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THE CONSEIL D'ÉTAT AND THE MIGRATION OF ADMINISTRATIVE JUSTICE: REASSESSING DROIT ADMINISTRATIF ACROSS LEGAL TRADITIONS

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Abstract

This article treats droit administratif as a legal technique as much as a body of French law. It traces the movement from the ancien régime's suspicion of the judiciary, through the nineteenth-century habit of the administration judging itself, to the consolidation of the Conseil d'État as a true court after 1872, and it maps the institutional design that gives the French model its character. It then assesses the principal criticisms, from Dicey's early hostility to modern objections grounded in judicial independence, and examines how elements of the model were absorbed, with significant modification, in the United Kingdom, the United States and India. The article argues that the influence of the French system lies less in doctrinal transplantation than in the diffusion of an institutional idea: that disputes with public power are best resolved by an expert, accessible and reasoned forum.

I. Introduction

Administrative law governs the relationship between the organs of the state that discharge public functions and the individuals affected by their decisions. It is a branch of public law, set apart from private law by its subject matter and, historically, by its sources: custom, general principles and judicial decisions have shaped it at least as much as legislation. Its practical importance lies in the modern state's need to make rules, to adjudicate the disputes that arise

under them and to enforce the outcome through boards, commissions and regulatory bodies, in fields as varied as trade, taxation, environmental protection and immigration.¹

The growth of governmental activity made it necessary to develop a body of rules to regulate how the administration acts and how it uses its power. That power is indispensable, because it secures public order, efficiency and control over the large bureaucracy that any functioning state requires.² Yet the same power invites abuse, and its scope must therefore be confined so that officials cannot turn their authority against the citizen. The difficulty is sharpened by the fact that administrators are commonly given a broad range of delegated legislative and adjudicative functions in support of their executive tasks. As the executive's reach extended into social, political and economic life, administrative law was incorporated, in one form or another, into legal systems across the world.

In common law systems, the principal check is judicial review by the ordinary courts. The grounds on which a court will intervene operate alongside statutory controls to limit the discretion of the bureaucracy.³ Judicial review is, however, a narrow instrument. A reviewing court examines the legality and procedural propriety of a decision, not its merits, and the courts themselves exert only a limited influence on the day-to-day business of administration. That limitation supplies a strong argument for a specialised forum able to resolve disagreements arising before, during or after administrative action, and the argument has been applied to boards, commissions and sector regulators of every kind. It is important to keep such a forum distinct from the appellate process, because adjudication by an expert body may reach the substance of a decision while review ordinarily may not.

France is the jurisdiction most closely associated with the specialised forum. *Droit administratif*, the law of the administration, is a distinct and autonomous body of rules that governs administrative bodies, public officials, and the relations between public authorities and private persons. It is applied by a separate hierarchy of administrative courts, headed by the Conseil d'État, rather than by the civil courts.⁴ The common law did not build a comparable system: it entrusted the control of public power to the ordinary courts and, until relatively

¹James W Garner, 'French Administrative Law' (1924) 33 Yale LJ 597; HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014).

²Prosper Weil, 'The Strength and Weakness of French Administrative Law' (1965) 23 CLJ 242; Garner (n 1).

³Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016); Wade and Forsyth (n 1).

⁴L Neville Brown and John S Bell, *French Administrative Law* (5th edn, Clarendon Press 1998); A Mestre, 'Droit Administratif' (1929) 3 CLJ 355.

recently, regarded the French arrangement with suspicion.⁵ Nevertheless, the technique proved influential enough to become a reference point in common law and civil law jurisdictions alike. One of its most visible features, the entrustment of administrative disputes to specialised adjudicative bodies, has been adopted in many forms in India, the United States and the United Kingdom, among others.⁶

This article examines the historical development of *droit administratif*, the composition and characteristics of the system, the criticisms it has attracted and the reasons for its influence. The approach is doctrinal and comparative, drawing on statutes, judgments and official reports, and on the secondary literature that has analysed them. The argument advanced is twofold. First, the significance of the French model has sometimes been overstated, since much of what has travelled is a general institutional idea and not a set of French rules. Second, that idea nonetheless contains useful considerations for the design of administrative justice, provided it is adapted to the constitutional setting into which it is introduced.

