conseil d'Etat*

The *Conseil d'Etat* was created in 1799. In the pre-Revolutionary period, like in many European kingdoms, the French king's Privy Council received complaints against his administration which were resolved within the administration, but there was no system of administrative courts. The *Conseil* decided on complaints against its own legal regulations and against appointments to royal offices, and it heard complaints against *intendants*. It is contested in the literature how far these practices constitute true roots of post-1799

¹⁶ Figures from the *Conseil d'Etat, Rapport d'activité 2019*, p. 44.

¹⁷ Gérard, *La Juridiction Administrative*, p. 147 found none in 2016.

French administrative law.¹⁸ The creation of the Conseil d'Etat in 1799 by the constitution of 22 Frimaire An VIII (13 December 1799) was designed to provide a better structure for advice to the government and adjudication of complaints against it.

Like the English Privy Council before 1641 and even in its modern UK form, the Conseil d'Etat had advisory sections and an adjudication section. Judges will usually be assigned both to the judicial section (Section du Contentieux) and to an administrative section (Public Finances, Interior, Public Works, Social and Administration), or to the Section du Rapport et des Etudes, not to mention the participation of members of the Conseil d'Etat in various administrative commissions. The integration of administrative and judicial functions is seen traditionally as the distinctive key to the effectiveness of the administrative judge. Odent, President of the Section du Contentieux, commented that, in the Conseil d'Etat:

The interpenetration of administrative and litigation functions is fortuitous: if administrative judges were isolated from the active administration, if they ceased to be in constant contact with the needs and constraints of administrative life, they would lose their specific character: instead of building a law adapted to the necessities of the public service, they would be inspired by a fossilised law bearing no relationship to the realities of active administration. Administrative judges must have an administrative training, and they have to sustain it to retain an understanding of administrative life.¹⁹

As will be noted when talking of the careers of members of the Conseil in the next chapter, most judges have experience of working in the 'active' administration.

3.3.3.1 The Judicial Role

These days, the Conseil d'Etat is largely an appellate court dealing with points of law. Its function is to decide difficult cases and also to maintain the unity of approach within the body of administrative courts. Since it is the only national court in the hierarchy of general administrative courts, it has a distinctive place.

The jurisdiction of the Conseil d'Etat is threefold. First, it is the judge in relation to appeals on a point of law (*en cassation*) in relation to decisions of

¹⁸ Bigot, *Introduction historique*, no. 10.

¹⁹ R. Odent, *Contentieux administratif*, 6 volumes (Paris: Les Cours du Droit, 1981), pp. 746–7. The point is repeated by Mme Questiaux [1995] P.L. 247 at p. 255 that the generality of powers conferred on the administration requires that judges who review the exercise of discretion 'do not drift too far away from the experience of the administration'.

the *cours administratives d'appel*, of certain specialist administrative courts, and of the *tribunaux administratifs* judging in first and last instance like they do regarding most of *référé*s (emergency interim proceedings – see Chapter 4, Section 3). This covers about 70 per cent of the work of the Conseil. Secondly, it is judge of appeal on law and fact in relation to decisions of the *tribunaux administratifs* on local elections (municipalities and cantons) and *référé-liberté*, emergency interim decisions affecting fundamental liberties. Thirdly, it is judge in first and last instance over questions concerning the legality of governmental decrees and other regulatory acts, and of regulatory acts of certain major public agencies, and it deals with litigation in relation to regional and European elections as well as the recruitment and discipline of senior civil servants.²⁰ This third category is about 25 per cent of its work. Over and above this, the Conseil may receive references from the lower administrative courts, the *tribunaux administratifs* and the *cours administratives d'appel* on points of law in much the same way as the Court of Justice of the European Union receives references from the courts of Member States. So, although there are some matters of fact involved in certain types of litigation before the Conseil, its overwhelming function is now as a judge of questions of law. As we will see in Chapter 4, the jurisdiction in relation to *référé*s does often involve findings of fact and some of that involves findings of fact by the Conseil itself. But this can never be very complex fact-finding.

The Conseil d'Etat operates internally at a number of levels. The basic level is the chamber (previously called a *sous-section*). This will be composed of a president, a number of senior members of the Conseil (*conseillers*), mid-career members (the *maîtres des requêtes*) and a permanent trainee (*auditeur*). The titles of roles are recognisable from the medieval Privy Council in both England and France. This is the body which will undertake the *instruction* or investigation of a case and produce an initial judgment (for this process see Chapter 4, Section 4). The cases are prepared by one of the *maîtres des requêtes* (or occasionally by a *conseiller*) as *rapporteur* and the draft judgment will be reviewed by a senior member of the chamber as 'revisor' (*réviseur*) before being discussed by the whole chamber in a weekly meeting before and after the hearing. As explained in Chapter 4, another member of the Conseil will act as *rapporteur public*, presenting at the hearing a more general legal perspective on a problem than would come from the parties. The *rapporteurs publics* are a distinct body of members of the Conseil d'Etat and may work closely with more than one chamber. As noted in Chapter 1, the *rapporteur public* was

²⁰ National elections to Parliament or to the presidency are judged by the Conseil constitutionnel.

called *commissaire du gouvernement* until the decree of 7 January 2009, which was adopted as a response to the sustained criticism addressed to it by the European Court of Human Rights case law in *Kress*, discussed in Chapter 1, Section 6.

