

The Institutional and Legal Context of Administrative Law

Administrative law is the law that defines and regulates the administration. The administration exists as an organisational and a political reality. It is there to serve the political process, but also to provide a reality check on political ambitions – political ideas have to be made to work in the practical world. Compared with other democracies, France has traditionally been a rather centralised state, but it also has deep-rooted local loyalties. As a result, national politicians have often wanted to retain a local power base as the mayor of a specific town or commune, in a way which is not found in the United Kingdom. Only since 2014 has it been unlawful to have both national or European parliamentary mandates and occupy an office in local government. Until then more than 80 per cent of members of the national parliament had some form of local role, such as mayor or deputy mayor of their local commune. The relationship between the central government (Section 2.1) and local administrations is worked out in relation both to the administrations (Section 2.2) and to elected bodies (Section 2.3). As in many contemporary European democracies, governmental power is exercised not only through central and local governments, but also through independent regulatory bodies (Section 2.4). The control and review of the exercise of governmental power operates within the different organs of government and through the law and complaint mechanisms, notably the ombudsman function (Section 2.5). In order to complete the legal context, this chapter presents an overview of the sources of administrative law (Section 2.6).

2.1 THE CENTRAL ORGANS OF THE STATE

The French state under the Constitution of the Fifth Republic has strong centralised organs.

2.1.1 *The Executive*

The distinctive feature of the Fifth Republic is the role of the President. In the Third (1870–1940) and Fourth Republics (1946–58), the President of the Republic was largely a figurehead chosen by Parliament who performed a useful role in appointing the Prime Minister in the frequent changes of government. As Weiss remarked in 1885, ‘The fundamental principle of the Constitution is, or ought to be, that the President hunts rabbits and does not govern.’¹ It was the result of a political clash that took place in 1877 at a time when republicans were not certain to impose the Republic. President MacMahon, a royalist, nominated a royalist as the head of government, but after the elections saw the victory of republicans, their leader Léon Gambetta asked the President to dismiss the head of government or to resign (*se soumettre ou se démettre*), which he did. After that, the President chaired the Council of Ministers, but not the *cabinet*, which junior ministers attended. The President in the Fifth Republic is radically different. Since 1962, the President is directly elected and effectively directs the policy of government (except in times of cohabitation). The President chooses and dismisses the Prime Minister, accepts (and often influences) the Prime Minister’s choice of ministers, is the head of defence and foreign relations, assents to legislation and, in name at least, makes many senior administrative and judicial appointments.

As a consequence of the direct election of the President, political parties are shaped as the majority for the President. In 2002 and 2017, new parties were created for the presidential election and in 2002, the successful party’s name was ‘Union for the Presidential Majority’, which indicated the centrality of the leader over the party. Since 1981, every presidential election has been followed by elections to the National Assembly. This reinforces the idea that Parliament should provide the President with the means to carry out his mandate. Until the reform of the President’s term of office in 2000, the length of the President’s mandate (seven years) was longer than that of the National Assembly (five years). As a result, midterm elections could sometimes generate a majority in the National Assembly that was from a party opposed to the President. In such cases, a prime minister will be effectively forced on the President from the parliamentary majority party. This is described as a situation of ‘cohabitation’. Such cohabitation governments operated in 1986–8 (Mitterand as President and Chirac as Prime Minister), in 1993–5

¹ Cited in P. M. Williams, *Crisis and Compromise: Politics in the Fourth Republic*, 3rd ed. (London: Longman, 1964), p. 185.

(Mitterrand as President and Balladur as Prime Minister) and in 1997–2002 (Chirac as President and Jospin as Prime Minister).

Another significant difference from the Third and Fourth Republics is that ministers are not members of Parliament. If members of Parliament are chosen as ministers, they must hand over their parliamentary seat to a party colleague for the duration of their service. The result is that the Prime Minister can be chosen from people with no strong party background, such as Raymond Barre (1976–81), or even from a party different from the President or the parliamentary majority, for example Edouard Philippe (2017–20), who was, however, excluded from his political party as a consequence. This arrangement was designed to enable the government to be drawn from people with expertise, rather than simply from those with political followings. Ministers are thus dependent on the President and the Prime Minister for their tenure. As a minister put it in 2013 in a less elegant way than Gambetta, ‘a minister either keeps his mouth shut or steps down’.

2.1.2 *The Legislature*

The executive holds strong power over Parliament. Under the Fifth Republic, Parliament and its activities have been rationalised, arguably with the result that it is more effective. Parliament meets for specified periods in the year totalling 120 days, and outside those periods (*sessions extraordinaires*, which are becoming more frequent) meets only on an agenda determined by the government. Within the ordinary legislative period, the government has the right to determine two weeks out of four for the discussion of its legislative proposals (*projets de loi*), and one week in four is dedicated to the exercise of control by Parliament over the government. Since the 2008 constitutional reform, the powers of Parliament have been enhanced in this regard. In addition, one day a week is given to questions to ministers and one day a month to parliamentary initiatives, including legislative proposals (*propositions de loi*). Parliamentary committees can question ministers and officials about the conduct of particular policies. These committees tend to be large and are less effective than those in the UK Parliament. However, the 2008 reform extended their powers to investigate similar to the US model, and these have become a new means to control the government as shown on several occasions, including the handling of the Covid-19 pandemic.

The government not only has powers to ensure its business is discussed by Parliament, it also has powers to ensure that it is passed. Finance laws must be considered within seventy days or else they become law all the same (art. 47 of the Constitution). Laws for the financing of social security must be decided

within fifty days (art. 47–1 of the Constitution). More generally, the government can insist that the Senate or the National Assembly vote on a text as a whole, rather than on individual articles one by one (art. 44–3 of the Constitution). This is often combined with making the vote a matter of confidence in the government. Under art. 49–3, when a vote is declared a matter of confidence, then only votes in favour of the no-confidence motion are counted and, to succeed, the motion must be passed by more than half of the members of the relevant parliamentary assembly. In consequence, abstentions count in favour of the government. Between 1959 and 2018, the government declared eighty-nine issues a matter of confidence, especially when a government did not have an absolute majority as with the Rocard government (1988–90). These attracted fifty-three no-confidence motions, of which the government lost only one (in 1962). Since the 2008 reform, there is a limitation in the number of uses of art. 49–3.

The most important function of the 1958 Constitution was to rationalise the relative competences of the government and Parliament in relation to legislation. Rather than give Parliament competence to vote laws on everything, it has limited competence and the rest is left to the executive to make legislation by decree. Article 34 of the Constitution establishes that, in certain matters such as education and health, the law establishes the *principles* and then the executive is free to establish the *rules* by decree. But in certain more fundamental matters such as nationality, crimes and taxes, laws should determine the *rules* as well as the principles. Article 37 then gives the executive power to legislate by decree on the remaining matters. In addition, the government may be authorised by law to legislate by way of *ordonnance* in areas that normally fall within the competence of Parliament under art. 34. Such rules come into force by executive decision, but eventually have to be ratified by Parliament and become law. The Conseil constitutionnel recently decided that, if not ratified in the given time, the articles pertaining to the competence of the legislator become law after the expiry date.² An example would be the reform of the Civil Code on contract law which covered more than two hundred articles and was made by *ordonnance* in 2016 and then ratified (with amendments) in 2018. Decrees of regulatory kind and *ordonnances* come into force without the approval of Parliament and, unlike in the United Kingdom, are not subject to scrutiny or disapproval by Parliament but can be subject to judicial review before they become law. Each of these forms of legislation presented by the government must first be considered by the consultative procedure in the Conseil d'Etat (see Chapter 3.3.3.2). The balance between

² CC decision no. 2020–843 QPC of 28 May 2020, *Force* 5.

these different forms of legislation can be seen if we take a single recent year. In 2018, there were 45 Laws voted by Parliament, 28 *Ordonnances* and 1,267 Decrees.³ This number is significantly smaller than in the previous year following presidential and parliamentary elections. But the new Prime Minister reintroduced a guideline that one new piece of legislation had to replace two old ones (circular of 26 July 2017).

In such ways, the Constitution of the Fifth Republic formalises the control of the executive over Parliament that exists in many countries. The reforms of 2008 aimed to rebalance this. One-fifth of parliamentarians supported by one-tenth of electors can call a referendum (art. 11 of the Constitution). Three-fifths of parliamentarians in the relevant committee can reject presidential nominations to senior public posts (art. 13). Parliament was given the right to debate before the deployment of French forces abroad (art. 35) and delegated legislation (*ordonnance*) has to be ratified expressly, rather than being continued in force by the failure of Parliament to vote positively against it (art. 38).

2.2 THE LOCAL ORGANS OF THE STATE

France has been a centralised state certainly since the Revolution of 1789, if not since unification in 1589. The French kings had their local administrators, the *intendants*, and the Revolution carried on the pattern of state officials running decentralised strategic administrations alongside elected bodies providing services which were valued locally. This pattern continues today.

The state's administration broadly follows the pattern of region, *département* and *arrondissement/commune*, with increasing diversity for big conurbations.

2.2.1 *Regional Administration*

The region emerged gradually throughout the twentieth century as a vehicle for decentralising the state and making public policy more responsive to local needs. The number, structure and functions of regions were reformed by the law of 7 August 2015 (the Loi NOTRe (Nouvelle Organisation Territoriale de la République)) in order to regroup some of the pre-existing regions. Since 1 January 2016, thirteen regions have been established in metropolitan France and five overseas. The region takes the lead in commenting on and funding initiatives which are particularly relevant to its area. A major function is the

³ For comparison, in 2018, the UK Parliament passed 34 public and general acts and the UK government made 1,128 statutory instruments.

coordination of economic initiatives with respect to the competence of the government. The region is responsible for economic development and planning. Here it will engage with public and private organisations. In addition, it has specific areas of competence, such as regional transport and professional training. For example, the region of Pays de la Loire has 3.7 million people mainly clustered around big centres such as Nantes, Le Mans and Angers. In 2020, it had a budget of €135.6 million.