II. From Royal Council to Administrative Court: The Formation of *Droit Administratif*

The origins of the French system lie in a long-standing conflict between the Crown's administration and the courts. Under the *ancien régime*, the Conseil du Roi advised the monarch and settled disputes touching royal administration, while the parlements, sovereign courts of a judicial character, frequently obstructed royal policy by refusing to register edicts and by entertaining claims against royal officers. The Revolution inherited a deep distrust of any judicial interference with the work of government.⁷ The Law of 16-24 August 1790 declared that judicial functions are distinct and must always remain separate from administrative functions, and it forbade judges to disturb the operations of administrative bodies.⁸ A revolutionary decree of the year III went further and prohibited the courts from taking cognisance of administrative acts of any kind. The separation of powers, in the French sense, therefore meant that the administration was shielded from the judges and not that it was subjected to them.

⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) ch 12.

⁶ Bernard Schwartz, *French Administrative Law and the Common-Law World* (New York University Press 1954).

⁷ Schwartz (n 6); Brown and Bell (n 4).

⁸ Loi des 16-24 août 1790 sur l'organisation judiciaire, tit II, art 13; Décret du 16 fructidor an III.

A separation between judge and administrator does not by itself create an administrative court. For much of the nineteenth century, administrative disputes were resolved by the administration itself: a person aggrieved applied to the competent minister, who in effect judged his own department, a practice later described as the *ministre-juge*. The Conseil d'État, established under Napoleon by the Constitution of Year VIII, was charged with drafting bills and regulations and with resolving difficulties arising in administrative matters.⁹ Its role in contentious matters was initially advisory. It prepared proposals on which the head of state decided, a system known as *justice retenue*; it held no regular public hearings and had no power to render decisions of its own.¹⁰ On the Napoleonic conception, the object of the institution was to settle the disputes that naturally arose in the course of administrative activity from within the administrative structure, and not to stand above it as an independent tribunal.¹¹

The decisive change came with the Law of 24 May 1872, which transferred the power of decision to the Conseil d'État, now acting in the name of the French people (*justice déléguée*), and which created the Tribunal des Conflits to resolve jurisdictional disputes between the administrative and ordinary courts.¹² The decision of the Tribunal des Conflits in *Blanco* on 8 February 1873 gave the new arrangement its doctrinal foundation. A young child had been injured by a wagon belonging to a state tobacco factory, and the question was whether the liability of the state for the acts of persons in its service should be governed by the Civil Code and heard by the civil courts. The tribunal held that this liability was neither general nor absolute, that it was subject to special rules varying with the needs of the service and the necessity of reconciling the rights of the state with private rights, and that the administrative jurisdiction was competent to apply them.¹³ The ruling settled that questions of administrative responsibility fell to administrative courts applying a body of substantive and procedural rules distinct from the civil law.

It nevertheless took a further sixteen years before the Conseil d'État began to receive applications directly from private individuals, and the process that began in 1889 laid the foundation for the settlement of conflicts between citizens and the administration. In *Cadot*,

⁹Constitution du 22 frimaire an VIII (13 December 1799), art 52.

¹⁰Garner (n 1); Hugo Flavier and Charles Froger, 'Administrative Justice in France: Singularity and Classicism' (2016) 3(2) BRICS LJ.

¹¹Weil (n 2).

¹²Loi du 24 mai 1872 portant réorganisation du Conseil d'État.