When it comes to judging cases, decisions are taken in varying formations. The most straightforward decisions (typically rejections of cases as totally unfounded called *procédure d'admission*) are made by the President of a chamber acting alone by way of *ordonnances* but only for 'cassation', that is to say quashing on a point of law. In 2018, 32 per cent of the Conseil d'Etat's decisions were made in this way.²¹ Relatively unproblematic cases are resolved by the *instruction* chamber on its own. In 2018, 3,590 (37.5 per cent) of the Conseil d'Etat's decisions were made in this way. More difficult cases or ones where a chamber is going to reverse a line of previous case law will be sent to two or more chambers sitting together – in 2018, there were 1,309 such decisions (13.5 per cent of cases). The most difficult cases will go to the plenary of the Section du Contentieux (15 cases (1.6 per cent of decisions in 2018)) or to the Assemblée du contentieux, which involves presidents of the administrative sections (13 cases (1.4 per cent of decisions in 2018)). The choice between the last two really depends on the degree of legal and constitutional principle that a decision involves. It is clear from this account that the Conseil d'Etat has an internal hierarchy of decisions, and this is true for most large supreme courts. In Chapter 4, the different rules of composition will be explained. This difference in composition has implications for the authority of decisions. The higher the formation within the court, the greater the authority that attaches to its decision. It is also clear that the decision within the Conseil is a collegial decision. Not every member will have read the papers to the same extent, but they take collective responsibility for the decision which emerges since dissenting opinions are not allowed.

3.3.3.2 The Consultative Role

The consultative work of the Conseil d'Etat is substantial. It is the primary legal advisor to the government. It does not advise on policy, but it ensures that proposed legislation conforms to the Constitution and is well drafted, intelligible, coherent and consistent with existing legal rules.

The consultative role of the Conseil d'Etat is divided into two main blocks of activity. On the one hand is advice on proposed legislation. On the other

²¹ See Conseil d'Etat, *Rapport d'activité 2019*, p. 55.

hand, the Conseil advises on the legal issues involved in problems facing the government.

Scrutiny of Draft Legislation: Most of the legislation work comes from the government, but Parliament may also refer texts for scrutiny. Since 1945 and now under art. 39 of the Constitution, all government bills are submitted to the Conseil for scrutiny before they are debated in Parliament. In practice, it will often be the case that a member of the Conseil is invited to be involved in the government department's drafting team that produces the text, since French government departments do not generally have their own in-house legal service. In recent years, a few members of the Conseil d'Etat have been seconded to ministries to head up an in-house legal service. The Prime Minister's office has published a long guidance note on the preparation of legislation, and the role of the Conseil d'Etat is to see how far this good practice has been followed.²² The text of the bill will be submitted to the appropriate section of the Conseil and a senior member will be assigned the task of producing an initial scrutiny report.²³ The section will then interview representatives of the sponsoring department and any related departments, such as the Ministry of Finance. The discussion takes place in one of the grand rooms of the Palais Royal (facing the Louvre Museum) with about a dozen members of the section and half a dozen representatives of the government present. It may well go on for several sessions. The discussion will examine whether the department has complied with the pre-legislative procedures required by the Constitution. Under art. 39 of the Constitution, all bills (with a few exceptions) must be submitted with an impact assessment. But certain types of bill are subject to additional requirements. For example, a bill on education must be submitted for the opinion of the Conseil économique, social et environnemental (CESE) before it is presented to Parliament. The discussion will also examine the compatibility of the proposed text with the Constitution – not only on matters of fundamental rights, but also with respect to the legislative competences of Parliament and government, particularly when a bill authorises further legislation by decree. The discussion on the clarity of the aims of a bill and of the language used is more rigorous than would be expected in the UK Parliament, even if Parliament still manages to introduce some fuzzy concepts into legislation. The result is a report agreed in private by the members of the section, which is then submitted to the agreement of the whole Conseil which meets in the Assemblée Générale. The

²² *Guide de légistique* (Paris: Documentation française, 2017).

²³ See generally J. Bell, 'What Is the Function of the Conseil d'Etat in the Preparation of Legislation?' (2000) 49 *International and Comparative Law Quarterly* 661–72.

opinion (*avis*) of the Conseil d'Etat is not automatically publicly accessible. It is specifically excluded from the right of access to public documents by art. L311-5 of the Code of Relations between the Public and the Administration. In practice, since 2015, most of the *avis* are made publicly available on the government website *Légifrance*. But the text of the bill in the form the Conseil d'Etat approved is not made public.

A special advisory role was created in 1999 for local laws (*lois du pays*) from New Caledonia. This is the nearest the French have got to devolved legislation.

Since 2009, it has been possible for Parliament to request the opinion of the Conseil d'Etat on bills proposed by members of either chamber of Parliament (*propositions de loi*). Once a bill has been presented for consideration, then the President of the relevant chamber, with the consent of the proposer, can send the bill for consideration before it is sent to scrutiny in a parliamentary committee. The procedure is similar to that for government bills, but with the difference that the people interviewed are the proposer and the result of the process is not a revised text, but merely a note on the legal issues that need to be addressed.

In 2018, the Conseil d'Etat examined 973 legal texts. The average for the preceding eight years was 1,167.²⁴ Of these, 69 were government bills and 7 were bills proposed by members of Parliament. In addition, it examined 27 draft *ordonnances* and 822 draft decrees. The Conseil likes to work fast and managed to review most texts within two months in 2018.

In addition to bills which are then submitted to Parliament for enactment, the government produces a large body of legislation which it enacts on its own authority. Under art. 38 of the Constitution, draft *ordonnances* (a form of delegated legislation) have to be submitted to the Conseil. These forms of legislation are used heavily when a new government comes into power and is given authority by Parliament to act quickly on particular issues. In recent years, such legislation has been used to deal with emergencies. In addition, a number of important decrees also have to be submitted to the Conseil under art. 37 of the Constitution, but there are not many of these each year. (Unlike in the United Kingdom, decrees are not subject to resolutions in Parliament before enactment.) Decrees are not normally submitted to the Assemblée Générale because they are usually more precise and technical.