The decentralised authority in relation to secondary, further and higher education is the *académie*, headed by a rector nominated by the government.⁴ Metropolitan France has twenty-six *académies*, so many regions have more than one *académie*. They are under the Ministry of Education. The Rectorat de l'*académie* is responsible for education policy, the appointment of teaching staff and researchers, and the running of schools, technical colleges and universities. The Rectorate is thus a very large regional employer with a very large budget. For example, the Académie of Nantes, which covers the whole of the region of Pays de la Loire, in 2019 had a budget of €3.452 billion for its population of 3.7 million. It had 874,800 pupils, students and apprentices in 3,600 education institutions and a staff of 63,600 people.

As will be seen, the political decisions on the development of a region are taken by elected councils and officials within their spheres of competence. Alongside these local policy decisions is a decentralised administration of the state run by the prefect of the region. Essentially, a ministry may choose to confer powers on a prefect rather than to operate a policy centrally from Paris. Article 1 of decree no 2015–510 of 7 May 2015 proclaims decentralisation (*déconcentration*) to be the default organisation of public administration of the central government. So, if the latter defines, facilitates and evaluates the general policy framework, then the 'facilitation, coordination and implementation' of the policy at the local level is the remit of the prefect. All the same, the ministry retains a role in coordinating the various local administrations of the state. In addition, the Secretary General of the government chairs the National Conference of Local Administration, which brings together the regional prefects and others to ensure the effective articulation of the state's local and central services.

The prefect of the region is first among equals within the prefectural *corps*.⁵ That said, he or she has authority over the prefects of the *départements* of the

⁴ The French term is retained to avoid confusion with the very different use of 'academy' as a description of a type of school in England.

⁵ At the time of writing, it has been announced that the prefectural *corps* will be abolished, but the prefect role will continue.

region in most matters. He or she has authority to give instructions on how to carry out government policies and to supervise their implementation. The three main exceptions are the supervision of *départements*, communes and local public bodies in their area, public order and security within their area, and the entry and residence of foreigners.

2.2.2 Département

Départements are local divisions of France that date from the Revolution (law of 22 December 1789–8 January 1790), based on the principle that one could ride on horseback from the capital to any location within the territory in a day. Metropolitan France consists of ninety-six *départements*. They have both a local authority with elected representatives – political decentralisation – and a local state governmental structure – administrative decentralisation called *déconcentration*. Article 6 of the decree on *déconcentration* provides that, unless otherwise prescribed, the *département* is legally the normal territorial unit for the implementation of national and EU policies. It has been the principal beneficiary of policies of political decentralisation started in 1982.

The *département* is further decentralised to the level of an *arrondissement*. This is not the same as the *arrondissements* of cities like Paris, Lyon and Marseille as shown in what follows, which is convenient for running government services under the authority of sub-prefects (*sous-préfets*).

Services are also operated on a level between *départements* – for example, water and forests – which are best run at a level below that of a region.

2.2.3 The Commune

Communes are the very local unit of administration. The commune was created in order to impose uniformity in the treatment of towns and cities across the country. There are now about thirty-five thousand communes. Many are very small and there have been attempts to encourage mergers in recent years. On 1 January 2018, 91 per cent of communes (32,148) in metropolitan France had fewer than thirty-five hundred inhabitants, and they accounted for only 33 per cent of the population. But they had a budget of €21.8 billion. Each commune has a mayor who holds administrative roles such as serving as the *officier of the état civil* (registrar of births, marriages and deaths) and being responsible for local public health and order. The mayor is thus the very local representative of the state – for example, at a marriage – as well as politically, the representative of the local area to the state and, in many cases, the person who endorses a candidacy for the presidency of the Republic.

2.2.4 The Big Cities: Paris, Lyon, Marseille (PLM)

The tripartite division of region, *département* and commune has long been inappropriate for the big conurbations of Paris, Lyon and Marseille. Since 1982, they have formed administrative units within communes (*arrondissements*), but with their own mayor and assembly in addition to those existing at the city level.

Since 2019, the Ville de Paris is a unitary public authority that is a commune and a *département* with legal personality, an elected mayor and a significant budget.

The city of Marseille is part of a joint organisation of communes called the *Métropole*, as are almost all communes (which can also take other forms and names) with specific competences transferred from the communes. The *Métropole* of Lyon is unique in France since it also holds the competence of the *département* of Rhône, but only for the communes belonging to this *Métropole*.

2.2.5 The Prefect

The prefect is an office created by Napoleon Bonaparte, and prefects are consequently sometimes nicknamed the *empereurs aux petits pieds*. The prefect is a senior civil service role. The Prime Minister selects members of the corps of prefects from those who succeed in the competition at the civil service college, the *École nationale de l'administration* (ENA), or from civil servants who enter the corps by way of competitive examination.

In 2013, there were 250 prefects for the whole of France; 127 of them held posts in regions and *départements* and 75 were at a senior level. Many of those who were not in local territories worked either for the President of the Republic or for the Ministry of the Interior. They are obliged to operate with strict and transparent neutrality, unless they are formally given leave of absence. When assigned to a territorial post, prefects are obliged to live in that area. They rarely become politically eminent with the exception of Sadi Carnot, the President of the Republic assassinated by an Italian anarchist in 1894 in Lyon. However, they may attract attention due to their important role, as did Baron Haussman, who refurbished the city of Paris in the mid nineteenth century, or Jean Moulin, whose first act of resistance was in his capacity of prefect. He refused – under torture – to endorse false accusations against black people launched in 1940 by German troops of occupation.

The prefect is the sole representative of the state in the local area. The prefect represents the Prime Minister or other ministers and ensures the

implementation of regulations and government decisions. For example, the prefect is entitled to speak to the Conseil régional either by agreement with the chair of the Conseil or at the insistence of the Prime Minister (art. L4132-35 of the Code général des collectivités territoriales (CGCT)). During the Covid-19 crisis, the prefect was in charge of ensuring that confinement rules were enforced (and sometimes to adapt them locally). That is because state arrangements on security belong to the prefect. The prefect is also the supervisor over local authorities. Until 1982, the local authorities had to submit decisions to the prefect and he or she was able to prevent them coming into force. Today, the prefect can only refer a decision to the *tribunal administratif* once received by him or her. In practice this happens in about 1,500 cases out of about 6 million decisions submitted to prefects every year.⁶ The prefect also monitors local financial decisions and may refer matters to the *chambres régionales des comptes*. The prefect is thus the state monitor of local authorities in a way that is only exercised centrally in England.

2.3 ELECTED LOCAL AUTHORITIES

Elected authorities are established at the levels of region, *département* and commune. They are institutions of local democracy and have their own local administrations, policies and resources. The Constitution of 1958 recognises the principle of the free administration of local authorities (arts. 34 and 72). That free administration involves the guarantee of sufficient powers, the guarantee of proportionate interference by the state and the guarantee of resources. The guarantee that the local authorities will have enough power to carry out their mission is recognised by art. 72(2) of the Constitution, which states that 'local authorities are called to take decisions on the totality of the competences which can be best implemented at their level'. But there are few inherent powers, and most are conferred by the legislator. The Conseil constitutionnel tends to operate with minimum scrutiny over the discretion exercised by the legislature in whether to allocate powers to local authorities.⁷ At the same time, article 1 of the Constitution entrenches the important principle of the indivisibility of the Republic. That has as a consequence that local authorities cannot be given powers to develop special treatment in their area which affects fundamental rights.⁸ Thus the conditions for local special treatment have to be carefully circumscribed. The freedom of

⁶ www.vie-publique.fr/fiches/20169-role-du-prefet-departement (visited 26 April 2021).

⁷ CC decision no. 98-397 DC of 6 March 1998, *The Functioning of Regional Councils*, Rec. 186.

⁸ CC decision no. 2001-454 DC of 17 January 2002, *Corsica*, AJDA 2002, 100 note Schoettl.

local authorities to govern their territory needs to be balanced against the basic equality of all French citizens in their rights and in the public services they receive. A peculiar French approach to this uniformity is shown in the treatment of local languages. The Conseil constitutionnel ruled that conferring rights on a local community – for example, the Bretons – to exercise their local language would infringe the unity of the Republic around one language (the principle of the unity of the French people).⁹ However, the legislator tends to increase more indirectly the use of local languages to be in conformity with the European charter of local languages.

2.3.1 *Region*

The region is governed by the Conseil régional as the deliberative organ, which elects the President of the region, and by a consultative organ, the Conseil économique, social et environnemental régional (CESER).

The Conseil régional is directly elected for six years in two rounds by a list system.¹⁰ In the first round, electors vote for a list of candidates by party grouping. In the second round, only those lists having obtained at least 10 per cent of votes in the first round are able to present lists for which candidates are chosen. These lists can be combined between the rounds with any list having obtained 5 per cent of the votes in the first round. After the second round, seats are allocated according to a ‘proportionalised majority’ system. The winning party list obtains a quarter of the seats, and the parties obtaining less than 5 per cent of the votes are eliminated. The remaining three-quarters of seats are then distributed in proportion to the votes cast for each party list in the second round of voting. The councillors then meet and elect the President of the region. In terms of policy areas, the Conseil régional has a broad remit. For example, the Conseil régional for the Pays de la Loire developed policies in 2020 for a regional train network, for providing career advice, for promoting summer tourism after the Covid-19 confinement, and for investing in medical research within the region.