¹³*Blanco* (TC 8 February 1873) Rec 61; Marceau Long and others, *Les grands arrêts de la jurisprudence administrative* (22nd edn, Dalloz 2019); Flavier and Froger (n 10).

the Conseil abandoned the theory of the minister as judge of first instance and accepted jurisdiction over administrative disputes as a court of general competence.¹⁴ That history is also a reminder that the institution did not emerge fully formed. Its authority rested on a succession of reforms and decisions that changed it from an advisory body into a judicial organ.

Consolidation continued in the twentieth century. The *tribunaux administratifs* became the ordinary courts of first instance in administrative matters in 1953, and the creation of the *cours administratives d'appel* in 1987 relieved the Conseil d'État of much of its appellate workload.¹⁵ In 1980 the Conseil constitutionnel recognised the independence of the administrative jurisdiction as a fundamental principle recognised by the laws of the Republic, so that an institution that had begun as an adviser to the executive acquired constitutional protection as a distinct judicial order.¹⁶

III. The Institutional Architecture of the French Model

It is helpful to distinguish at the outset between droit administratif, the body of law, and the Conseil d'État, the institution that has done most to create it. The two are often conflated, but a clear separation clarifies what exactly was exported. The institutional framework consists of a hierarchy of administrative courts topped by the Conseil, together with the Tribunal des Conflits, which polices the boundary between the administrative and judicial orders.

The members of the Conseil d'État are appointed by decree adopted in the Council of Ministers on the recommendation of the Government. Parliament plays no part in their selection, and the Government's influence over the composition of the Conseil was in practice modest, since the great majority of posts were filled by progression through the ranks, from *auditeur* to *maître des requêtes* to *conseiller d'État*, with a limited proportion reserved for outside appointments.¹⁷ Those who sit as administrative judges are often described as *magistrats administratifs*, and they enjoy a measure of autonomy and security of tenure. The guarantees exist for a functional reason. A judge of administrative disputes must understand not only how the machinery of

¹⁴*Cadot* (CE 13 December 1889) Rec 1148; Brown and Bell (n 4).

¹⁵Décret n° 53-934 du 30 septembre 1953 portant réforme du contentieux administratif; Loi n° 87-1127 du 31 décembre 1987 portant réforme du contentieux administratif.

¹⁶Conseil constitutionnel, Décision n° 80-119 DC, 22 July 1980 (*Loi portant validation d'actes administratifs*).

¹⁷Brown and Bell (n 4); Garner (n 1).

government works but also how it fails, and must be able to identify the practices that make it efficient and the obstacles that it is likely to meet.¹⁸

The Tribunal des Conflits shows the care taken to balance the two orders of courts. Under the Law of 1872 the tribunal consisted of nine members: three drawn from the Conseil d'État, three from the Cour de cassation, two further members chosen by those six, and the Minister of Justice, the *garde des sceaux*, as president *ex officio*.¹⁹ A vice-president, chosen by the members, was in practice the officer who presided over the tribunal's sittings. Although the details of its composition have been adjusted since, the principle of parity between the two supreme courts has endured.²⁰ The Tribunal des Conflits and the Conseil d'État together form the core of the system that so many other jurisdictions later studied and, in part, adopted.

The rationale behind the arrangement is the separation of powers as understood in France. The administrative courts do not interfere with the legislature or substitute their own policy choices for those of the executive, and the executive and legislature in turn leave the resolution of administrative disputes to a body that is institutionally independent of them. French commentators have regarded the result as an almost complete separation of the three functions, each exercised within its own field.²¹ Observers abroad, searching for analogies, compared the Conseil d'État with the United States Court of Claims and with the Privy Council in England.²² Those comparisons are instructive but imperfect, because the Conseil's jurisdiction is plenary over administrative disputes and sits within a hierarchy that is separate from, and not subordinate to, the ordinary courts.