Because some bills need to be examined quickly, given the urgency of the subject matter or the government's timetable for passing particular legislation, the Conseil d'Etat has developed a 'fast-track' review through the Commission

²⁴ Conseil d'Etat, *Rapport d'activité 2019*, p. 195.

Permanente. This procedure replaces the consideration by the relevant section and by the Assemblée Générale. The Commission Permanente is composed of the Vice President, the President of the relevant section for the matter in question, two members nominated from each section of the Conseil, and two others nominated by the President of the section and the Vice President for their special expertise in the matter. Presidents of other sections may attend. In 2018, only four bills were considered by the Commission Permanente. That said, it does prove a useful device. For example, a bill to deal with the Covid-19 crisis was introduced on 17 March 2020 and reported on by the Commission Permanente on 18 March, leading to a law passed by Parliament on 23 March and the postponement of elections on 22 March.²⁵ A slightly slower timescale was followed in May 2020 when it took five days to consider a bill postponing the decision on the timing of municipal elections then due to be made by 27 May at the latest, which eventually took place on 28 June.²⁶

How does one measure whether this system works well? It is not sufficient to have details of the procedure followed and the number of pieces of legislation scrutinised. One way of measuring it would be to follow the bills as they go further in the legislative process. For example, of the seven bills from Parliament considered in 2018, four became law and three were subjected to constitutional review by the Conseil constitutionnel before they were enacted (since the Constitution allows for such a request from only sixty members of either the National Assembly or the Senate). In all three cases, the bill was declared consistent with the Constitution, subject to one reservation of interpretation. Similarly of the twenty-six government bills listed as having been scrutinised by the Conseil d'Etat in 2018, seventeen were enacted subsequently by Parliament and three were ratifications of *ordonnances* which take effect, even if not actually enacted by Parliament.²⁷ Of those seventeen enacted *lois*, thirteen were referred for review by the Conseil constitutionnel. Of these, in nine cases the only provisions struck down were those introduced into the bill in Parliament after the Conseil d'Etat had given its advice and for which the Conseil d'Etat could not be blamed. In two cases, the whole *loi* was declared compatible with the Constitution. In two other cases, the Conseil constitutionnel struck down provisions in the bill which the Conseil d'Etat had also criticised in its advice, including one both declared unintelligible to the citizen. By contrast, where the government had adopted the suggestions of

²⁵ Conseil d'Etat, *avis* no. 399873 of 18 March 2020.

²⁶ Conseil d'Etat, *avis* no. 400229 of 26 May 2020 (the bill was submitted on 21 May).

²⁷ Conseil d'Etat, *Rapport d'activité* 2019, pp. 200–1.

the Conseil d'Etat, they were upheld as compatible with the Constitution by the Conseil constitutionnel.²⁸ These examples suggest that, at the very least, the Conseil d'Etat is well able to anticipate the approach of the Conseil constitutionnel to what is constitutionally acceptable. It is well placed to give the government good advice on how to draft legislation, although this not a full guarantee, as shown by the 2010 law forbidding the concealment of the face in public which was criticised on constitutional grounds by the Conseil d'Etat but largely upheld by the Conseil constitutionnel.

The other category of advice is on more general legal issues which concern an administration. The Conseil d'Etat lists ten opinions given in 2018. An example is the set of legal questions arising from the decision to cancel the large expansion of a small airport at Notre-Dame-des-Landes, an environmentally sensitive area which was the subject of a lengthy illegal occupation by protestors. The legal issues included whether the government could resile from its concession contracts involved in the construction in the light of the circumstances.²⁹ Many legal principles first articulated by the Conseil in its *avis* then are used as the basis for its judicial decisions. As was seen in Chapter 1, this dual function raised concern on the impartiality of the Conseil d'Etat after the European Court of Human Rights ruling in the 1995 *Procola*, which considered that the same organisation both advising the government and deciding an issue judicially was contrary to art. 6 in relation to the Luxembourg Conseil d'Etat. But the French Conseil d'Etat convinced the European Court of Human Rights that the much larger number of its members enabled it to comply with the objective impartiality principle whilst also recusing members involved in the advisory process from the judicial activity of the Conseil.

3.3.3.3 *Section du rapport et des études*

Founded in 1963 as the Commission du Rapport with the task of reporting to the government on the activity of the Conseil d'Etat and current problems that they identified, this body became the Section du Rapports et des Etudes in 1985. Its current missions are set out in Art. R123-5 CJA.

The first of those missions is to be the vehicle through which the Conseil d'Etat draws the attention of public authorities to the legislative or

²⁸ These were provisions on fixed penalty fines and the equivalent of cautions (*composition pénale*) in the Law on Justice of 23 March 2019, see CC decision no. 2019-778 DC of 21 March 2019.

²⁹ See *Rapport d'activité* 2019, pp. 246–50.

administrative reforms which it considers necessary in the public interest under Art. L112-3 and develops a study on these at the request of the Prime Minister or its own Vice President. In this role, it goes beyond being a law reform commission and is much closer to what Neville Brown described as a 'think tank'.³⁰ Some of these issues identified by the Conseil itself are developed into a full study as part of its annual report. A full list is given on the Conseil d'Etat's website, but important examples include France and the European Union (1993 and 2007), rights to housing (2009), the role of independent agencies in public law (2012) and the simplification and the quality of legislation (2016). Examples of studies commissioned by the Prime Minister include reform of the law on bioethics (2009 and 2018), compulsory recourse to the administration before beginning litigation (2008) and taking account of risk in public decision-making (2018). These studies will be worked on by members of the section together with others in the Conseil, and they will solicit such outside expertise as they find useful. The report is then approved by the section and by the Assemblée Générale.