The CESER is a consultative body. It advises on the economic, social and environmental consequences of regional policies; it is consulted on such policies and it contributes to the assessment of their effectiveness (art. 4134–1 CGCT). The aim is to get a spread of civil society interests. This Conseil operates mainly through thematic committees. For example, the CESER of

⁹ CC decision no. 99–412 DC of 15 June 1999, *European Charter of Regional and Minority Languages*, AJDA 1999, 573 note Schoettl.

¹⁰ Art. L338 Code électoral.

the Pays de la Loire is composed of 120 members appointed for six years. One group comprises representatives of local employees, another group includes representatives of employers and the self-employed, a third group consists of representatives of associations – for example, from environmental associations or youth associations – and a small fourth group is made up of individuals appointed by the prefect. The CESER operates through seven standing committees. In 2019, the CESER produced opinions on the future of regional transport and the future of industrial strategy and professional education, as well as giving its opinion on the regional budget for the coming year. Its advice is not binding on the Conseil régional.

2.3.2 Département

The *département* is the typical unit for developing local policies. It is led by a *Conseil départemental* elected by constituencies called ‘cantons’. For example, the Conseil for the Sarthe *département* consists of forty-two members, one man and one woman elected from each of twenty-one cantons on a majority, two-round basis since the 2008 constitutional reform imposed parity in political institutions. These councillors in turn elect a president of the *département*. The full Conseil meets four times a year and an executive committee, the Commission permanente, transacts most business. Specialist committees also feed into the decision-making process. Their remit covers tourism, culture, social housing, local transport infrastructure and skills development. The Département de la Sarthe has a budget of €101 million for a population of 566,506 inhabitants. A lot of important decisions are taken at this level. For example, secondary schools (*collèges*) are run by the *département* when it comes to the construction and maintenance of buildings, whereas *lycées* are run at the regional level and primary schools at the city level.

2.3.3 The Commune

The commune is a very small unit for local decisions on areas like urban planning, kindergartens, primary schools and tourism. The small size is illustrated by the fact that the Département de la Sarthe had, in 2020, 354 communes, but only 21 cantons electing its Conseil départemental. In the 2017 census, only 9 of these communes had more than 5,000 inhabitants, and 122 had fewer than 500 inhabitants. The smallest (Nauvay) had a population of 11. It is not surprising that some communes have been merged in recent years and that some find it very difficult to field candidates for elected offices such as

the mayor. More than 100 communes failed to have candidates in the 2020 municipal elections.¹¹ In those elections in the Département de la Sarthe, only a quarter of the mayors elected were women.

The number of services provided directly by a commune depends on its size. Many services are provided by joint organisations between communes (*établissements publics de coopération intercommunale* which have legal personality). A larger commune like the town of Laval has elementary schools, planning, sports and cultural centres, tourism and social welfare provision. With a population of 52,359, Laval had a budget of €88,225,000 in 2020. A smaller commune like Mamers with just over 5,000 inhabitants had a budget of just over €12 million. Spending per head of population is actually not very different between small and big communes, but the former can do very little on their own. Democracy needs to adjust to the effectiveness of public services.

The local mayor has powers over public order and public health. But these are subject to strict justifications and also to the pre-eminent competences of state specialised authorities. For example, when the mayor of Sceaux decided at the beginning of the Covid-19 crisis that masks must be worn in public, the Conseil d'Etat struck down the public health order on the ground that the legislator had conferred the control of the epidemic to the state and its officials and there was no imperative local reason for departing from the coherence of national measures.¹² Of course, subsequently the mayor's idea became national policy when masks were widely available.

2.3.4 The Big Cities: Paris, Lyon, Marseille

Under the PLM Law of 1982, these three major conurbations are divided into electoral sectors. (In Paris, these sectors are called *arrondissements*, though the central *arrondissements* are grouped together. The sectors in Lyon are also called *arrondissements*.) The voters in each sector elect councillors on a party list basis and these in turn elect one of their members to be their sector mayor. In proportion to their populations, a number of the sector councillors also sit as city councillors for the Ville. The councillors for the city plus the mayors of the sectors form an electoral college which elects the city mayor. Particularly in Paris, which has the powers of a *département* as well as those of a commune, the position of the mayor is significant. Unlike the mayors of large English cities such as Manchester

¹¹ *Le Monde*, 13 March 2020.

¹² CE ord. 17 avril 2020, *Commune de Sceaux*, no. 440057, AJDA 2020, 1013.

and London, the mayors of these big French cities do not have authority over the state police or the fire service, but they have greater power in the provision of services and head the local police called *police municipale* which has limited powers.

The budget of these large cities is substantial. Lyon in 2020 had a budget of €798 million (and the *Métropole* of Lyon €4 billion). Of the expenditure on particular directly provided services, 45 per cent went to children and education and 30 per cent to culture and sport.

2.4 INDEPENDENT ADMINISTRATIVE AUTHORITIES (AAIS)

Modern administration has given rise to a range of bodies which are neither government departments or local state administrations nor elected bodies. At one time, there were nationalised industries (*entreprises publiques*), but these were largely privatised in the last part of the twentieth century. A number of large public enterprises remain, such as the state train company SNCF and the rail track company RFF. Much of the activity of such bodies is governed by private law in relation to customers and subsidy arrangements with public authorities. In more recent times, the state has been concerned less with the direct delivery of services than with the regulation of private actors involved in an activity to achieve public interest objectives. A variety of these bodies grew up over the years, and the Law of 20 January 2017 has attempted to give coherence to the rules governing the most important regulatory bodies, the so-called Independent Administrative Authorities (*autorités administratives indépendantes* (AAIs)). These twenty-six bodies are a small but important subset UK scholars would call ‘quangos’ or ‘Executive Non-departmental Public Bodies’ (ENDPBs). Examples of those included are the authority controlling airport noise, the authority regulating online gambling, the commission for access to public documents, the national commission on election expenses and the financing of politics, the commission responsible for assessing research and universities and the *Défenseur des droits* (the ombudsman).

Some AAIs are called *autorités publiques indépendantes* (APIs) because they have legal personality in their own right conferred by the law which created them. This has been particularly the case of some of the financial regulators. For example, the *Autorité des marchés financiers* and the *Commission de contrôle des assurances, des mutuelles et des institutions de prévoyance* were given legal personality to regulate respectively the financial and insurance markets. Having separate legal personality reinforced their independence in relation to public bodies.

Although the Law of 2017 does not provide a general definition of AAIs and merely lists the bodies to which it applies, there are a number of typical features: regulation, a power of decision and independence from government.

2.4.1 Regulation

The purpose of these different bodies is to regulate the conduct of individuals, groups and companies in a particular sphere of activity. Some regulate the actions of the public administration – for example, the commission for access to public documents (CADA) or the commission responsible for assessing research and universities (HCERES). Some regulate the activities of commercial entities which are public (e.g. the authority controlling airport noise (ACNUSA)) or private (e.g. the authority regulating online gambling (ARJEL)). They assess and rule on the conduct in their domain. This might be by dealing with complaints of individuals or it may be by setting standards. In either case, they exercise normative power which governs the way in which particular activities are carried out.

A particular concern relates to the rule-making powers of AAIs. In the Constitution, legislative power is conferred either on Parliament (art. 34) or on the Prime Minister (art. 21). So how can AAIs make rules that directly regulate the conduct of citizens and companies? The Conseil constitutionnel has had two responses. First, the regulatory power of an AAI is not superior to that of the Prime Minister. Thus, a legislative provision was struck down which subordinated the rules laid down in decrees to general rules produced by an AAI.¹³ Secondly, the measures must be limited in scope both in terms of their field of application and by their content.¹⁴ The rules produced by AAIs are soft law rather than hard law like the decrees promulgated by the government. So, for example, they cannot create a total ban on ‘cookie walls’ within soft law guidelines on the protection of personal data. Such a generalised and absolute ban would require hard law, and the Conseil national de l’informatique et des libertés (CNIL) could not create such hard law.¹⁵

¹³ CC Decision no. 86–217 DC of 18 September 1986, *Commission Nationale de la Communication et des Libertés* (CNCL), AJDA 1987, 162 note Wachsmann.

¹⁴ CC Decision no. 88–268 DC of 17 January 1989, *Conseil Supérieur de l’Audiovisuel* (CSA), Rec. 18: no general power of regulation permitted over publicity, sponsorship and institutional communication.

¹⁵ CE 19 juin 2020, *Société Google LLC*, no. 430810.

2.4.2 *Decision*

The key difference between these and many other public bodies is that they have power to make decisions rather than to be consulted. So they are genuinely executive bodies with powers to enforce their decisions either directly or indirectly (e.g. by bringing prosecutions). In particular, many of these bodies have the power to sanction the actions of the persons they regulate. The sanctions can be substantial.

2.4.3 *Independence*

The key feature of the AAIs is their independence from the government. This feature gives them both status and legitimacy. For example, because the CNIL is independent of the government, the public will have confidence in its view about whether ‘Stop-Covid’, a contact-tracing application downloaded onto the phones of individual citizens, would sufficiently protect their privacy.¹⁶ In that case, the CNIL set out guidelines for the operation of such applications so individual freedoms could be protected.

The independence of AAIs is not clearly regulated in the Constitution. Article 20 of the Constitution puts the administration at the disposal of the government. So, on first reading of this very hierarchical provision, it might appear that AAIs are subordinated to the government. In 1987, the Conseil d’Etat remarked in its advisory capacity that they are ‘a category for which the constituent did not provide and which is difficult to reconcile with the balance of powers which it put in place’.¹⁷ But case law of the Conseil constitutionnel sees the independence of AAIs as a permitted exception.¹⁸

The status and powers of such bodies rests on statute. Only the *Défenseur des droits* is a constitutionally defined authority and even then she does not make legally binding decisions.