One feature of the architecture deserves emphasis because it has produced both admiration and criticism. The Conseil d'État performs two functions: it advises the Government on draft legislation and regulations, and it adjudicates disputes through its judicial section, the *Section du contentieux*. This duality gives its judges a knowledge of the administration from the inside, which is a source of expertise. It also raises the question, to which this article returns, whether the same institution can credibly advise on a text and subsequently judge its legality.²³

¹⁸HW Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 Osgoode Hall LJ 1.

¹⁹Loi du 24 mai 1872 (n 12).

²⁰Brown and Bell (n 4).

²¹Garner (n 1).

²²Schwartz (n 6).

²³*Procola v Luxembourg* (1995) 22 EHRR 193.

IV. The Characteristics of Droit Administratif

Three groups of rules make up droit administratif.²⁴ The first comprises the rules that govern the organisation and functioning of the administration and its personnel, including the rules on recruitment, remuneration, discipline and removal of officials and the standards of conduct expected of them. The second comprises the rules that govern and secure the performance of public utilities and services. The concept of *service public* has long been central to French thinking, and the rules in this field are sector-specific, since each service has its own demands.²⁵ The third comprises the rules that govern the resolution of administrative disputes. This last group is the most significant for comparative purposes, because it defines the jurisdiction and procedures of the administrative courts and is the part most frequently borrowed.

A defining characteristic is that the system is predominantly jurisprudential. French administrative law was not enacted as a code. It was built, case by case, by the Conseil d'État, with the Tribunal des Conflits drawing the boundary of jurisdiction and the Cour de cassation applying the civil law on the other side of that boundary, and it was only at the start of the present century that the rules of procedure were collected in a single code.²⁶ This is a feature that the system shares with the English common law, and it distinguishes the French approach from the legislative style typical of the United States federal administrative state. The judge-made character also explains why the system is regarded as flexible: it develops by reference to the needs of the administration and of the citizen in particular cases, rather than by comprehensive prior design.

The accessibility of the forum is a second characteristic. The *recours pour excès de pouvoir*, the action to annul an administrative act for illegality, is open at low cost and, historically, without the need for a lawyer.²⁷ In *Dame Lamotte*, the Conseil held that the action is available even without a statutory text, as a general principle of law, and that legislation is not to be read as excluding it in the absence of a clear intention to do so.²⁸ The procedure is supported by the *rapporteur public*, formerly the *commissaire du gouvernement*, an official who presents an independent opinion on the case to the court.²⁹ By contrast with a typical civil court, which is

²⁴Brown and Bell (n 4).

²⁵Blanco (n 13).

²⁶Brown and Bell (n 4); Long and others (n 13).

²⁷Garner (n 1).

²⁸*Dame Lamotte* (CE Ass 17 February 1950) Rec 110.

²⁹Décret n° 2009-14 du 7 janvier 2009 relatif au rapporteur public des juridictions administratives et au déroulement de l'audience devant ces juridictions.

expected to deal with every kind of dispute, the administrative bench is staffed by judges who have expert knowledge and practical experience of the administrative sectors that they supervise. The expectation in an ordinary court that a generalist judge will be competent in every field of regulation is unrealistic.

A third characteristic is the combination of independence and legitimacy. The Conseil d'État protects the independence of administrative judges by insulating them from the pressure of commercial interests, other judges and politicians, and it has built its authority on a record of decisions that have often favoured the citizen against the administration.³⁰ Those decisions are typically reasoned, and the reasoning is available as a resource for later cases and for other legal systems, which is one reason why the model was so readily studied abroad.

V. Criticism and Reappraisal

The earliest criticism of the French arrangement came from within the French system itself and concerned its lack of independence. For as long as the Conseil d'État acted only as a counsellor to the minister to whom a complaint was addressed, it lacked the authority to render decisions, it did not sit in regular public hearings, and the administration remained the judge in its own cause.³¹ The history set out above is largely the story of how that criticism was answered, by the Law of 1872, by *Cadot*, and by the progressive judicialisation of the Conseil's procedures.

