

ADMINISTRATIVE JUSTICE IN FRANCE

First of all, I would like to say how glad and honoured I am to have been invited by my friend, the Honourable Justice Garry Downes, to give this address during this 11th AIJA Tribunals Conference in Australia. To me, it is not only a nice opportunity to come again to a marvellous country that I have only visited once, as a tourist, in the past, but it is, above all, a chance to make better known, in such a far away place as the opposite point of the globe, the French system of administrative justice which we are so proud of.

Although I am presently addressing an audience of high level law specialists, my purpose, today, will not be to deliver a scholarly lecture, but rather, according to Justice Downes's own suggestion, to give a deliberately basic presentation of our system. As I assume that most of you probably know as little about French law as I know about Australian law, I will try to keep to a didactic, and as simple as possible, description of our organization and procedures. Given that, rightly or wrongly, French administrative justice is often considered in Europe as a paragon of its kind, I will also try to insist, in this presentation, on some of its most specific features, so as to give cause for a comparison between the common law and the continental systems and introduce a possible debate about their respective advantages and disadvantages.

For obvious reasons, it is not conceivable, within the framework of such a short address, to analyse the substance of French administrative law, which is a wide and complex subject, but I will first describe the organization of our administrative court system (which will be the first

part of my presentation) and then the main features of its judicial and procedural mechanisms (which will be its second part).

I) The organization of the French administrative court system.

. For various historical reasons, and because we think, basically, that public authorities have specific powers and obligations that require that their action should not be reviewed by ordinary courts, litigation taking place between public legal persons – such as the State, national agencies or local bodies – has always been brought in France to specific jurisdictions.

Actually, this separation between civil courts and administrative courts, that might appear a little strange according to common law standards, is fairly familiar to most civil law countries.

In France, we stick to this principle to a very extensive degree, so that we have two completely separate orders of jurisdictions, each having its own supreme court at its head : the “Cour de cassation” for the ordinary courts, and the “Conseil d’Etat”, or Council of State, for the administrative courts – which, by the way, are less numerous and have of course fewer cases to deal with than the ordinary courts, but traditionally always have precedence over them.

The administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities, from tiny decisions made by any local authority to decrees issued by the President of the Republic, whether the complainant seeks the annulment of an act or financial compensation for damage, and this applies in all fields of public administration. The most

common kinds of administrative cases include, for example, those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants' career and pensions, European and local government elections, and so on.

The possible conflicts of jurisdiction between civil and administrative courts, which, in practice, are quite exceptional, are arbitrated by a special court, called the "Tribunal des conflits", whose members are chosen, on an equal representation basis, among judges of the Council of State and of the "Cour de cassation".

The order of administrative jurisdictions has, as well as the civil order, three levels of courts : the administrative tribunals, the administrative courts of appeal and, naturally, the Council of State, at the top, that normally acts as a "juge de cassation" (i.e. as a court reviewing only legal and procedural aspects of the judgements, but not the assessment of the merits of the case).

The order of administrative jurisdictions also includes many specialized administrative courts, such as, for example, the "Cour des comptes" (or Court of Auditors, that audits public expenditure), the National Court of Political Asylum (that decides about granting the political refugee status) and many social or disciplinary tribunals of different kinds. All these specialized courts – which, by the way, are probably closer to the notion of "administrative tribunals" as it is understood in many common law countries – also come under the jurisdiction of the Council of State, acting as "juge de cassation".

. As you can see from the foregoing, the Council of State is the spinal cord of the whole system of administrative courts.

The Council of State is one of the oldest institutions of France, as its history goes back as early as the XIIIth century, when it was created by King Philip the IVth, called Philip the Beautiful, in order to give him advice on government issues and to assist him in his mission to deliver royal justice to his subjects. After having been briefly suppressed during the French Revolution, as it was strongly tied to the monarchy, the Council of State was re-established, in its modern form, by Napoleon, just a few weeks after he came to power, in 1799, and has survived, since then, all the numerous and dramatic changes of political regimes that occurred in France up to the present Vth Republic.

Since the XIXth century, the seat of the Council has been established in the “Palais-Royal”, in Paris, which is a former residence of the French royal family located just next to the Louvre.