The second task is to identify difficulties which arise in the execution of judgments from the administrative courts. As will be seen in Chapter 4.8, the administrative courts have been given extra powers in the past forty years to enforce their decisions. So most of the effort in securing enforcement now lies with them. The reforms of 2017 have simplified the process of enforcing administrative court decisions. In relation to the Conseil d'Etat, any litigant who is having difficulty in obtaining implementation of its judgment may apply to the Section du Rapport et des Etudes and it will seek to discover the problems of the relevant administration and seek to facilitate compliance. If this administrative phase fails to secure the required action, the matter passes to the judicial phase and the President of the Section du Contentieux is empowered to issue enforcement orders of the kind explained in Chapter 4.8. These orders may be backed by a penalty fine (*astreinte*) for persisting in non-compliance. These are rare events. The judicial phase of enforcement took place in only eleven cases in 2018 and only one of these led to an *astreinte*. This compares with eighty-seven applications which were made to begin the administrative phase in the same year.³¹

In relation to this second role, the section may also be asked by the administration involved in a case to clarify parts of the judgment, so that it knows precisely what to do. These *demandes d'éclaircissement* under art. 931–1 CJA again are fairly rare events. The Conseil d'Etat issued two of these in 2018.

³⁰ Brown and Bell, 'Recent Reforms of French Administrative Justice', p. 79.

³¹ Conseil d'Etat, *Rapport d'activité 2019*, p. 181.

The third role is to produce an annual report for the Conseil d'Etat, outlining its activity and bringing attention to any problems in the law or encountered in the enforcement of judicial decisions. The report of activity is a rich mine of information about the work of the administrative courts, in terms of statistics, but also in terms of examples. It is here that the Conseil can comment on its own decisions with a view to highlighting to the government where the law is inadequate or where administrative practice needs to be improved. In that way, its annual report is more like that of the UK Supreme Court than that of the English and Welsh Lord Chief Justice.

A fourth task not mentioned in the CJA is the maintenance of the Conseil d'Etat's important and numerous international relations. Within the Section du Rapport et des Etudes is a unit dealing with international relations and a unit dealing with European law. The special place of French law in the world and its diffusion is assisted by the first unit and the many visits it arranges and receives in the course of the year. The more specific task of the European unit is to ensure that the Conseil is briefed on norms which are developed inside the institutions of the European Union.

Within this area, the section is also responsible for a number of conferences and workshops organised by the Conseil on topics of interest, such as alternative dispute resolution in 2019.³² It is also responsible for organising exchanges, including the exchanges with the British judiciaries which have been going on since the 1980s.

3.3.4 Cour nationale du droit d'asile

Claims for refugee status are among the largest body of cases brought to administrative courts. In 2018, the Office français de protection des réfugiés et apatrides (OFPRA) received 123,625 claims for asylum and refugee status.³³ It granted 26.6 per cent of requests, a figure which rose to 35.9 per cent after appeal to what is now called the Cour nationale du droit d'asile. It is thus clear that the administrative side of refugee work is both substantial and significant. Challenges on other immigration matters are taken through the generalist administrative courts.

The Commission des recours des réfugiés started work in 1953 and had a steady caseload of about 300 cases a year until 1979. But subsequently the number of refugee applications increased very substantially to reach 16,515 by 1989. Its function is to hear appeals from the decisions of the OFPRA. The

³² See Chapter 4, Section 2.3.

³³ OFPRA, *Rapport d'activité 2018*.

Commission operated initially with just three members. As cases increased, more staff were added. A radical reform was made in 2007 which transformed the Commission into the Cour nationale du droit d'asile (CNDA) and attached it to the Conseil d'Etat. It heard 47,314 cases in 2017.³⁴

Whereas presidents are full time, assessors are part-time. Presidents are judges appointed by the Vice President of the Conseil d'Etat, the President of the Cour des Comptes or the Minister of Justice. Assessors are appointed by the Conseil d'Etat and by the UNHCR and are required to serve at least thirty sessions in each of the three years of their appointment. They need to show an appropriate expertise in the field and are of French nationality, but they are not necessarily judges in their main job. In 2019, the CNDA had 24 full-time presidents (including a member of the Conseil d'Etat as its president). In addition, there were 176 fee-paid presidents and 291 assessors.³⁵ Cases are prepared by judicial assistants, as *rapporteurs*, who do not sit with the judge in the deliberation.

The CNDA sits either in a collegial formation or (more normally) with single judges. The collegial formation consists of a president, an assessor appointed by the Vice President of the Conseil d'Etat, and an assessor appointed by the United Nations High Commissioner for Refugees. This decides within five months of the application. Presidents sit as single judges and decide within five weeks of an application. Since 2013, there has been a Grand Chamber made up from nine judges (three presidents, three assessors appointed by the UN High Commissioner for Refugees and three assessors appointed by the Vice President of the Conseil d'Etat). In 2019, there were twenty-two chambers, each with its own full-time president, and the chambers are grouped into six sections. An average of ten fee-paid presidents and ten assessors are then assigned to each chamber. Each judgment formation deals with an average of 364 cases in a sitting day!³⁶ The *Cour* held 691 sittings in 2019, including 223 by videoconference.³⁷

In 2019, the CNDA decided 66,464 cases, of which 66.5 per cent were decided with a hearing and the rest by *ordonnance* (typically because they were inadmissible). Seventy per cent were decided in a collegial formation and 30 per cent by a single judge.³⁸ The *Cour* has its own legal aid department which dealt with 51,891 requests in 2019, of which 48,789 were granted.