The most famous external criticism is that of AV Dicey. In his account of the rule of law, Dicey used the expression *droit administratif* to describe a body of rules that regulated the rights and liabilities of the state's servants and protected them, through special tribunals, from the ordinary law, and he contrasted this unfavourably with the English principle that officials are subject to the same law and the same courts as private citizens.³² For Dicey, a system that recognised the existence of a special administrative law was incompatible with the equality before the law that he regarded as fundamental to the English constitution.

Dicey's verdict did not remain static. In his later article of 1901, he acknowledged that the French system had been misunderstood in England, that it was not designed to confer immunity on officials, and that it offered benefits that most Englishmen did not readily perceive. He praised the ability of French jurists to construct year after year a sizeable body of law and to

³⁰Garner (n 1); Weil (n 2).

³¹Flavier and Froger (n 10); Weil (n 2).

³²Dicey, *Introduction* (n 5) ch 12.

devise new means of protecting the public interest.³³ The scholars who followed him took the reappraisal further. Jennings argued that the English objection rested on a misunderstanding of the French arrangement, and Garner's survey for an American audience described a system whose treatment of the citizen compared favourably with the alternatives.³⁴ Arthurs later revisited the Diceyan inheritance and questioned whether it still served English administrative law well. The criticism, in short, was in substantial part a product of the distance between two legal cultures.

Criticism has not disappeared, however, and its modern form is more precise. Weil's assessment of the strengths and weaknesses of the system weighed the Conseil's creativity and its command of administrative practice against the costs of a dual jurisdiction, in particular the technical difficulty of determining which of two orders of courts should hear a given case.³⁵ The jurisdictional frontier is a source of uncertainty and delay for litigants, which is why the Tribunal des Conflits remains a necessary, if not always popular, part of the machinery.

The most important contemporary objection concerns structural impartiality. The European Court of Human Rights has examined both the French institution and its Luxembourg counterpart. In *Procola v Luxembourg*, it held that the participation of members of the Luxembourg Conseil d'État in both the advisory and the judicial consideration of the same regulation was incompatible with the requirement of an independent and impartial tribunal.³⁶ In *Kress v France*, it considered the role of the *commissaire du gouvernement* and held that his presence in the judges' deliberations violated the principle of equality of arms.³⁷ The French response culminated in the renaming of the officer as *rapporteur public* and in changes to the conduct of hearings in 2009.³⁸ The episode is instructive. The model that was admired for the proximity of its judges to the administration came to be challenged on that very ground, and its defenders were obliged to refine the institutional safeguards rather than defend the structure as it stood.

³³AV Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302.

³⁴WI Jennings, 'Administrative Law and Administrative Jurisdiction' (1938) 20 J Comp Legis & Int'l L (3rd ser) 99; Garner (n 1); Arthurs (n 18).

³⁵Weil (n 2).

³⁶*Procola v Luxembourg* (n 23).

³⁷*Kress v France* (2002) 35 EHRR 15.

³⁸Décret n° 2009-14 (n 29).

VI. The Influence of the French Model on Other Systems

A. The United Kingdom

The English reception of the French model was complicated by Dicey's authority. In the first part of the twentieth century, the growth of delegated legislation and administrative adjudication provoked a reaction summed up in Lord Hewart's warning against a 'new despotism', and the Committee on Ministers' Powers examined the matter in 1932.³⁹ The Franks Committee in 1957 then recommended that tribunals be treated as machinery for adjudication and not as part of the machinery of administration, and its proposals were reflected in the Tribunals and Inquiries Act 1958.⁴⁰ The process culminated in the Tribunals, Courts and Enforcement Act 2007, which created a unified two-tier structure of the First-tier Tribunal and the Upper Tribunal.⁴¹

These bodies resemble the French administrative courts in their specialisation and in the technical expertise of their members, and in this sense the observation that regulatory tribunals mirror French jurisdictions is not wholly wrong. Equally, it would be incorrect to treat the French idea as foreign to English practice, since the Crown's own institutions had historically combined advisory and judicial functions.⁴² The differences are nonetheless fundamental. English tribunals sit within a unified judicial system, and their decisions remain subject to the supervisory jurisdiction of the ordinary superior courts, which the House of Lords made emphatic in *Anisminic* and the Supreme Court preserved in relation to the Upper Tribunal in *Cart*.⁴³ There is no separate hierarchy of administrative courts headed by a body of the Conseil's kind.