It may be that, in some cases, these AAIs do not have an independent budget (e.g. the CADA’s budget is simply part of the Prime Minister’s budget) or their power to issue guidelines is subordinated to approval by the Prime Minister. It will also be true that the decisions and sanctions will be subject to judicial review by the administrative courts, including soft ones such as ‘naming and

¹⁶ www.cnil.fr/en/publication-cnils-opinion-french-contact-tracing-application-known-stop-covid (visited 2 July 2020).

¹⁷ *Etudes et Documents du Conseil d’Etat*, 1987, p. 53.

¹⁸ See CC decision no. 86–217 DC of 18 September 1986, CNCL, note 13; C. Teitgen-Colly, ‘Les instances de régulation et la Constitution’, *RDP* 1990, 153.

shaming' or public advice.¹⁹ Some features of independence are common, such as the non-renewable tenure of members (so as to avoid the need to maintain the favour of someone who might reappoint them).

2.5 DÉFENSEUR(E) DES DROITS

Like many democracies in the second half of the twentieth century, France adopted the institution of the ombudsman in 1973. The proponents of the institution argued that this would provide a protection to the citizens against an aloof bureaucracy. For example, Poniatowski declared:

The French administration is often heartless, haughty, and convinced that it embodies the sovereign. Sprung directly from the past and having largely taken shape under the monarchy, it is riddled with monarchical attitudes. It does not regard itself as a public service but as a master ordering subjects about.²⁰

The *Médiateur*, as he was then called, offered a simple and accessible remedy that was not limited to the scope of judicial review and could examine the merits of a decision for unfairness.

The constitutional reforms of 2008 gave the *Défenseur des droits*, as he then became, a constitutional foundation. Article 71–1 of the Constitution gives the *Défenseur* the mission of ensuring that individual rights are respected by public bodies and those delivering public services. This is clarified by Art. 4 of the Organic Law of 29 March 2011. That law also gives him the mission of protecting the internationally defined rights of the child or rights against direct or indirect discrimination, as well as the promotion of equality. He is also responsible for ensuring compliance with the code of ethics for the security forces and for directing whistle-blowers on violations of rights to an appropriate authority. Any person who considers that they have been harmed by a public service can bring a complaint, and the *Défenseur* can begin an investigation on his own initiative. For example, in January 2020, the *Défenseur* and former minister of justice, Jacques Toubon, opened an inquiry on his own initiative into the death of a delivery driver of North African origin at the hands of the police.²¹ In 2019, he began eleven such inquiries, also under his own initiative. Associations protecting people against discrimination also have standing to make complaints.

¹⁹ CE Ass. 21 March 2016, *Société Fairvesta international*, no. 368082.

²⁰ Cited in L. N. Brown and P. Lavirotte, 'The Mediator: A French Ombudsman?' (1974) 90 *L.Q.R.* 212; L. N. Brown and J. Bell (with J.-L. Galabert), *French Administrative Law*, 5th ed. (Oxford: Oxford University Press, 1998), pp. 32–4.

²¹ *Le Monde*, 9 January 2020.

The *Défenseur* thus has a wider remit in some respects than the parliamentary and health ombudsman in the United Kingdom. His work also covers the work of the Equal Opportunities Commission, the local government ombudsman and the Independent Office for Police Conduct. On the other hand, the *Défenseur* does not have responsibility for the French equivalent of the British National Health Service. In May 2021, the new *Défenseure*, Claire Hédon, reported very critically on more than nine hundred complaints about breaches of fundamental rights in care homes received by her office since 2014, notably during Covid-19 confinement.²²

The independence of the *Défenseur* is ensured by his non-renewable term of office for six years, by the prohibition on anyone giving him instructions, and by his immunity from suit in relation to his work. Tenure of this role is incompatible with any other public role, either elective or administrative.

Because it is a national institution covering the full range of central and local government, the *Défenseur des droits* has a substantial workload. In 2019, the *Défenseur* received 103,066 complaints and his offices received a further 48,183 telephone enquiries. The institution has 510 local representatives and 874 local offices.²³ The advantage of local offices is that complainants can appear in person, which 77 per cent did in 2019.²⁴ By contrast, the central office received more than 60 per cent of its complaints online. In 2019, the institution closed 99,095 complaints with 80 per cent of cases settled informally thanks to the *Défenseur's* intervention. There were 304 formal decisions with nearly 700 recommendations. In terms of areas of work, in 2019, 24 per cent of cases related to social security and welfare, 11.2 per cent to road traffic, 10 per cent to migrants and 9.4 per cent to the courts and prisons system, half of which related to prisons.²⁵

The *Défenseur* can make reports to the President on particular topics, give advice on pending legislation or recommend legislative reform. In 2019, he made 180 recommendations for legislative reform. He also gave advice on legislation to deal with the Covid-19 pandemic.²⁶

During the Covid-19 pandemic, the *Défenseur* received 1,424 complaints, more than 870 of which related to restrictions on individual freedoms imposed by the confinement measures.²⁷ He created a special hotline for prisoners to

²² Défenseur des droits, *Les droits fondamentaux des personnes âgées accueillies en EHPAD* (Paris, 2021).

²³ Défenseur des droits, *Rapport annuel d'activité 2019* (Paris, 2020), p. 12.

²⁴ *Ibid.*, p. 16.

²⁵ *Ibid.*

²⁶ Défenseur des droits, *Synthèse urgence sanitaire* (Paris, 2020), pp. 16–17.

²⁷ *Ibid.*, p. 6.

complain about their conditions and received 2,000 calls. Such calls led to discussions with the Ministry of Justice and the prison authorities and prompted action to reduce the risks to prisoners from the disease.²⁸ He produced a decision (report n° 2020–100) which found that the closure of offices for the registration of asylum seekers was required neither by the Covid-19 legislation nor by the threat of infection, and it severely prejudiced their rights. He also intervened with supermarkets to end the practice of refusing to let handicapped children accompany their parents on shopping trips and requiring them to be left at the door.²⁹

A good example of the role of the *Défenseur* in the area of discrimination is in dealing with complaints relating to the mistreatment of Moslem women because of their attire out of a misguided understanding of the requirements of the neutrality of the state in matters of religious belief. Examples related to applicants for housing (report n° 2018–070), students sitting university examinations (report n° 2016–299), swimmers wearing the ‘burkini’ on the beach or mothers accompanying classes on a school outing. In this area, the *Défenseur* worked in line with the advisory opinions of the Conseil d’Etat.³⁰

The role of the *Défenseur(e)* is an important alternative to the courts. It is free and speedy. But there are limitations. As art. 25 of the Organic Law of 2011 makes clear, the *Défenseur(e)* may make recommendations and may suggest a fair settlement of a grievance, but he has no powers of enforcement. The public authorities are merely bound to explain what they have done in relation to his recommendations. All the same, the high level of settlements makes this a very important kind of alternative dispute resolution.

2.6 SOURCES OF ADMINISTRATIVE LAW

Although codes govern a large number of areas of administrative activity, these ‘codes’ are much more like consolidating acts of Parliament than the broad general principles of the French Code civil. Like the common law, the general rules and principles of French administrative law, especially those relating to judicial review, are laid down not in codes or legislation, but in the case law of the courts, systematised by legal scholarship. Although the French talk about the hierarchy of rules (*la hiérarchie des normes*), the interaction between the different levels in providing legal solutions is more complex. All the same, this

²⁸ Ibid., pp. 7–8.

²⁹ Ibid., p. 11.

³⁰ Ibid., pp. 35–6.

presentation of sources will follow the pattern of the classical hierarchy of norms.

2.6.1 *The Constitution*

The French Constitution of 1958 is not a complete statement of the rules and principles of the Constitution. The Constitution has to be sought in a variety of locations, not all of them written texts.

The text of the 1958 Constitution contains most of the core institutional rules on the powers of the President, of Parliament, of the executive and of the judiciary, as well as rules on constitutional amendment. In a number of areas, these rules are supplemented by Organic Laws – for example, the *ordonnance* of 2 January 1959 on finance laws and the Organic Law of 26 July 1996 on social security budgets, as well as the Organic Law of 29 March 2011 on the *Défenseur des droits*. The rules of procedure in each chamber of the Parliament are also approved by the Conseil constitutionnel.

The 1958 Constitution did not try to set out a new set of rights. Rather it merely took over the statements in previous constitutions. In 1946, there were problems in obtaining popular approval for a new statement of fundamental rights. The eventual compromise was to reaffirm the Declaration of the Rights of Man and of the Citizen of 1789 together with a set of ‘principles particularly necessary for our times’. The 1958 Constitution simply endorsed both these documents. There is clearly a problem of priority between the two sets of fundamental rights. The Conseil constitutionnel had to resolve this in relation to the nationalisation of various key industries in 1982.³¹ The Conseil used historical arguments to justify the priority of the 1789 text because the Preamble to the 1946 Constitution specifically endorsed that earlier set of principles, but now it tends to make compromises between the two of them.

The Preamble to the 1946 Constitution also states that it affirms ‘the fundamental principles recognized by the laws of the Republic’. But it fails to state which laws or, indeed, which Republic. It was understood to apply essentially to the fundamental values recognised by the laws of the Third Republic.³² That Republic never had a single constitutional text, but gradually built up a set of

³¹ CC decision no. 81–132 DC of 16 January 1982, *Nationalisations*, Rec. 18; J. Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992), DECISION 2.