The main particularity of the Council of State is that it exercises, through its different divisions (called “sections”), a double role. It is not only the supreme court of the administrative jurisdiction, as previously mentioned, but it also acts as a legal adviser to the Government.

As a matter of fact, these two functions are regarded, in our tradition, as complementary : The Council of State is, by definition, the best possible legal adviser the Government can get, as it is also the supreme administrative court itself. At the same time, the close ties between the Council of State and the administration resulting from this advisory mission allow the

former to be perfectly knowledgeable about the latter's assets and difficulties, thus allowing the Council to be the best possible administrative judge. So the two functions permanently foster each other in a kind of interactive process.

The advisory role of the Council, which is of the utmost importance in the daily functioning of French institutions, consists in looking into draft bills or decrees having been prepared within ministries to give advice to the Government about their consistency with constitutional law or principles as well as international or national statutory law. It is a constitutional obligation for the Government to submit most of its major legal work, including all bills, to prior examination by the Council of State and, although the Government remains free, in theory, not to follow a piece of advice of the Council, it almost always follows its advice in practice.

The Government may also, whenever it wishes to, request advice from the Council on all legal or administrative matters, which it recently did, for example, about several issues having a major impact on the society or the economy.

Moreover, the Government may ask the Council, which acts, in this regard, as a kind of public "think tank", to draft reports analyzing any subject of national interest and suggesting, for example, changes in domestic law or in administrative organization.

In order to avoid any possible conflict of interests, the advisory work of the Council of State is carried out, within the institution, by several bodies (especially by five so-called "administrative sections") which are distinct from the judicial panels that may have to decide on cases related to issues previously submitted to the Council.

But the second role of the Council of State – which is the one I have to insist on as it is more relevant to the subject of this address – is its jurisdictional mission, that is exercised by its largest section, the “Section du Contentieux” (or “Litigation Section”).

The Council of State acting as the administrative supreme court issues between 10 000 and 11 000 judgements each year.

When doing this work, the Litigation Section serves in different capacities :

- It may serve as first and last instance judge, as for approximately 20 % of the cases settled by the Council each year. In this case, all matters – law and/or facts – can be debated before the Council. There are some very precise rules on which cases should be submitted directly to the Council. Most of them cover litigation of high importance, such as complaints challenging governmental decrees, ministerial decisions or decisions made by certain national public agencies, and individual cases involving certain high-ranking civil servants. All cases arising from decisions made by French public authorities in any place located outside the geographical scope of the jurisdiction of administrative tribunals are also directly submitted to the Council. Notably, this may often happen when a French ambassador or consul makes a decision in a foreign country, as is frequent, for instance, in the field of immigration applications ;

- The Council may also serve as a “juge de cassation”, which is its most common and natural role, for all judgements issued by an administrative court of appeal, by one of the specialized administrative courts that I mentioned before, and also for some judgements of

administrative tribunals in certain minor cases which cannot be appealed. The Council then reviews the whole case within all its legal aspects but does not look into the facts which have been debated before the previous courts. If the claim is regarded as valid, the Council is then free to settle the case right away – then acting either as an appeal or first instance judge – or to send it back to the court whose judgement has been successfully challenged. If the case is sent back – which seldom happens – the court or tribunal has to comply with what has been ruled by the Council ;

- Finally, the Council may also serve as an appeal judge, in some cases, especially for litigation involving local elections, which fall under the jurisdiction of the administrative tribunals, on first hearing, but go directly on appeal to the Council of state, instead of the administrative court of appeal, in order to reach more rapidly a final judgement in each case.

The Litigation Section is divided into ten so-called “subsections”, or chambers, which are in charge of a preliminary review of cases before these are settled in court sessions. Each of these subsections is specialized in certain fields of law.

. To conclude this brief presentation of the Council of State, I will just give you a few indications about the membership of the institution.

The Council of State has approximately 300 members. However, it should be noted that, as its members may be temporarily assigned to other high rank public positions, such as directors in the different ministries, presidents of government agencies, ambassadors, etc. – not to mention those who pursue a political career, as ministers or members of Parliament –, the

actual number of members working in the Council at a given time usually lies between 150 and 200.

Most members are recruited from the National School of Administration (popularly called ENA, from its French acronym), which is the national college created by General de Gaulle to train all high rank civil servants of the French administration. The Council of State traditionally attracts the graduates of ENA with the highest placing in the order of merit, that is determined by competitive examinations. But there is also another way of recruitment, which is appointment by the President of the Republic, in a limited proportion of the membership, of persons having distinguished themselves in the practice of public administration.