The convergence occurred primarily through the judicial development of public law. The principles of review associated with *Wednesbury* and, later, the grounds of illegality, irrationality and procedural impropriety developed with little formal reference to the French

³⁹Lord Hewart of Bury, *The New Despotism* (Ernest Benn 1929); Committee on Ministers' Powers, *Report* (Cmd 4060, 1932).

⁴⁰Committee on Administrative Tribunals and Enquiries, *Report* (Cmnd 218, 1957); Tribunals and Inquiries Act 1958.

⁴¹Tribunals, Courts and Enforcement Act 2007.

⁴²Theodore FT Plucknett, *A Concise History of the Common Law* (Lawbook Exchange 2001); JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 1996).

⁴³*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

model.⁴⁴ Yet it is telling that Lord Diplock, in identifying the possible future adoption of proportionality, noted that it was recognised in the administrative law of several fellow members of the European Economic Community, and that elsewhere he described the development of a comprehensive system of administrative law as the greatest achievement of the English courts in his judicial lifetime.⁴⁵ The English reception was thus a process of functional convergence, not of transplantation.

B. The United States

In the United States, the modern administrative state arose with the creation of independent regulatory agencies, beginning with the Interstate Commerce Commission in 1887, and with the legislative authorisation of agency rule-making and adjudication.⁴⁶ Scholars were early students of the French system, and Goodnow's comparative study offered American readers a systematic account of the administrative law of Europe.⁴⁷ The initial reception was nevertheless coloured by Dicey, and the American Bar Association's concern about administrative adjudication in the 1930s echoed the English anxiety.

The American solution was a procedural one. The Administrative Procedure Act of 1946 standardised the procedures of federal agencies and provided for judicial review in the ordinary courts, and the Supreme Court had already accepted in *Crowell v Benson* that agencies may make findings of fact in the first instance, provided that an independent court retains the power to review questions of law.⁴⁸ Agencies thus perform adjudicative tasks that resemble those of French administrative courts, but they remain subject to review in a unitary court system. The American approach to judicial deference illustrates the point. For four decades *Chevron* required courts to defer to reasonable agency interpretations of ambiguous statutes, a doctrine that recalled the Conseil d'État's respect for administrative expertise, but the Supreme Court overruled it in *Loper Bright*, restating the primacy of the courts in the interpretation of law.⁴⁹

⁴⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 410.

⁴⁵ *Council of Civil Service Unions* (n 44) 410; *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 641.

⁴⁶ Interstate Commerce Act 1887, 24 Stat 379.

⁴⁷ Frank J Goodnow, *Comparative Administrative Law* (GP Putnam's Sons 1893).

⁴⁸ Administrative Procedure Act 1946, 5 USC §§ 551-559, 701-706; *Crowell v Benson* 285 US 22 (1932).

⁴⁹ *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984); *Loper Bright Enterprises v Raimondo* 603 US 369 (2024).

The oscillation underlines that what is borrowed is a set of questions about institutional competence rather than a settled answer.