³² The Conseil appears to endorse principles adopted in legislation up until the adoption of the 1946 Constitution. Thus, in CC decision no. 97–393 DC of 18 December 1997, *Family Allowances*, Rec. 320, the Conseil was prepared to consider that an *ordonnance* of the provisional government from 4 October 1945 and a *loi* of 22 August 1946 could be the basis for such a fundamental principle.

fundamental constitutional principles through legislation, much like the British Constitution. The decisive decision establishing constitutional review, the *Associations Law* decision, was based on the right to association that was a fundamental principle recognised by the laws of the Republic, notably the *loi* of 1901.³³ The process of determining whether a contested value is a fundamental principle recognised by the laws of the Republic involves a number of stages. Firstly, the Conseil identifies a text which talks about the value in question. In doing this, the Conseil needs a prior conception of which right is at issue and whether it is possibly fundamental. Typically, the authors of the reference will cite texts. The texts will either be whole laws, or even disparate provisions, as will be seen in the case of the freedom of education which was ‘discovered’ in Article 91 of the Finance Law of 31 March 1931.³⁴ Secondly, the Conseil looks not so much at the precise words of the text as at the fundamental value it expresses, a general principle underlying its specific provisions. Thirdly, it has to be permanently confirmed – that is, it must not have been repealed at some point by a law of a Republic. Finally, having elicited a principle of general import, like the freedom of association, it has to produce a specific rule capable of resolving the question before it, such as the rule against prior restraint. In performing this task, the Conseil is at its most creative. Apart from the freedom of association, the Conseil has also declared as fundamental a number of principles in administrative law such as the independence of administrative judges and the separation of public and private law courts,³⁵ the continuity of public services³⁶ and human dignity.³⁷ The Conseil constitutionnel has abandoned the search for specific texts in more recent years. Since 1976, the Conseil constitutionnel has typically referred to ‘principles having constitutional value’ (*principes à valeur constitutionnelle*), frequently without mentioning a specific source. This phrase includes both the written texts and other materials drawn from fundamental principle recognised by the laws of the Republic, some general principles of law and some objectives of constitutional value.³⁸ The Conseil constitutionnel is not the only body to identify such principles. The Conseil d’Etat has also done so.³⁹

³³ CC decision no. 71–44 DC of 16 July 1971, *Associations Law*, Rec. 29; Bell, *French Constitutional Law*, DECISION 1.

³⁴ CC decision no. 77–87 DC of 23 November 1977, *Freedom of Education*, Rec. 42; Bell, *French Constitutional Law*, DECISION 21.

³⁵ CC decision no. 86–224 DC of 23 January 1987, *Competition Law*, Rec. 8.

³⁶ CC decision no. 79–105 DC of 25 July 1979, *Strikes on Radio and TV*, Rec. 33; Bell, *French Constitutional Law*, DECISION 23.

³⁷ CC decision nos. 343 and 344 DC of 27 July 1994, *Bioethics*, Rec. 100; GD no. 47.

³⁸ See J.-P. Costa, ‘Principes fondamentaux, principes généraux, principes à valeur constitutionnelle’, *Conseil constitutionnel et Conseil d’Etat* (Paris: LGDJ, 1988), p. 133.

³⁹ CE Ass. 3 July 1996, *Koné*, nos. 394399 and 400328, Leb. 355.

In addition to these fundamental principles which leave scope for interpretation, the Conseil has set out a number of ‘objectives having constitutional value’.⁴⁰ They are means for implementing constitutional values. As Genevois states, ‘the objective of constitutional value appears as the necessary corollary of the implementation of a constitutionally recognized value’.⁴¹ Although these are matters of means rather than ends, the Conseil constitutionnel has been reluctant to leave Parliament with total liberty in this area. If an objective is identified as of ‘constitutional value’, it has a special status as a means by which the legislature must realise a fundamental constitutional value. The law cannot be changed in such a way as to weaken the constitutional protection afforded to individual rights. In this way, the objectives restrict the freedom of action of the legislature.

2.6.2 *Codes and Legislation*

As has been mentioned, a large number of very specific ‘codes’ regulate much of the activity of the administration. The code général des collectivités territoriales (CGCT), the code de l’entrée et du séjour des étrangers et du droit de l’asile (Ceseda), the code de la commande publique (CCP) and the code général des impôts are all consolidated collections of legal rules applicable to major areas of administrative activity. But there are no general codes. The nearest is the code des relations entre le public et l’administration (CRPA) of 2015, which deals with the non-litigation aspects of administrative procedure. In 2000, the rules of administrative court procedure were consolidated into the code de la justice administrative (CJA) and these come close to the codes of civil and criminal procedure. Key legislation established the role of the Conseil d’Etat, such as the Law of 24 May 1872 or the *ordonnance* of 31 July 1945 and regularly gives powers to government and other public bodies. But there is no code or legislative provision which sets out the principles on which judicial review and state liability are based. In addition to these codes and legislation specific to the administration, the Conseil d’Etat accepts that any law is ‘opposable’ to the administration. For instance, a nomination of a high civil servant to a private undertaking was ruled out as contrary to the famous criminal offence of *pantouflage* which banned any civil servant from being employed by a firm over which he or she had exercised supervision in

⁴⁰ See B. Faure, ‘Les objectifs de valeur constitutionnelle: une nouvelle catégorie juridique?’ (1995) 21 Rfde 47.

⁴¹ B. Genevois, *La Jurisprudence du Conseil constitutionnel* (Paris: Editions STH, 1988), § 342. He draws a parallel with *Nold v Commission* [1974] ECR 491 (European Court of Justice).

the previous five years (art. 432–13 of the criminal code)⁴². Competition law which sanctions abuses of dominant position and illicit collusion can be also be opposed against any administrative act whether unilateral or contractual which has the potential effect of placing a firm in a situation to infringe these rules. Therefore, a long duration of a contract giving exclusive rights may be deemed as placing the benefitting firm into an automatic abuse of dominant position.⁴³

2.6.3 EU Law

European Union law is a major source of French law. As noted in Chapter 1, Section 5, the French administrative courts were much slower than the ordinary courts in recognising the supremacy of EU law over national laws. The position was clarified first by the *Nicolo* decision of the Conseil d'Etat in 1989,⁴⁴ and then by an amendment to the Constitution in 1992 such that its art. 88–1 now provides:

The Republic shall participate in the European Union made up of states which have freely chosen to exercise certain of their competences in common by virtue of the Treaty on European Union and the Treaty on the Functioning of the European Union as they result from the treaty signed in Lisbon on 13 December 2007.⁴⁵

Situations in which a French court has to declare a French law incompatible with EU law are very rare. The approach of the Conseil d'Etat is shown by *Association ornithologique et mammalogique de Saône-et-Loire*.⁴⁶ In the first decision, the Prime Minister was requested to declassify a Law of 15 July 1994 under which the date for the opening of the hunting season for migratory birds was fixed in a way that was incompatible with a recent decision of the ECJ interpreting a directive of 1979 on the protection of wild birds. The Conseil d'Etat did not quash his refusal. It noted that the Prime Minister had an obligation to implement EU law and to draw the consequences of the incompatibility of the law with the 1979 directive as interpreted by the ECJ. But the Prime Minister had wide discretion about how to do this, and his failure to choose a particular route could not be challenged. On the other hand, in

⁴² CE Ass. 6 Décembre 1996, *Société Lambda*, no. 167502.

⁴³ CE Sect. 3 nov. 1997, *Société Million et Marais*, no. 169907.

⁴⁴ CE Ass. 20 October 1989, *Nicolo*, no. 108243, Leb. 190 concl. Frydman.

⁴⁵ See more generally S. Boyron, 'The "New" French Constitution and the European Union' (2009) 11 *Cambridge Yearbook of European Legal Studies* 321.

⁴⁶ CE Sect. 3 December 1999, nos. 164789, 165122, RFDA 2000, 59 concl. Lamy.

the second decision, the Conseil d'Etat quashed the refusal of the minister to fix dates for the season for hunting waterfowl. He claimed that he was prevented from doing so by a law of 1998 which had a formula for setting dates which was earlier than 1 September. But the Conseil d'Etat held that this law was incompatible with the 1979 directive and so the minister could not refuse to exercise his general powers under the Rural Code to set the start of the hunting season.

The discretion to keep an unlawful provision in force is very limited. In *Association La Cimade*, a decree provided for the automatic loss of benefits from migrants with an irregular immigration status.⁴⁷ The Conseil d'Etat held this to be incompatible with an EU directive of 2013 which only permitted withdrawal of benefits in limited circumstances and which required attention to the individual circumstances of the person in question. Despite the claims of administrative difficulties from the Minister of the Interior, the Conseil d'Etat refused to delay the quashing of the provision in the decree. A delay in annulling the illegal provision could only be used in exceptional cases in the face of an imperative necessity.

In a situation where it is possible to challenge the domestic implementation of a directive on grounds of incompatibility both with EU law and with the French Constitution, the Conseil d'Etat has taken the view that it should refer the issue by way of a preliminary reference to the CJEU in case there is an equivalent principle at the EU level such as the principle of equality.⁴⁸ In that case, the challenge to the domestic legislation involved an allegation that the directive itself was invalid because it treated similar industries differently with regard to quotas on greenhouse gas emissions, an issue which might infringe both general principles of EU law and French constitutional values. Since the entry into force of the QPC, the priority is for the constitution unless the issue raises an urgent question justifying a preliminary ruling to the ECJ.⁴⁹

A normal situation is when the French courts apply EU law either because it is directly applicable – for example, a regulation – or because it has been transposed into domestic law – for example, a directive. If the delay to transpose a directive is expired (or the directive badly transposed) and the directive clear and unconditional, the Conseil took thirty-one years to recognise its direct effect.⁵⁰ Substantial amounts of French legislation implement

⁴⁷ CE 31 July 2019, no. 428530, *Leb.* 334 concl. Odet.