It is important to emphasize that promotion of members of the Council from one grade to another (which are, successively, “auditeur”, “maître des requêtes” and “conseiller d’Etat”) is strictly automatic, to give them full guarantees of independence, and depends only upon seniority of service.

Finally – and last but not least – the Council of State has the curious particularity to be presided over by a “Vice-President”, as the presidency of its general assembly is formally attributed to the Prime Minister. But the latter has no effective power in the functioning of the institution. And it has to be specified that the Vice-President of the Council of State is the highest ranking official in the French administration.

. As regards administrative tribunals, they were established, in their present-day form, in 1953 and are the ordinary first instance judge for all cases other than those having to be directly submitted to the Council of state.

There are 41 administrative tribunals all over the country, with 30 in mainland France (the Paris administrative tribunal being by far the biggest and having a special organization) and 11 in the different French overseas territories (such as, for example, the Administrative Tribunal of New Caledonia, just to mention one located in the neighbouring area of the Gold Coast).

The administrative tribunals issued, altogether, some 183 000 judgements in 2007, which gives you an idea of the quantitative importance of administrative litigation in France.

. The administrative courts of appeal are a more recent institution, as they only date back to 1987 (we just celebrated their 20th anniversary). Before their creation, all judgements of the tribunals could be appealed directly to the Council of State, which, due to the growing number of cases, resulted in an excessive work load for the Council and so made it necessary to establish an intermediate level of courts. Now, judgements of the tribunals can normally be challenged before the administrative courts of appeal, with the main exception of those concerning some minor cases which, as I previously mentioned, cannot be appealed and are only liable to be submitted to the Council of State acting as “juge de cassation”.

There are 8 administrative courts of appeal in the whole country (the most recent of them being the one located in Versailles, which was established in 2004 to cover most of the Paris metropolitan area and whose President I have been for two months).

These eight courts issued, altogether, about 26 000 judgements last year. It is, by the way, noteworthy that the rate of appeal is significantly lower in administrative cases than it is in civil cases, which is considered by many observers as a sign that administrative justice probably is, for various reasons, of better quality.

. The organization of administrative tribunals and courts of appeal, as well as the procedural rules that they apply, are, basically, reproduced from those of the Council of State. These jurisdictions even have - though on a much smaller scale than the Council itself -, an advisory role, too, as they can be asked to give legal advice to the prefects (which are the local representatives of the French Government).

It is essential to stress that the main guideline of all the administrative tribunals and courts of appeal is to comply with the case-law issued by the Council of State. As a matter of fact, though the Council's precedents are not, in theory, legally binding, administrative jurisdictions practically always implement them very strictly, since their judgements could otherwise be successfully challenged.

Except for the presidents of administrative courts of appeal, who are members of the Council of State, the members of all administrative tribunals and courts belong to a special body of judges, that is distinct both from the Council of State and from judicial judges.

These judges, whose number is a little more than 1000, are also granted, of course, full guarantees of independence by their status. They are, notably, irremovable and, in order to prevent them from any interference of the executive power, all the main decisions concerning

their career, such as promotions or transfers, are made by an independent council, called the “Superior Council of administrative tribunals and courts of appeal”, which is presided over by the Vice-President of the Council of State.

Some of these judges are recruited, like members of the Council of State, from ENA, but, due to the need for a growing number of judges in recent years, it has been necessary to implement other ways of recruitment, such as special competitions that are organized each year to select new judges among civil servants, lawyers or high level law graduates.

It should also be noted that some of these judges may be, themselves, selected, in the course of their career, to join the Council of State, according to their merits.

Finally, another particularity of our administrative court system is that all administrative tribunals and courts of appeal are placed under the management of the Council of State, which is responsible for all aspects of their organization, functioning, staff recruitment or training, and funding. Thus, the Council not only acts as the supreme court of these jurisdictions, but also, in the mean time, as a kind of small “ministry of administrative justice” in charge of their administrative and financial management. For this purpose, the Council of State, which is, notably, completely separate from the ministry of justice itself, enjoys full managerial independence and budgetary autonomy. The Council’s mission in this field is exercised, under the authority of the Vice-President, by its Secretary-General – which, actually, has been my own position for seven years until my recent appointment as President of the Versailles Court of Appeal.