³⁴ Conseil d'Etat, *Rapport d'activité 2019*, p. 71.

³⁵ CNDA, *Rapport d'activité 2019* (Paris, 2019), p. 41.

³⁶ *Ibid.*, p. 35.

³⁷ *Ibid.*, p. 36.

³⁸ *Ibid.*, p. 13.

Appeal on a point of law (*recours en cassation*) lies from the CNDA to the Conseil d'Etat. Few cases are challenged in this way (1.4 per cent in 2019) and only 0.1 per cent were quashed.³⁹

3.3.5 Cour des comptes and Other Financial Courts

The idea of a 'court' of accounts may seem strange to a British lawyer who is used to a parliamentary official, the comptroller and auditor general as head of the National Audit Office, supervising national government accounts and reporting to the House of Commons Public Accounts Committee. The Cour des comptes dates from 1807, but shares common ancestors in medieval administration with the comptroller and auditor general. The early, judicial role of the Cour des Comptes is to judge accounting officers in government bodies and to sanction them for irregularities in accounts. Accounting officers are usually appointed by the Ministry of Finance and are accountable in the first instance to it. But their independent role within departments is secured by their accountability to the Cour des Comptes. It receives and signs off more than a thousand accounts a year and gives a discharge to the accounting officer.

Apart from judging accounts, there are three other roles for the *Cour* – to supervise, to certify and to evaluate. The supervisory role is to ensure the appropriateness, the efficiency and the effectiveness of the management of public money. Is the administration following proper procedures, is it wasting resources, and is it achieving the results for which the money was given? In its mission created in 2000, the *Cour* certifies the accounts of the state and, since 2005, those of social security. Here the *Cour* ensures the accuracy, comprehensibility and transparency of public accounts, thus enabling the government to be held to account for spending. Finally, in its mission created in 2008 of evaluation, the Cour des comptes looks at the fitness for purpose of expenditure in terms of the objectives which were required to be achieved. This is very similar to a 'value for money' study by the National Audit Office. In terms of benchmark standards, the OECD, also based in Paris, provides research and ideas for many public auditors, including the French and the British.

The Cour des comptes has six chambers which specialise in different sectors of the public service. There is also a prosecutor section which is responsible for leading investigations into irregularities. As will be seen in

³⁹ Ibid.

what follows, being a financial judge is a high-status position for a public official and one in which a person may make a career.

The Cour des comptes is responsible for national bodies (1,027 in 2019). It is assisted by 13 regional *chambres régionales des comptes* responsible for 15,646 bodies.⁴⁰ The judicial activities arise because accounting officers are liable personally and financially for the deficiencies in their accounts. Investigations are undertaken on site and examine the audit trails of expenditure and income. The accounts are initially examined by the officials of the *Cour* or relevant *chambre régionale*. Where the accounts are in order, then the *Cour* or the relevant *chambre* issues an order to that effect, which discharges the accounting officer. Where the accounts are not in order, the *Cour* or *chambre* issues a *débet*, identifying money which is owed. In 2019, the sums in question amounted to €19.55 million.⁴¹ If any irregularity appears, the *procureur* of the court is informed and she will requisition information. If there is a problem, she may simply inform the public body and make recommendations. If there has been a significant failing by an accounting officer, she may investigate further. As a result of investigations, the *Cour* or *chambre* may impose a fine on the accounting officer which he or she has to pay personally. In 2019, these fines amounted to €45,147. It is clear that these fines are in no way comparable to the surcharge which may be imposed for the misuse of public funds in the United Kingdom, which is an obligation to make good the money lost by wilful misconduct. In 2019, the Cour des comptes handed down 95 judgments at first and last instance in relation to state accounting officers and heard 73 appeals. The *chambres régionales des comptes* heard 339 cases at first instance. Where very serious wrongdoing has been identified, the *procureur* may refer the matter to the criminal authorities, which was done in 71 instances in 2019. Alternatively, she may begin proceedings before the Cour de discipline budgétaire et financière (CDBF). This is a purely sanctioning body which penalises any public official, not just accounting officers, especially in matters of remuneration, public procurement and awarding grants. It is presided over by the President of the Cour des comptes and includes the President of the Section des Finances of the Conseil d'Etat and is composed of equal numbers of judges from the two courts. It dealt with 12 cases in 2019, which took an average of 41.2 months.⁴² An example was the prosecution of the director general and several other senior officials of Radio France for signing building contracts without following the required rules on public procurement. The

⁴⁰ Cour des comptes, *Rapport d'activité 2019*, p. 8.

⁴¹ *Ibid.*, p. 9.

⁴² CDBF, *Rapport d'activité 2020* (Paris, 2020), p. 22.

adjustments to the original contracts amounted to more than 40 per cent of the original contract price for the refurbishment of a major public building. The whole case took a total of 1,509 days and led to a fine of €1,000 for the director general and €500 for each of two senior officials. Another case involved the payment of grants to farmers' associations without adequate detail of the purposes for which the money was given. This led to a fine of €2,500 against the chair of the regional agriculture board.⁴³