C. India

India offers the clearest case of deliberate comparative inquiry. The Fourteenth Report of the Law Commission, chaired by MC Setalvad, considered whether the French system, or elements of it, should be adopted in India.⁵⁰ The Commission adapted the model to the legal and sociological conditions of India. It did not recommend a separate hierarchy of administrative courts, and the general jurisdiction of the Supreme Court and the High Courts was preserved. It recommended instead that tribunals be established for particular administrative sectors, composed of persons with subject-matter expertise, empowered to adjudicate disputes within their fields and guided by precedent, equity, fairness and the principles of natural justice.⁵¹ Enabling statutes were required for each tribunal, and it remains doubtful whether the *droit administratif* system was the cause of the later tribunalisation of Indian administrative justice, as distinct from one of several influences on it.⁵²

The constitutional development of tribunals illustrates both the attraction of the model and the limits of its reception. Articles 323A and 323B, inserted by the Constitution (Forty-second Amendment) Act 1976, authorised Parliament and the state legislatures to establish tribunals for service matters and for specified subjects, and the Administrative Tribunals Act 1985 followed.⁵³ In *Sampath Kumar*, the Supreme Court upheld the exclusion of the High Courts' jurisdiction in service matters on the footing that the tribunal was a competent substitute.⁵⁴ In *Chandra Kumar*, however, a larger bench held that judicial review by the High Courts and the Supreme Court forms part of the basic structure of the Constitution, so that tribunals act as courts of first instance and remain subject to the High Courts' supervisory jurisdiction.⁵⁵ This outcome is a hybrid. India has adopted the specialised forum, yet it has refused the separation of administrative from ordinary judicial hierarchies on which the French system depends.

⁵⁰Law Commission of India, *Fourteenth Report: Reform of Judicial Administration* (Government of India 1958).

⁵¹Law Commission of India (n 50); SP Sathe, *Administrative Law* (7th edn, LexisNexis Butterworths 2004).

⁵²Sathe (n 51).

⁵³Constitution (Forty-second Amendment) Act 1976, s 46; Administrative Tribunals Act 1985.

⁵⁴*SP Sampath Kumar v Union of India* (1987) 1 SCC 124.

⁵⁵*L Chandra Kumar v Union of India* (1997) 3 SCC 261.

Later decisions have addressed the independence on which any specialised forum depends. In *R Gandhi*, the Supreme Court insisted that tribunals which take over the work of courts must offer comparable independence and competence, and in a series of cases the Court has scrutinised the legislation on tribunal appointments and conditions of service, including provisions of the Tribunals Reforms Act 2021.⁵⁶ The reception of the French idea in India has therefore been continuously constrained by constitutional principles that have no precise French equivalent.

VII. Explaining the Influence of the French System

Why did a system produced by one country's particular history become a point of reference elsewhere? Several explanations can be offered, and they are cumulative.

The first is the appeal of specialised judicial knowledge. Administrative disputes are technically diverse, and a generalist bench cannot be expected to master all of them. The French model, in which judges acquire sustained experience of administrative questions, offered a plausible answer to a problem experienced by every system as regulation expanded.⁵⁷

The second is accessibility. The administrative courts have been less complicated, less expensive and less forbidding than ordinary courts, so that a litigant who has a choice will frequently prefer to bring a grievance before the administrative jurisdiction.⁵⁸ A model that lowers the cost of challenging public power attracts reformers in systems where that cost has been a barrier.

The third is legitimacy. Garner recorded that the French public's confidence in the Conseil d'État exceeded its confidence in the ordinary civil courts, and, he suggested, even the American public's regard for the Supreme Court, because the Conseil had a record of vindicating individual rights against a well-organised bureaucracy.⁵⁹ Jennings reached a similar conclusion in a comparative setting, observing that few systems protect the citizen so effectively against official misconduct while securing compensation for resulting harm.

⁵⁶*Union of India v R Gandhi, President, Madras Bar Association* (2010) 11 SCC 1; *Tribunals Reforms Act 2021*; *Madras Bar Association v Union of India* 2021 SCC OnLine SC 1114.

⁵⁷Garner (n 1); Craig (n 3).

⁵⁸Garner (n 1).