After this very much condensed presentation of the structure of our administrative court system, I would now like to describe, in a second part of this address, the main features of the judicial and procedural mechanisms of French administrative justice.

II) The judicial and procedural mechanisms of French administrative justice.

. To try to make it very simple, I would say that our whole administrative justice judicial and procedural system is based on the permanent goal to maintain two fundamental balances :

- first, a balance between the respect for the specific requirements of administrative action and the protection of citizens' rights,

- and, secondly, a balance between the concern to ensure the efficiency of the administrative judge and the respect for procedural guarantees of the parties.

The necessity to keep an equilibrium between the specific requirements of administrative action and the protection of citizens' rights affects both the definition of the powers of the judge and the extent of judicial review.

. As regards powers of the judge, litigation coming before the administrative courts may be basically divided into two categories : the "contentieux de l'excès de pouvoir" (or "ultra vires litigation"), where the complainant only seeks the annulment of some administrative act or decision on the ground of its illegality, and the "plein contentieux" (or "full litigation"), where the complaint goes beyond illegality and the function of the court is to determine a person's

rights or entitlement, which may not only result in quashing an administrative decision but also involves revising it or granting compensation for torts.

Litigation of the latter kind arises in a number of areas, such as local government elections, tax cases and actions for damages on the ground of contractual or non-contractual liability. But most cases brought before the administrative courts belong to the “excès de pouvoir” category, where the court deliberately confines itself to a power of annulment of the impugned decision. As a matter of fact, one of the basic principles of administrative justice is that, in order to respect the prerogatives of administrative authorities, the judge should never act as the administration itself. And a court would, of course, breach this rule if it substituted its own decision for the one that has been challenged, by revising it.

However, this power of annulment proves to be, in certain cases, inadequate to give complete satisfaction to the complainant and, in particular, to fully protect his or her legitimate rights. This is the reason why, since a 1995 Act, the administrative judge has been granted power to issue injunctions ordering the administration to take such measures as the court deems necessary to execute its judgement. These measures may vary from one case to another, depending on the grounds for the annulment of the impugned decision.

Let's take, for example, the case of a judgement having annulled an administrative decision refusing to grant an immigration permit. If this decision has been set aside because of a procedural ultra vires, but might be right as to substance, the court will only order the administration to re-examine the immigrant's application in order to make a new decision. But, if the decision has been voided because it violated one of the applicant's substantial rights, such as, for instance, his right to lead a normal family life with a spouse and children

already residing in France, the court will order the administration to issue the immigration permit.

Another traditional limitation to the powers of the administrative judge in relation to the prerogatives of the administration lies in the so-called “*privilège de la décision exécutoire*” (or “*privilege of the binding decision*”), according to which administrative decisions may be enforced, even if they have been challenged before an administrative court, as long as they have not been rescinded by this court. Thus, the lodging of a complaint does not suspend the potentially harmful effects of a decision pending the final judgement, which, in certain cases, may cause real damage to the complainant, especially when the preliminary inquiry of the case takes a long time.

It is not conceivable, at least in the French approach, to admit that complaints before administrative courts could have the automatic effect of suspending the enforcement of the challenged decisions, as this would mean that the implementation of any administrative act or regulation could be paralyzed by the lodging of such a complaint by any single citizen. But, once again, a balanced solution has been found, as, especially since an important reform adopted in year 2000, administrative courts have developed a full range of summary proceedings (called “*procédures de référé*”) which allow the judge, under certain conditions, to suspend the enforcement of administrative decisions. As a matter of fact, such a suspension can now be provisionally ordered on the mere grounds that the complaint relies on a plea which appears sufficient to cast a serious doubt on the legality of the challenged decision – even if this plea will not be necessarily considered as founded in the final judgement – and that the enforcement of the impugned decision could result in a violation of the complainant’s rights or cause him damage of any kind, thus creating an urgent need to prevent or stop it.

These summary proceedings are very commonly (and, quite often, successfully) used, for instance, by complainants in litigation related to building permits, town planning or public works, as the sheer complexity of regulations in all these fields makes it very easy for lawyers to find serious grounds for the annulment of administrative decisions, and as the implementation of these decisions might frequently have irreversible effects (such as, for instance, the construction of a building or the actual beginning of public works), that should be prevented.