3.3.6 Other Administrative Courts

A large number of administrative tribunals or *commissions* are specialist courts. Similar to British tribunals in the past, the membership of these bodies has sometimes included current officials with expertise in the subject matter of the *commission*. Usually, they would also be members from among judges of the civil, administrative or financial courts. But inevitably questions arose about the independence of any officials appointed to these courts. In 2000, the Cour de cassation ruled that one social security tribunal, the Cour nationale de l'incapacité et de la tarification de l'assurance des accidents du travail, breached Art. 6 of the European Convention by having members who were officials who could be moved to other roles at any point.⁴⁴ Similarly in 2002, the Conseil d'Etat ruled that having officials as members of the Commission centrale d'aide sociale who did not enjoy any guarantees of independence breached the European Convention.⁴⁵ In two decisions of 2011 and 2012, the Conseil constitutionnel ruled that the composition of two bodies of welfare courts breach constitutional provisions (notably in art. 16 DDHC) on judicial independence. It first ruled on the commissions départementales d'aide sociale (CDAS)⁴⁶ and decided that the presence of departmental official appointed by the minister breached judicial independence. This then led it to rule that the similar composition of the appeal body from these commissions, the Commission centrale d'aide sociale (CCAS), was also unconstitutional.⁴⁷ Their jurisdiction and that of other social security and social welfare commissions was transferred to the general civil and

⁴³ Ibid., pp. 41–3 (*Président de la chambre départementale d'agriculture de la Gironde*).

⁴⁴ Cour de cassation, assemblée plénière, 22 December 2000, nos. 99–11303 et 99–11615.

⁴⁵ CE Ass, 6 December 2002, *Trognon*, no. 240028.

⁴⁶ CC decision no. 2010–110 QPC, 25 March 2011, *M. Jean-Pierre B* (Composition de la commission départementale d'aide sociale).

⁴⁷ CC decision no. 2012–250 QPC, 8 June 2012, *M. Christian G* (Composition de la commission centrale d'aide sociale).

administrative courts from 1 January 2019, as part of a general reorganisation of first-instance courts.

Many administrative bodies exercise professional discipline. A number of these relate to medical professions (e.g. doctors, dentists, pharmacists and nurses). There are often different levels of court. For example, in the case of doctors, there are twenty-five first-instance disciplinary chambers at regional level with appeal to a national disciplinary chamber of the professional college, the *Ordre des médecins*.⁴⁸ The *Conseil Supérieur de la Magistrature* when it sits on disciplinary matters concerning professional civil and criminal judges (who are civil servants) is also treated as an administrative court and subject to review by the *Conseil d'Etat*. These cover a range of professions. For example, the *Conseil national de l'enseignement supérieur et de la recherche* is an appeal body on university discipline which hears just over one hundred cases a year. It is chaired by a member of the *Conseil d'Etat* and is comprised of teachers or researchers of the same grade or higher to the person under investigation and it also has student members (Art. L232-3 Code de l'Education).

The *Commission du contentieux du stationnement payant* is an administrative court responsible for appeals on parking fines after they were decriminalised. There is a single court in Limoges for the whole country.⁴⁹ It is presided over by an administrative judge from the *tribunaux administratifs* or the *cours administratives d'appel* with assessors appointed on a part-time basis. It is the busiest of all the specialist administrative courts. In its first year, 2018, it received a total of 69,478 appeals but was only able to deal with 11,508, creating a huge backlog. Its problems were compounded by being created around an IT platform which did not work properly.

3.4 ADMINISTRATIVE JUDGES

Administrative judges belong to one of two *corps* or groups. The first is the *corps* of the judges of the *tribunaux administratifs* and the *cours administratives d'appel*, which dates from 1980. The second and more ancient is the *corps* of

⁴⁸ *La justice administrative*, chapter 19. See also www.conseil-national.medecin.fr/lordre-medecins/linstitution-ordinale/juridiction-ordinale. For statistics, see *Chambre disciplinaire de l'ordre des médecins, Rapport annuel d'activité de la juridiction ordinale 2018* (Paris, 2019). In 2018, 1,402 cases were decided, involving 370 public hearings. The report notes at p. 9 that the normal length of time for a first-instance decision is ten months and nineteen days compared with the norm of six months laid down in legislation. The national chamber dealt with 334 appeals in 2018.

⁴⁹ Gérard, *La Juridiction Administrative*, chapter 21.

the members of the Conseil d'Etat. Their administration is combined within the Conseil d'Etat, notably through its vice president and its secretary general. But they are distinct bodies of civil servants and special procedures apply to the transfer between them – it is not a simple promotion as within the judiciaries of the United Kingdom.

3.4.1 *Corps of Judges of the Tribunaux administratifs and the Cours administratives d'appel*

The most numerous administrative judges belong to this corps – about twelve hundred in 2020. About three-quarters of the members of this *corps* work in the *tribunaux administratifs*. Their activity is predominantly judicial, although they do have some advisory functions.

Their career structure is governed by the Conseil supérieur des tribunaux administratives et des cours administratives d'appel. This body is responsible for overseeing senior appointments, such as presidents of courts. The supervising role regarding careers of administrative judges in courts below the Conseil d'Etat lay on the shoulder of the home office (Ministère de l'intérieur) until the law of 31 December 1987. Parliament was reluctant to apply the same principle as for civil, commercial and criminal courts – that is, giving the supervision to the Ministry of Justice – and this role was eventually allocated to the Conseil d'Etat itself through this Conseil supérieur.

There are four routes of entry. The first is nomination directly from the ENA (art. R233-1 CJA). There were eight appointments by this route in 2019. The second is by examination either from among civil servants of at least four year's standing (*concours interne*) or from outside the civil service – for example, from among *avocats* and those qualified to enter ENA (*concours externe*) (arts. R233-4, R233-8 to R233-14 CJA). In 2019, 38 candidates were successful (20 women and 18 men) out of 480 who sat the exams.⁵⁰ Their average age was thirty, but the average age of external candidates was twenty-five, while that of internal candidates (existing civil servants) was thirty-six. This is obviously the route chosen by those who were not successful in the ENA exams. The third is by secondment to the *tribunaux administratifs* (*détachement*) from either civil servants or university professors or lecturers. This recruitment takes the form of advert and application (Art. R233-5 CJA). In 2019, 7 judges were appointed by this route (4 women and 3 men). The fourth is by appointment from outside the corps to senior positions as *conseiller* or *premier conseiller* (*tour extérieure*, i.e. political nominations based on

⁵⁰ *Procès-Verbal* of the July 2019 (from Conseil d'Etat website).

experience). In 2020, the recruitment for this category was 10 posts. This means that, like members of the Conseil d'Etat, those *conseillers* are not trained with future members of civil, commercial and criminal courts who are trained in the Ecole Nationale de la Magistrature based in Bordeaux, the city of Montesquieu.