⁴⁸ CE Ass. 8 February 2007, *Société Arcelor Atlantique et Lorraine*, no. 287110, *Leb.* 55 concl. Guyomar.

⁴⁹ CE 14 May 2010, *Rujovic*, no. 312305.

⁵⁰ CE Ass. 30 October 2009, *Perreux*, no. 298348, overturning CE Ass. 22 December 1978, *Cohn-Bendit*, no. 11604.

EU law. Major areas such as VAT and agricultural law, as well as many provisions on consumer and environmental law, have their origins in EU law or have been modified by EU law, such as public contracts. The function of the courts here is to interpret national law consistently with EU law. In its annual report for 2007, the Conseil d'Etat examined the relations of the French administration with the European Union and noted the large number of directives which France had not implemented on time.⁵¹ The transposition of directives into domestic law was declared a constitutional objective by the Conseil constitutionnel in 2004 and by a circular from the Prime Minister in the same year.⁵² The efforts have been rewarded since France moved from twenty-third place out of twenty-eight Member States in 2007 in its efficiency of implementing directives on time to eighth place in 2019.⁵³

The French administrative courts are under an obligation to provide effective remedies for the breach of EU law. Under art. 19 TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Furthermore, art. 47 of the Charter of Fundamental Rights provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Those effective remedies involve not only disapplying incompatible legislation and annulling incompatible administrative decisions, but also interpreting domestic law to make it compatible with EU law. An example is *Société Natiocredimurs*, in which an EU directive on waste required that the producer of waste or the owner of the land on which it is found be responsible for clearing it up.⁵⁴ The French implementing legislation empowered the local authority to require the producer and the landowner to pay for the cost of removing waste. After a fire at a factory, toxic waste was left which the local mayor ordered the landowner to remove. The landowner contested the order on the ground that the primary person responsible should have been the

⁵¹ *Rapport annuel 2007: L'administration française et l'Union européenne: Quelles influences? Quelles stratégies?* (Paris, 2007), pp. 321ff.

⁵² CC decision no. 2004-496 DC of 10 June 2004, *Confidence in the Digital Economy*, RFDA 2004, 651.

⁵³ European Commission, *Commission Staff Working Document Part I: General Statistical Overview Accompanying the Document 'Monitoring the Application of European Union Law 2019 Annual Report'* (Brussels, 2020), p. 26.

⁵⁴ CE 1 March 2013, no. 354188.

operator of the factory. The Conseil d'Etat upheld the landowner's claim and annulled the mayor's order. Whereas the French legislation seemed to give the mayor a choice of whom he might order to clear up the waste, the preparatory works of the directive were clear that the landowner was only liable in a subsidiary position – for example, when the producer could not be identified. The Conseil d'Etat thus used interpretation to align the domestic legislation with the directive. In addition, the French state will be liable in damages for the unlawful effects of a failure to implement EU law correctly, as will be seen in Chapter 8, Section 4.5.

The obligations of EU law do not fall principally on the judicial branch of government, but on the executive. Thus, as was seen in Chapter 1, Section 5, in *Compagnie Alitalia*, the Conseil d'Etat held that the principle under which an administrative authority was obliged to withdraw an illegal decision applied not only to decisions contrary to national law, but also to those contrary to European Union law.⁵⁵ In this case, the minister was obliged to withdraw national regulations in the General Tax Code which were inconsistent with the sixth EEC VAT directive.

A permanent unit in the Section du Rapport et des Etudes of the Conseil d'Etat monitors developments in European law.⁵⁶ This *délégation au droit européen* produces monthly electronic newsletters which provide the Conseil d'Etat with updates on cases and legislation on the European Union and the European Convention. There are also regular alerts and bulletins on legislative developments, enabling not only the judicial section, but also the administrative sections to keep abreast of forthcoming developments as well as actual court decisions. This unit can answer questions posed by members of the Conseil d'Etat during their work. Under art. R123-6 CJA, the unit can also appear as an advisor to an administrative section in its consideration of forthcoming legislation. The unit is thus part of a proactive attempt by the Conseil d'Etat to ensure that it implements EU law correctly. The unit also takes part in international gatherings outside Europe within its wider mission to integrate international law with national law.

The influence of EU law is not confined to situations where the rules and principles of EU law are directly applicable. There may also be 'spillover' effects in that ideas developed in EU law are applied more generally in domestic law. Whether a 'spillover' occurs is a matter of choice. As will be

⁵⁵ CE Ass. 3 February 1989, *Compagnie Alitalia*, no. 70452, Leb. 44; AJDA 1989, 387 note Fouquet.

⁵⁶ See Conseil d'Etat, *Rapport public: L'activité juridictionnelle et consultative des juridictions administratives en 2019* (Paris, 2020), p. 381.

seen in Chapter 7, the Conseil d'Etat has refused to expand the concept of protecting legitimate expectations into domestic law beyond where the administrative courts are applying EU law directly.⁵⁷ Nevertheless, the same decision brought into French law an idea from EU law that the validity of an administrative decision should depend on the availability of transitional provisions.⁵⁸

2.6.4 European Convention on Human Rights

As was mentioned in Chapter 1, Section 6, France ratified the European Convention on Human Rights in 1974 to be applied before French courts, and it allowed individual action before the Strasbourg court in 1981, contrary to the UK, which did it the other way round. Its status in domestic law comes from art. 55 of the Constitution, which gives a ratified treaty a superior status to domestic laws made by Parliament. As a result, it is a significant part of French public law. It creates obligations on public authorities not to interfere unduly with a range of fundamental rights. The use of the Convention as a part of the test for the legality of administrative decisions will be discussed in Chapter 7, Section 3.3.

When discussing the controversy over the role of the *commissaire du gouvernement* in Chapter 1, Section 6, it was seen that the Convention can set alternative standards to those current in French administrative law. The Conseil d'Etat acceded reluctantly to the position adopted by the European Court of Human Rights only after trying to test whether the European Court was prepared to review its earlier decision, which had not been unanimous.

But, as in the United Kingdom, the major role of the Convention is in interpretation. Domestic legislation and case law are read in such a way that is consistent with the Convention. A good example is the *Diop* case.⁵⁹ Diop was a Senegalese citizen. When Senegal was a colony, he joined the French army in 1937 and left in 1947 to join the police force, acquiring his pension in 1959. Having served the French state, he was entitled to a French pension, which the French state continued to pay after Senegal's independence. That pension was revalued annually until a law of 1979 applied art. 71 of the Finance Law for

⁵⁷ CE Ass. 24 March 2006, *KPMG*, no. 288460, *AJDA* 2006, 1028.

⁵⁸ F. Train, 'L'influence du droit communautaire sur le droit administratif français en matière du droit transitoire', *AJDA* 2010, 1305.

⁵⁹ CE Ass. 30 November 2001, *Ministre de la Défense c Diop*, no. 212179, Rec. 605 concl. Courtial. This is a part of a long saga of legislation on the use of nationality and residence as criteria for discrimination in public service pensions that has involved decisions of the Conseil constitutionnel and the Conseil d'Etat ensuring that the principles of equality in the Constitution and the prohibition on discrimination in the Convention are respected: see *Grands Arrêts*, pp. 762–6.

1960 of 26 December 1959 to Senegalese citizens. Under this law, the pension was replaced by an annual payment which did not come under revaluation. Diop wrote to the Minister of Defence, who rejected his request that the pension be revalued. Agreeing with the *cour administrative d'appel* of Paris, the Conseil d'Etat held that the pension was a debt which, consistent with the case law of the European Court of Human Rights, was a property right under art. 1 of Protocol 1 to the Convention of which the law on revaluation had deprived Diop. Furthermore, the rule on revaluation discriminated between former French public employees on the ground of their nationality – a French national former soldier living in Senegal would have a revaluated pension and a Senegalese one would not. This was unjustified discrimination contrary to art. 14 of the Convention. Accordingly, the minister should have assessed Diop's right to a pension without regard to art. 71 of the 1959 law and should have revalued his pension.

The approach in the case reflects that suggested by *commissaire du gouvernement* Labetoulle in *Debout* in 1978.⁶⁰ He suggested that domestic law should be interpreted to be consistent with the Convention 'as far as possible with two preoccupations: on the one hand to avoid any solution which is radically incompatible with the case law of the [European] Court [of Human Rights]; on the other hand, to avoid a solution which on a specific point would mark a departure from previous domestic law'.

Article 6 of the Convention is very significant within the provisions applied by the Conseil d'Etat in the interpretation of its own case law. For example, it was used by the Conseil d'Etat to require professional and other disciplinary bodies to conduct their proceedings in public.⁶¹ It also uses that article to control the imposition of administrative sanctions. In *Didier*, it applied the European Court's approach to the bodies which art. 6 covers to include the disciplinary panel of the Financial Markets Authority, even though this would not count as a 'court' within French domestic law.⁶² As a result, the principle of impartiality applied to its proceedings in relation to the presence of the investigating judge in the decision-making panel.

The Convention not only plays a role in acting as a guide to the interpretation of domestic legislation and case law, it may also serve as an encouragement for the French administrative courts to enhance their protection of fundamental rights. Chapter 7, Section 3.2 gives the example of freedom of

⁶⁰ CE Sect. 27 October 1978, no. 07103, Rec. 395 concl. Labetoulle.

⁶¹ CE Sect. 30 October 1998, *Lorenzi*, no. 159444, RFDA 1999, 633; CE 23 February 2000, *L'Hermite*, no. 192480, AJDA 2000, 363.