Moreover, in the case of an infringement of personal freedom or some other fundamental rights and liberties, the administrative judge may even go beyond the mere suspension of the challenged decision and order any appropriate measure to protect those rights and liberties. This specific procedure, called “référé liberté”, has been widely used, for example, in recent years, in litigation related to some restrictions to the right of association or other civil liberties that had to be decided by public authorities to struggle against terrorist threats after the September 11th attacks in the United States.

. As regards, now, the extent of judicial review of administrative decisions, it is important to note, first, that, unlike administrative jurisdictions of some other countries, French administrative courts review both the formal validity of these decisions and their substantial merits.

There are two traditionally admitted grounds for review concerning formal validity.

The first one is “incompétence” (or “want of authority”), which means that the challenged decision is claimed to have been made by a public official acting without authority. This will be the case, for example, when a prefect or a mayor has made a decision that actually fell under the authority of a minister.

The second of these grounds for review is “vice de forme” (or “procedural ultra vires”), which means that the decision is claimed to have been made in violation of a required procedural formality, such as, for example, the mandatory prior consultation of an advisory committee. In this field, it has to be stressed, though, that the courts will generally not insist on a rigid observance of all procedural formalities and make a distinction, among those, between the ones that are essential and the ones that are regarded as inessential, so that only failure to observe an essential formality will lead to the voidance of the subsequent decision. For example, it has been decided by the Council of State, in the case of a slum clearance order that had been posted in all districts most concerned, but not (as was required by law) in every district of the same city, that this was an inessential error insufficient to invalidate the proceedings. To the contrary, an order of extradition of a foreign citizen which was made without consultation with all appropriate government departments, as provided by law, was held void for want of compliance with an essential procedural requirement.

Concerning substantial merits of administrative acts, there are also two traditionally admitted grounds for review.

The first one, and by far the most important, is “violation de la loi” (or “violation of law”), which can be subdivided into several grounds, such as error of law, error of fact and (with a

different degree of review according to the nature of the challenged decision) error in the assessment of facts.

The violation of law, as it is conceived here, includes the violation of the Constitution, of an international treaty, of a statutory law, or even of an administrative regulation or decision of a higher rank in the hierarchy of administrative acts.

It also includes the violation of what we call the “*principes généraux du droit*” (or “general principles of law”), which are various fundamental principles recognized as universally applicable by our public law tradition, such as, for example, the principle of equality of citizens before the law, many principles related to the protection of individual rights and liberties, or the principle of non-retroactivity of administrative acts.

It is in the field of the review of violation of law, and, more specifically, of the review of error in the assessment of facts by the official who made a decision, that appears most clearly the necessity to keep a balance between the specific requirements of administrative action and the protection of citizens’ rights. As a matter of fact, the further the judge will go in verifying the absence of such an error of assessment, in the interest of citizens, the more limited the power of administration will be in terms of discretion it enjoys when making a decision.

The degree of judicial review on this point will depend on the nature of discretion that is recognized to the administration by applicable law.

There are some cases, although not very common, where the administration is in a situation of “*compétence liée*” (literally, “bound authority”), which means that it has no

discretion at all. This will happen, just to take a classic example of such a situation, if a citizen applies for a hunting licence, after having passed the examination entitling him to get it and having paid for the required duty : according to law, the administration is then bound to issue this licence and, as it has no choice to do otherwise, the judge will exercise a full review on its decision if it happens to reject the application.

At the other end of the spectrum, the administration may have a full “pouvoir discrétionnaire” (or “discretionary power”), which means that it has an absolute discretion to make such or such decision. For example, it is a free choice, for the President of the Republic, to decide to award decorations, such as the Legion of Honour, to any citizen. So the judge will not review at all the President’s possible errors of assessment of the citizens’ merits.

But, in most cases, the administration is rather in an intermediate situation between these two extremes, where it has a limited discretion. In this situation, and according to different criteria determined by the Council of State case-law, the court will either exercise a full review of “qualification juridique des faits” (or “legal definition of facts”), or confine itself to a review of “erreur manifeste d’appréciation” (or “manifest error of assessment of facts”). In the former case, the court will set aside the impugned decision on the mere ground that its assessment of facts is different from that of the administration, whereas, in the latter, it will only check if this decision is not flawed by a gross mistake of assessment and will not quash it as far it was reasonable, even if the judge thinks that it was not necessarily right.