In March 2020, 45 per cent of the *magistrats* of this *corps* were women. Only 37 per cent of the presidents of the *cours administratives d'appel* are women and 35 per cent of the presidents of the *tribunaux administratifs*.⁵¹

3.4.2 Corps of the Conseil d'Etat

At the time of writing, there were 231 members of the Conseil d'Etat, about two-thirds of whom carry out its current business in the Palais-Royal in the heart of Paris. The membership of the Conseil d'Etat is different from that of the superior courts of the United Kingdom. To begin with, the members of the Conseil are younger than judges in the jurisdictions of the UK – the average age of entry is thirty-five. But this average is made up from at least three different categories – those who are initial entrants from the National Civil Service College (ENA) and who make up three-quarters of its members, those who enter by way of competitions from within the public service especially the *tribunaux administratifs* and *cours administratives d'appel*, and those who are appointed from outside (the *tour extérieur*), including a small number of people appointed to senior roles for a four-year period from universities or public positions. Those appointed by the *tour extérieur* are more likely to have a legal qualification than those recruited directly through ENA. Those who enter the Conseil directly from ENA are typically aged twenty-seven, whereas the *tour extérieur* entrants would be forty-nine.

The second difference is that most of recruits are not lawyers. Rouban noted that in the fifty years from 1958 to 2008, the proportion of members of the Conseil d'Etat with a law degree fell from 87 per cent to 48 per cent.⁵² Indeed, he noted that the decline was greatest amongst those entering directly from ENA (in 2000 only 31 per cent of *maîtres de requêtes* and 25 per cent of *auditeurs* – the two most junior career stages – were lawyers).⁵³ It was more likely that the recruits from the other categories would be lawyers. The direct

⁵¹ Journée Internationale des Droits des Femmes: Conférence-débat du Conseil d'Etat, interventions of Vice-President Lasserre and Secretary-General Bobo, 6 March 2020 on Conseil d'Etat website (visited 6 June 2020).

⁵² L. Rouban, *Le Conseil d'Etat 1958–2008. Sociologie d'un grand corps*, Les cahiers du CEVIPOF no. 49 (Paris: CNRS, 2008), p. 33.

⁵³ *Ibid.*, p. 50.

entrants, who will usually go on to occupy the most senior positions in the Conseil, are more likely to have attended one of the *grandes écoles* (66 per cent of direct entrants) – for example, Ecole Polytechnique or Ecole Normale Supérieure, or one of the business schools followed by Sciences-Politiques and ENA than to have been to a law school. All the same, Rouban argued, ‘It would be difficult to say that the increasing rarity of lawyers has led to a lowering of the legal quality of decisions.’⁵⁴ This may be explained by the importance of law courses in Sciences-Politiques and ENA. A third difference that arises from the fact that administrative judges are public servants and not simply lawyers. Membership of the Conseil d’Etat as a career is that members will not devote their whole career to judicial activities. Very many will spend a number of years as advisors or administrators in a ministerial office or in some other public body. In addition, just over 20 per cent will go into a career in business. Rouban states that, among those he studied, only half the women and a quarter of the men spent their whole career within the Conseil d’Etat. Taking a job on the outside is the typical route to advancement, and nearly all the vice presidents of the Conseil d’Etat have had major role in public administration. The current vice president, Bruno Lasserre, was director general of posts and telecommunications and also head of the competition authority for years. His predecessor, Jean-Marc Sauvé, served as a senior administrator in the Ministries of Justice and the Interior before becoming secretary general of the government (equivalent of the cabinet secretary in the UK). Sauvé’s predecessor, Renaud Denoix de Saint Marc, had also been secretary general of the government, as well as administrator of Radio France, and served in a number of administrative roles in ministries. In 2020, both the French judge at the Court of Justice of the European Union and the French judge at the European Court of Human Rights came from the Conseil d’Etat, as did the secretary general of the Conseil constitutionnel.

Rouban calculated that between 1958 and 2002, 12 per cent of the members of the Conseil held political office, including one president of the Republic and thirty-three ministers.⁵⁵ Throughout the twentieth century, at least 10 per cent of members of the Conseil were politically active.

A fourth difference is that more of them are women. The first women were appointed to the Conseil in 1953. Whereas in 1958, women made up only 3 per cent of its members, by 2007 this had risen to 24 per cent, and in March 2020 it was 33 per cent. But there is still some work to be done. In 2020, only 28 per cent of the sections of the Conseil and 30 per cent of the

⁵⁴ Ibid., p. 53.

⁵⁵ Ibid., p. 105.

chambers of the Section du Contentieux were presided over by women.⁵⁶ The number of women presidents of sections is no greater than in 1986, when the first women entrants to the Conseil (Mmes Grévisse and Questiaux) had reached that grade. As in the private law courts (and in the private sector), the large number of women entrants does not translate into an equal proportion in the most senior positions.