⁵⁹*Ibid.*

Scholars in England and the United States came increasingly to respect the system and the judgments that it had produced, which gave the model prestige it had initially lacked.⁶⁰

The fourth is the creativity of the case law. The Conseil d'État developed general principles of law and remedies for protecting individuals from wrongful or self-serving administrative action, and it did so without waiting for legislation. Commentators have frequently attributed this to the Conseil's willingness to decide on the basis of fairness and general principles, which gave its solutions a liberality that statutory systems found difficult to match.⁶¹

A fifth factor is more general. The influence may have been exaggerated because functional need, and not imitation, explains much of the convergence. All modern states expanded administration and then confronted the same questions about expertise, access and control. Comparative lawyers have long warned of the difficulty of transplanting institutions across legal cultures and of the danger of attributing to borrowing what is better explained by parallel development.⁶² The more modest claim, and the one the evidence best supports, is that the French experience supplied a vocabulary and a set of institutional options that reformers elsewhere could use. This is also the dimension that has found a second life in the study of global administrative law, where similar questions of reason-giving, review and accountability are posed beyond the nation state.⁶³

VIII. Conclusion and Suggestions

Droit administratif places emphasis on the separation of powers, restricting both legislative and judicial interference with the operation of the administration, and it is justified by the effectiveness of the Conseil d'État and the administrative courts. The Conseil has been called the guardian of administrative morality and the bulwark of civil liberties, descriptions that reflect the promptness and inventiveness of its decisions.⁶⁴ Its judges are specialists in the fields that they adjudicate, in contrast to the position in ordinary courts, where judges are required to handle an extraordinary variety of subjects.⁶⁵ The system answers the need for an independent

⁶⁰Arthurs (n 18); Jennings (n 34).

⁶¹Garner (n 1); *Dame Lamotte* (n 28).

⁶²Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974); Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

⁶³Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp Probs 15.

⁶⁴Garner (n 1); Weil (n 2).

⁶⁵Garner (n 1).

institution capable of resolving the specialised and varied problems that arise from executive action.

The historical record shows that the system was not the product of a single design. It developed from regional customs, from the legacy of the Napoleonic reforms, and from judicial decisions, and it passed through criticism from observers, some of whom later changed their minds about its value.⁶⁶ Its influence is real but easily misdescribed. It has helped to establish judicial reasoning as a requirement of administrative decision-making, and it has shaped the way in which jurisdictions as different as the United Kingdom, the United States and India conceive of specialised adjudication. The ombudsman, which France adopted in 1973 and which the United Kingdom and India have also developed, shows that these institutions have travelled by several routes and that a complete system of administrative accountability typically combines adjudication with other mechanisms.⁶⁷

Four suggestions follow from the analysis. First, jurisdictions considering the creation or reform of administrative tribunals should borrow selectively, taking the elements that have proved their worth, namely subject-matter expertise, accessible procedure and reasoned decisions, and adapting them to the local constitutional structure rather than importing a hierarchy wholesale. Second, the independence of tribunals must be protected by explicit guarantees concerning appointment, tenure and conditions of service, since the French experience before the European Court of Human Rights and the Indian experience after *Chandra Kumar* both show that expertise without independence is not enough. Third, where an institution combines advisory and adjudicative functions, internal separation and recusal rules are necessary to avoid the appearance of partiality. Fourth, systems should maintain a clear and accessible rule for determining which forum has jurisdiction, so that the benefits of specialisation are not lost in procedural uncertainty. Taken together, these points suggest that the lasting contribution of droit administratif is a set of design principles for administrative justice, and that its value for other systems depends on the care with which those principles are adapted.

⁶⁶Dicey, 'Droit Administratif' (n 33); Brown and Bell (n 4).

⁶⁷Loi n° 73-6 du 3 janvier 1973 instituant un Médiateur de la République; Parliamentary Commissioner Act 1967; Lokpal and Lokayuktas Act 2013.