For example, if a building permit has been refused because the planned construction was deemed by the administration to be harmful to visual perspectives around a nearby historical monument, this assessment will be subject to full review. But, in the case of a civil servant

who has been disciplined by his superior, the court, after having checked if the alleged offence could actually give grounds to disciplinary proceedings, will not fully review the proportionality of the imposed sanction to this offence, and will confine itself, on this point, to check the absence of manifest error of assessment.

The last of the four grounds for review, which is also related to substantial merits of the administrative decision, is the “détournement de pouvoir” (or “abuse of power”).

The notion of “détournement de pouvoir” refers to the motives that inspired the administration when making its decision. The court will consider that a decision is tainted with such a cause of illegality if an administrative power or discretion has been exercised for some object other than that for which this power or discretion was conferred to the administration. This may happen, to take the worst possible example, if the official who made the decision acted in his own personal interest, as a mayor that would issue a local regulation intended to favour a business that he owns and handicap his competitors. But this may also happen in other contexts that do not involve personal interests, like in the case, for instance, of a traffic regulation that would not be intended to make traffic easier, which is the normal object of such a regulation, but only to allow a city to improve its budgetary situation by getting more money from fines.

. I am now coming to the question of the balance we have to keep between our concern to ensure the efficiency of the administrative judge and the respect for procedural guarantees of the parties.

The necessity to maintain this equilibrium affects both the procedure before the administrative courts and the conditions in which judgements are ruled.

. As regards the procedure before the administrative courts, it is traditionally described as having four main distinguishing features, which are that it is written, secret, inquisitorial and (at least in the way we understand it in the French approach, as I will explain later) adversarial or, as we put it, “contradictory”.

It is, first, a written procedure. This does not mean, actually, that it is exclusively written, as there are also (especially before the administrative tribunals and, to a lesser degree, before the administrative courts of appeal) some oral proceedings, and, even before the Council of State, where such proceedings are, in practice, more exceptional, lawyers always have the possibility of delivering oral remarks. But it is true that the procedure is essentially written, as the parties are requested to send to the court paper submissions, that must contain all their pleas, and their possible oral observations during the court session must remain confined to matters already raised in the written stage of the procedure.

It has to be underlined that the course of this written procedure is much facilitated by the cooperation of lawyers, given that, though it is only optional, for certain litigation, at the first instance level, parties are generally represented by a counsel before administrative tribunals, and that such a representation is even mandatory before the courts of appeal and the Council of State. Concerning the Council itself, it has to be specified that this representation is not exercised, moreover, by ordinary lawyers, but by one of 60 special lawyers, called “*avocats au Conseil d’Etat et à la Cour de cassation*”, that form a closed corporation having a monopoly of legal representation before both supreme courts.

The second characteristic of our procedure is that it is secret, which means that third parties are not allowed to have access to the parties' submissions sent to the court. However, this only applies, of course, to the written part of the procedure, as the court sessions themselves are held in public.

The third main feature of the procedure before administrative courts is that it is "inquisitoire" (or "inquisitorial"). This means that, unlike, for instance, in the French civil procedure, called "procédure accusatoire" (or "accusatorial"), in which the course of the procedure is directed by the parties, it is directed, here, by the court itself. Thus, the court takes upon itself the task of transmitting the parties' written submissions to other parties during the preliminary inquiry of the case and of finding out the facts, including by ordering, if necessary, the presentation of additional information or evidence.

The court has large powers at its disposal to direct the procedure. It determines, notably, the time limits that have to be respected by the parties for the presentation of their submissions, as well as the closing date of the preliminary inquiry. It may use at its discretion all possible means to form its conviction on the case, such as, for instance, a complementary investigation with the help of a legal expert. It may even decide, under certain circumstances, to reverse the burden of proof, that normally rests with the complainant, to turn it to the administration.

For example, in a famous affair that took place in 1954, called the "Barel" case, in which the complainant claimed he had been illegally denied the right to enter ENA because of his political ideas, as he was a communist, the Council of State ordered the Government to

present evidence of the real motive of the challenged decision and, as it could not, yet, elicit this evidence from the relevant minister, finally quashed this decision as being based on unlawful discrimination.