A fifth difference is the idea of a career. Because they often start at a young age (particularly if they are direct entrants from ENA), members of the Conseil d'Etat will seek to build a career. They will move through the ranks from *auditeur* to *maître des requêtes* and then to *rapporteur public*. *Rapporteurs publics* are usually in their thirties and this position lasts around ten to twelve years. Not all the judges in the Conseil d'Etat have to perform this role at some time in their career, but most if not all the presidents within the Conseil d'Etat were *rapporteurs publics* before becoming *réviseurs* and eventually – if a position was available – president of one of the ten chambers of the Section du contentieux.

There is a concern about elitism. The candidates for entry direct from ENA are within the top fifteen of the eighty-five or so graduating from ENA each year. In 2019, among the eighty-two members of the 'Promotion Molière' from ENA, eight went to the *tribunaux administratifs* and *cours administratives d'appel* and four to the Conseil d'Etat. In other respects, the members of the Conseil d'Etat are part of a social élite. Although there are very few dynasties within the Conseil, nearly half come from public sector families and more than 75 per cent come from upper-class families, including a majority from the Paris region.⁵⁷ This makes them far more exclusive than those recruited by the English judiciary from Oxford and Cambridge.⁵⁸ An *ordonnance* of 2 June 2021 addressed this issue by transforming the ENA into an 'Institut national du service public'. One of the aim of this reform is to diversify the recruitment of high civil servants. Members of the Conseil d'Etat, the Cour des comptes, the *tribunaux administratifs*, the *cours administratives d'appel* and the *chambres régionales et territoriales des comptes* will, in addition, be liable to be transferred to other roles and will be subject to performance appraisal.

⁵⁶ See Vice President Lasserre, *Allocation* for International Women's Day, 6 March 2020.

⁵⁷ Rouban, *Le Conseil d'Etat 1958–2008*, pp. 23–4.

⁵⁸ Even if one notes that the three 2019 appointments to the Supreme Court were all people who had come first in their year in the law degree at Oxford and Cambridge, they had each come through a cohort of about 230 students for whose places there were more than 1,000 applicants.

3.4.3 Corps of Financial Judges

Alongside the ‘ordinary’ (civil and criminal) judges and the judges of the general administrative courts, the next major group of judges are those in the financial courts. In 2019, there were fifty judges and rapporteurs in the Cour des comptes and forty judges and *vérificateurs* in the *chambres régionales des comptes*.⁵⁹ Of the senior personnel in these courts (including judges), 45 per cent were women in 2018, and the courts had never had so many women. Three of the seven presidents of chamber in the Cour des comptes were women, as was the *procureure générale* and one of her assistants. Three of the thirteen presidents of the *chambres régionales* were also women.⁶⁰ The status of financial judge is high. This was shown by the choices made at the exit from ENA in 2019. The ‘Promotion Molière’ had eighty-two students, four of whom chose to enter the Cour des comptes and four the *chambres régionales des comptes*. As with the general administrative courts, there is also a competition among existing civil servants and *avocats* for entry into the financial judiciary.

The career pattern of the members of the Cour des comptes is very similar to that of the Conseil d’Etat. The entrant from ENA becomes an ‘*auditeur*’ grade 2 for eighteen months before passing to grade 1 and then as a *conseiller référendaire* after three years from entry. In 2019, there were 417 judges, including 16 *auditeurs* (36 per cent women), 168 *conseillers référendaires* (33 per cent women), 203 *conseillers maîtres* (22 per cent women), and 12 presidents (33 per cent women).⁶¹ Some serve elsewhere in public office, and one president of the Republic in recent years was a member (Chirac). In 2020, the competition for *conseillers* (judges) of the *chambres régionales* aimed to make eight appointments. There is also scope for the appointment of external reporters (*rapporteurs*) to the Cour des comptes. These are experienced civil servants who are appointed for up to two three-year terms, and they work at the same level as members of the *Cour*. In 2019, there were 75 of these, of whom 40 were women. As with the Cour nationale du droit d’asile, the court is assisted by officials (*vérificateurs*) who prepare the early stages, notably reading carefully the accounts and highlighting deficiencies. There were about 400 of these officials in 2020.

3.5 CONCLUSION

The structure of the French administrative courts and the career pattern of their judiciaries are the most distinctive features of the French administrative

⁵⁹ Cour des comptes, *Rapport d’activité 2019*, pp. 28–9.

⁶⁰ *Ibid.*, p. 30.

⁶¹ Cour des comptes website (visited 30 June 2020).

law system. As Odent pointed out, the close involvement of judges with the active administration whom they control is a particularly distinctive feature.⁶² It is perhaps the most difficult feature for the outside observer to understand, and it clearly has been difficult for the European Court of Human Rights to see how this fits with an independent judiciary, as was seen in Chapter 1, Section 6, when discussing the role of what was then called the *commissaire du gouvernement*. Yet the values that underpin the institutions and the people who operate within them are shared with other countries. The French administrative courts did act independently since the beginning of the Third Republic and this was formalised by the removal of the *ministre-juge* concept in the *Cadot* decision of 1889.⁶³ The independence of ‘commissions’ has been reinforced in recent years, and Sections 2.2 and 2.4 of this chapter have shown the way the judicial character of these bodies has been more fully formalised in the twenty-first century. The United Kingdom has had similar experiences with the role of the Lord Chancellor and the judicial character of its tribunal system. They also have had to respect judicial independence more obviously and formally. For systems which have adapted over long periods of time to democracy and to expectations of standards of justice, the process has not always been easy. Although there is a danger that the European Convention on Human Rights is interpreted as a Procrustean bed onto which every legal system has to fit, the Strasbourg court has rightly allowed different legal systems a margin of appreciation in adapting their historical institutions and practices to contemporary shared values. Thus French administrative law remains distinctive, but not exceptional.

⁶² Note 19.

⁶³ Note 8.