⁶² CE. Ass. 3 December 1999, *Didier*, no. 207434.

the press. Whereas before the Convention was ratified, the administrative courts would only interfere with restrictions on the freedom of the press on public interest grounds where the decision was manifestly wrong, in *Ekin*, the Conseil d'Etat decided that no restriction would be allowed unless the public authority demonstrated a clear case of necessity, a requirement more in line with the Convention.⁶³ Effectively, the burden of proof of necessity has shifted.

2.6.5 General Principles of Law

After the Vichy period, the Conseil d'Etat sought to clarify the 'republican constitutional tradition'. Even though the courts could not then strike down legislation, they could limit executive acts and they could interpret legislation restrictively. A series of general principles were elaborated by the administrative courts, drawing both on the specific declarations of rights and on more general principles. In 1951, Rivero identified four sources of general principles of law: (i) the traditional principles of 1789, such as equality, freedom of trade and conscience and the secular character of the State, (ii) general principles derived by analogy with private law and private law procedure (bindingness of decisions, rights of due process), (iii) principles drawn from 'the nature of things', the logic of institutions, such as continuity of public service, and (iv) necessary ethical principles, such as the administration seeking to serve the common good.⁶⁴ These thus include constitutional values such as freedom of education and religion and freedom of commerce, as well as procedural safeguards like the right to a hearing and the right to challenge decisions of the administration in the courts. Even rules of procedure, such as the right of appeal, might be included. *Commissaire du gouvernement Gentot* stated in *Dame David*:⁶⁵

If the general principles of law express – or reflect – commonly accepted ideas which are at the base of our legal system, they have to be consecrated by history and traditions, and be characterised by a certain permanence and a certain appeal to universality.

⁶³ CE Sect. 9 July 1997, no. 151064, AJDA 1998, 374 note Verdier.

⁶⁴ D. 1951 Chr. 21 at 22. See generally B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative* (Paris: Sirey, 1954), and id., 'La théorie des principes généraux du droit à l'épreuve du temps', *Etudes et Documents du Conseil d'Etat* 1981–2, 33.

⁶⁵ CE 4 October 1974, no. 88930, Leb. 464; D. 1975, 369, note Auby; JCP 1975.II.19967, note Drago. Although the case only concerned civil procedure, the *commissaire* took the view that the finding of a general principle of civil judicial procedure might lead to the rules of administrative court procedure being called into question.

Letourneur linked this with statutory interpretation:

When the legislator of a specific nation votes a particular text, he does so within the framework of the political, social and economic organization existing at the period in question, a framework determined by a certain number of principles which represent the state of the evolution and civilization which that nation has reached; when the judge does not find in a written text the solution to the litigation which is submitted to him, he is necessarily led to apply the same principles that the legislator is accustomed to take as his guide.⁶⁶

Although the general principles have an important status, not all of them are of constitutional status. As Chapus suggested in 1966, some are binding on the legislature, which eventually became true when the Conseil constitutionnel upheld some of them as constitutional principles, while others merely bind the administration in its legislative and administrative functions.⁶⁷ Both types also have some importance in the interpretation of the Constitution. All general principles are of importance in defining the scope of the executive's power to legislate under art. 37 of the Constitution. Furthermore, only Parliament may alter general principles of law under art. 34 of the Constitution. But some general principles, though unwritten, may also bind the legislature in that they constitute fundamental principle recognised by the laws of the Republic or objectives of constitutional value, such as the continuity of public services, and these Parliament cannot alter. The point was well made by *commissaire du gouvernement* Fournier in *Syndicat Général des Ingénieurs Conseils* in 1959:

There are the general principles of law properly so-called, laid down by the declarations of rights or deduced by judges from them. Among these fundamental principles, which are at the foundation of our political system, one must undoubtedly place the equality of citizens, the guarantee of essential freedoms, the separation of powers and the finality of judicial decisions, the non-retroactivity of the decisions of public authorities and the inviolability of acquired rights, the right of citizens to challenge administrative decisions, a right which has a passive form (the right to a hearing) and an active form (the right to bring an action for judicial review). Equally should be included, as a counterbalance, the continuity of public services, essential to the life of the nation.⁶⁸

⁶⁶ M. Letourneur, 'Les principes généraux du droit dans la jurisprudence du Conseil d'Etat', *Etudes et Documents du Conseil d'Etat* 1951, 19 at p. 20.

⁶⁷ R. Chapus, 'De la valeur des principes généraux du droit et des autres règles jurisprudentielles de droit administratif' D. 1966 99 at p. 104.

⁶⁸ CE Sect. 26 June 1959, no. 92099, Leb. 394. See further G. Morange, 'Une catégorie juridique ambiguë: les principes généraux du droit', RDP 1977, 761.

Among the important general principles of law of infra-constitutional status are that administrative silence is tantamount to a decision to reject a request from a citizen,⁶⁹ that only laws and not administrative decrees or decisions can have retrospective effect,⁷⁰ and that of *audi alteram partem* (*le principe du contradictoire*).⁷¹

2.6.6 Case Law (La jurisprudence)

Set up in 1799 and soon with a duty to provide reasons for its decisions, the Conseil d'Etat published judgments from 1806. Even under the Restoration (1814–30), it was producing on average 400 judgments a year. The first commercial collection of judgments was in 1819 and the official series began in 1831, the *Recueil Lebon*, which continues to this day to publish the main cases selected by the Conseil d'Etat itself. So there were official law reports in France many years before the Incorporated Council of Law Reporting began its series in 1865 in England. Unlike in England, administrative law was a clearly defined subject as the product of a distinct court. Having no code, the Conseil d'Etat naturally referred to its own case law even if precedents were not cited as authority in judgments as in England. The major turning points in the development of administrative law have mainly come through judicial decisions. It is clear in the arguments of the *commissaire du gouvernement* (as the office was then called) as well as from textbooks since the 1830s that constant reference was made to cases. Indeed, it could be argued that French administrative law was a kind of common law system. As Bernard Schwartz commented,

The development of a system of administrative law to help minimize [the danger of arbitrariness] has been, in France as in the common law world, largely the handiwork of the judge. In this respect the *droit administratif*, unlike most other branches of French law, bears a resemblance to the kind of law prevalent in the Anglo-American system. The French administrative lawyer, like his confrere in the common law world is accustomed to derive the basic principles of his system inductively from the decided cases . . . [But] in the common law world the basic principles of administrative law have been worked out by the ordinary courts by analogy from the principles of private law. In France, on the other hand, the law courts concerned with the

⁶⁹ See CC decision no. 69–55 L of 26 June 1969, *Protection of Monuments* Rec. 27; CE Ass. 27 February 1970, *Commune de Bozas*, no. 76380.

⁷⁰ CC decision no. 69–57 L of 24 October 1969, *Repayment of Fees at the Ecole Polytechnique*, Rec. 32.

⁷¹ CC decision no. 72–75 L of 21 December 1972, *Administrative Procedure*, Rec. 36.

dispensation of justice between individuals have played only a minor part in the field . . . The *droit administratif* is based on the existence of a special law for cases involving the administration and of special courts to decide them.⁷²

Dicey made the same point in his lectures (which were unpublished until the remarkable work of John Allison): ‘*Droit administratif* is in its contents utterly unlike any branch of English law, but in the method of its formation it resembles English law far more closely than does the codified civil law of France. For *droit administratif* is, like the greater part of English law, “case-law”, or “judge-made law”.’⁷³

Under the Third Republic, the lack of a constitution made it necessary for judges to develop the principles of public law. In more recent times, it is not merely the diversity of the sources of the domestic Constitution that require the judges to take the lead in developing public law principles. The administrative courts are responsible for giving effect to the priority of European Union law and the European Convention on Human Rights over domestic law. Articles 55 and 88–1 of the Constitution give that priority, but without setting up a mechanism to achieve the alignment that is legally required. So, as was seen in Chapter 1, this task has fallen to the administrative and civil courts. As a result, case law has a major significance in public law.

The difficulty of the case law has always been the style of decision. The laconic style, beginning ‘Considering that . . .’, and the syllogistic organisation of the argument made the judgments difficult to interpret and understand. But the format of the decision of an administrative court was deductive in style and exiguous in justification, which might suggest a timidity in the exercise of judicial lawmaking power. As Gaudemet suggested, ‘The drafting of the decision cannot be simply the written transposition of the work of reflection and reasoning of the administrative judge.’⁷⁴ The explanation lies in considering the function of the text of a judgment. That style was changed in 2010 and the administrative courts have adopted a style that is short by common law standards, but is more like the judgments of the European courts in Strasbourg and Luxembourg. The judgments need to be read in conjunction with the *conclusions* of the *rappporteur public* and any annotations. Although the drafting of leading decisions is undertaken with great care, the production of a decision by a very large group of people will often be brief, the lowest

⁷² *French Administrative Law and the Common-Law World* (New York: New York University Press, 1954), pp. 2–3.

⁷³ A. V. Dicey, *Lectures on Comparative Constitutionalism* (edited by J. W. F. Allison) (Oxford: Oxford University Press, 2013), pp. 311–12.

⁷⁴ *Ibid.*, p. 95.

common denominator necessary to achieve the decision.⁷⁵ Occasionally, there may be ‘authorised commentary’ by members of the Service de documentation of the Conseil, who have published a regular review of recent decisions in the AJDA since 1962, and this can serve as a kind of briefing for the wider public, since they attend the *délibéré* of the commented cases, although never breaching its secrecy. Rather than relying on the format of reasons, the skilled interpreter is forced to rely on certain institutional practices. Le Berre notes that the internal practices of the Conseil may be a good indicator – if a decision is taken by the *chambres réunies*, then it will not be intended to overturn established case law, since that function is reserved to the more solemn formations of the Section du contentieux or the Assemblée.⁷⁶ Since the Conseil controls the publication of its own decisions, this process is also used to signal whether the decision is making an important development in the law, or merely is a routine decision or one confined to its facts. The absence of publication of a decision can minimise its importance, as well as if not commented by the members of the Conseil d’Etat after the judgment.⁷⁷

2.6.7 Legal Scholarship (La doctrine)

The term ‘administrative law’ has been shaped by legal scholarship, but in much closer relationship with the judiciary in France than in England.⁷⁸ The term first appears in 1807, and the very first course was offered in 1808.⁷⁹ The appointment of a professor in Paris in 1819 (Gerando) was the real starting point for legal education in administrative law.⁸⁰ From the 1830s, there was regular teaching in the universities, leading to the permanent foundation of

⁷⁵ See J. Bell, ‘Reflections on the Procedure of the Conseil d’Etat’, in G. Hand and J. McBride, eds., *Droit sans frontières* (Birmingham: Birmingham Faculty of Law, 1991) (hereafter Bell, ‘Reflections’), 211 at p. 226.

⁷⁶ H. Le Berre, *Les revirements de jurisprudence en droit administratif de l’an VIII à 1998* (Conseil d’Etat et Tribunal des Conflits) (Paris: LGDJ, 1999), p. 297; Bell, ‘Reflections’, p. 229.

⁷⁷ Le Berre, *Les revirements de jurisprudence en droit administratif de l’an VIII à 1998*, pp. 298–9, citing as an example CE Sect 7 July 1982, *Commune de Guidel c Mme Courtet*, no. 30533, RDP 1983, 1439 which allowed a *recours pour excès de pouvoir* against a contract, but which was sidelined by non-reporting in *Lebon*.

⁷⁸ See generally J. Bell, ‘La contribution de la doctrine à la formation du droit administratif : perspectif britannique’, in *Le Service Public: Mélanges Long* (Paris: Dalloz 2015), pp. 41–54.

⁷⁹ As part of the proposals drawn up by the inspectors of the Faculties: J.-L. Mestre, ‘Aux origines de l’enseignement du droit administratif: le Cours de législation administrative de Portiez de l’Oise (1808)’, RFDA 1993, pp. 244–6.

⁸⁰ M. Touziel-Divina, *La Doctrine Publiciste 1800–1880* (Paris: La Mémoire du Droit, 2009), p. 263.

administrative law chairs in all universities in 1838.⁸¹ A national programme for university courses in administrative law was imposed by decree in 1862.⁸² From 1855, there was a national recruitment of university professors of law (the *agrégation de droit*). Administrative law was thus taught to students from an early date.⁸³ So there was demand for textbooks and a body of teachers across the country required at least to produce their courses, often in printed form. In addition, the training of senior civil servants started after 1830. Teaching in administrative law was established in 1831 at the *École des Ponts-et-Chaussées*, the leading college for the administration's engineers. The teachers were leading members of the *Conseil d'Etat*, such as Cotelle, Aucoc and E. Laferrière.⁸⁴ After 1872, the *École libre des Sciences Politiques* followed the same pattern for generalist administrators with leading members of the *Conseil d'Etat* as teachers such as Romieu, Odent and Braibant during the following century. The written versions of the courses taught in those institutions became the major texts of administrative law scholarship (and the work of their successors remains such today).⁸⁵ Furthermore, *commissaires du gouvernement* (as they were then known) would not only teach, but would also develop legal doctrine in their *conclusions* in judicial proceedings. These would provide the court with a dispassionate and extensive survey of the law, together with clear recommendations as to its development. Their role in negotiating the listing of cases for hearing enabled them to plan the grouping of decisions favourable to dealing with important issues of law and thus in shaping legal doctrine.⁸⁶

University professors not only wrote textbooks at the turn of the twentieth century, but they also shaped the subject by their case notes, a genre serving judges would not be able to use. The great *principled content* of administrative

⁸¹ T. Fortsakis, *Conceptualisme et empiricisme en droit administratif français* (Paris: LGDJ, 1987), pp. 44–8.

⁸² Touzeil-Divina, *La Doctrine Publiciste*, pp. 237–40.

⁸³ Students were required to obtain a law degree in order to become an *avocat* from 1810.

⁸⁴ Touzeil-Divina, *La Doctrine Publiciste*, pp. 116–20; P. Gonod, *Edouard Laferrière, un Juriste au Service de la République* (Paris: LGDJ, 1997), pp. 38–9.

⁸⁵ See P. Gonod, 'Les membres du Conseil d'Etat, auteurs de manuels de droit administratif', in J. Caillosse, ed., *Le Conseil d'Etat et l'Université* (Paris: Dalloz, 2015), p. 127. She states that the three 'Bibles' of administrative law are all by Conseillers d'Etat: *Les grands arrêts de la jurisprudence administrative*, the course of Odent (1970) and the treatise of Laferrière (1887). As Rivero put it, 'le juge écrit et le juge enseigne': 'Jurisprudence et doctrine dans l'élaboration du droit administratif', *Etudes et Documents du Conseil d'Etat* 1955, 27 at p. 29.

⁸⁶ See B. Stirn, 'Les commissaires du gouvernement et la doctrine', in *La Revue Administrative* 1997 numéro spécial: *Le Conseil d'Etat et la Doctrine*, p. 41. The nearest equivalent in the English common law was the lengthy judicial decision which, unlike the French judicial decision, is discursive and fully argued.

law and judicial review came with the work of Laferrière in 1887 and with academics such as Hauriou and Duguit who wrote at the turn of the twentieth century. The contribution of Laferrière's *Traité* (1887) and Hauriou's *Précis* was to present a much greater and more principled systematisation of administrative law and judicial review.⁸⁷ That has continued through the work of university professors such as Chapus and members of the Conseil d'Etat such as Braibant, Stirn and Guyomar. In addition, after 1870, there was a programme for doctoral students in public law which encouraged original research. Indeed, the course for about forty doctorate students which he gave in 1883–4 was the basis for Laferrière's *Traité*.⁸⁸

The function of doctrinal writing is to provide structure which is missing in the absence of a code, but also the kind of principled content which the Code civil provides.

The early development of legal scholarship in France contrasts with England. Even as late as 1964, only fourteen of nineteen law schools offered an option in administrative law, and Professor Wilson noted that this reflected the rapid rise of a subject 'which would generally have been regarded as unsuitable for study at [the] undergraduate level a few years ago'.⁸⁹

2.7 CONCLUSION

The context of French administrative law is distinctive, but not exceptional. The organisation of government is distinctive in that the French President is the head of the executive and commands personal political authority more similar to the President of the United States than to the heads of state in most of Europe. The fact that ministers are not members of Parliament and Parliament formally has limited powers reinforces the power of the President. Parliament has less investigative power than in the United Kingdom. In practice, the formal weakness of the French Parliament in the face of the executive is matched by the practical weakness of many parliaments in other countries of Europe. The formally centralised character of French governmental institutions is also matched by de facto centralisation in other countries. France does not have the strong decentralised powers in regional governments that are found in Germany, Belgium and Spain. But reforms

⁸⁷ Fortsakis, *Conceptualisme et empiricisme*, Part 1, chapter 2.

⁸⁸ G. Richard, 'Enseigner le droit public à Paris sous la Troisième République' (Thesis Paris IX, 2013), pp. 64–6, 742; Gonod, *Edouard Laferrière*, p. 39. This contrasts with England, where doctorates in administrative law date from only after 1945.

⁸⁹ J. F. Wilson, 'A Survey of Legal Education in the United Kingdom' (1966) 9 *JSPTL* (NS) 1 at p. 46.

since the 1980s have given more power to regions and to local government at a time when traditionally strong local government in England has become weaker. The roles of the prefect and the rector of the *Académie* symbolise central control over local government and public education in a more visible way than in other countries, thereby reinforcing the image of the centralised state since, as Odilon Barrot put it, with ‘deconcentration’, ‘it is the same hammer which hits but with a shorter handle’. French institutions have evolved either from the Revolution of 1789 and the reforms of Napoleon Bonaparte or from an even earlier period. Adaptation has often reflected the path dependency of how institutions were initially created, especially in the relationships of central and local government. But France is also capable of major change, such as in the institutions of the Fifth Republic.

France’s legal sources of administrative law also reflect a gradual development driven by distinctive institutions, particularly the Conseil d’Etat and the education of students and administrators in the universities and in the *grandes écoles*. The pattern of development is distinct from that in Germany or in the United Kingdom. Indeed, it has been influential beyond its borders. At the same time, French law operates in an international and supranational environment to which it not only contributes, but from which it learns. As was seen in Chapter 1 and will be seen in the remaining chapters, supranational influences from within Europe are integral to the way French administrative law now operates. Almost half of the claims before the Conseil d’Etat make some appeal to the European Convention on Human Rights. European Union law is directly applicable. French law thus shares sources of law with other countries in a way which is more profound than in the post-Brexit United Kingdom or in the United States.

Although France has distinct institutions and procedures, it has followed international trends in many ways in which government has developed in the past forty years. It adopted the ombudsman from Scandinavia in a distinctive manner and then turned the institution into the ‘Defender of Rights’, as had already been done in Spain. In this way, the ability of the citizen to complain has been enhanced. France has followed trends in regulating aspects of the private sector, especially financial markets, through independent administrative authorities. It has also followed trends to control public bodies through independent agencies. French administrative law continues to adapt in ways that maintain a certain French distinctiveness, but with a willingness to adapt to both domestic pressures and international trends.