Finally, the procedure before administrative courts is – as we put it in French – “contradictoire” (literally, “contradictory”), which is pretty close to what is usually called “adversarial” in common law countries. This means that all parties must be given access, in due course, to the other parties’ submissions and to all information or documents presented in the case, in order to be able to contradict (hence the name of “contradictory procedure”) the statements that this material may contain. This obligation to ensure full contradiction between the parties is considered as a general principle of our procedure, whose violation would cause nullity of the judgement.

So – and I know there may often be some confusion about this – it must be emphasized that the inquisitorial nature of our procedure does not infringe in any way the rights of the parties to debate on the arguments and evidence presented in the case. If the court has always the possibility, as I previously explained, to order further inquiry of a case, it is on condition, of course, that the results of the complementary information so collected be given in due course to all parties.

It is interesting to note that the same principle applies when the judge decides to annul an impugned administrative act, as is possible in certain cases, on grounds that were not submitted by the parties but are considered to be of a particularly grave nature (which are called “moyens d’ordre public”, or “public interest pleas”). One of the conditions required from the judge to raise such grounds on his own initiative is that he has the obligation to

inform the parties of this intention prior to rule his judgement, so that they can submit their observations about this possible reason for annulment.

. As regards the conditions in which judgements are ruled, the main question we have to cope with is that of a permanent arbitration between a full respect of our traditional methods of judgement and the necessity of exploring alternative solutions in order to make justice more efficient.

The essential debate here generally focuses on the application of the principle of collegiality.

Normally, administrative court judgements are pronounced by collegial panels, whose number of judges varies depending on the importance and the legal difficulty of the case.

For example, in the Council of State, there are several different levels of court sessions, which involve between three and seventeen judges on the bench. In administrative tribunals and courts of appeal, panels are usually made up of three judges, but there are also plenary court sessions, including the president of the court and all presidents of chambers, where the most delicate cases are determined.

Apart from judges on the bench, another member of the court should be mentioned here: the “*commissaire du gouvernement*” (literally, “government commissioner”), who, though his title may be seriously misleading, does not stand for the Government, and is also a fully independent judge. His duty consists in looking into cases, once they have already been

examined by a “rapporteur”, and publicly delivering his legal opinion during the court session, when he submits his own proposal for settling each case.

I was personally “commissaire du gouvernement” in the Council of State, for four years, and had, for example, the privilege to stand in that position, in 1989, in the so-called Nicolo case, in which the Council decided for the first time, according to my proposal, to fully admit the supremacy of international treaties and European regulations over French statutory law.

But, if the respect of the principle of collegiality and the intervention of the “commissaire du gouvernement” offer precious guarantees to achieve a perfect quality of judgements, they are not always compatible with another of our objectives, which is to reduce the duration of our procedures, and may be dispensable in some cases.

This is the reason why we have developed, in recent years, some alternative procedures of judgement for the simplest cases.

For example, a lot of basic rulings of our courts, such as those dismissing obviously inadmissible complaints, are now issued in the form of orders made by a single judge, acting without even convening a public session.

More importantly, since 1995, collegiality has been abolished, in the administrative tribunals, for litigation of minor importance, such as, for instance, liability cases of small financial amounts (less than 10 000 euros, or about 16 000 Australian dollars) or litigation related to local taxes, certain social benefits and driving licence withdrawals. It should be noted, however, that, although these cases are settled by a single judge, this judge is assisted

by a “commissaire du gouvernement”, whose intervention has been maintained, and that the judge always keeps the possibility, if one of these cases turns out not to be a simple one, to refer it to a collegial panel of the same tribunal.

Finally, the Council of State and the administrative courts are now considering, precisely, an extension of such mechanisms – including even, possibly, this time, the abolition of the systematic intervention of the “commissaire du gouvernement” – to other categories of litigation, like, for example, the very numerous cases related to immigration.

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In conclusion, I would like to say a few words about the main current challenge that French administrative justice has to take up, which is, as you probably could guess from the last part of my speech, a massive increase in the number of cases brought before the courts.

Since 2002, for example, the average growth rate of litigation has been about 10 % each year, and this simply confirms a long-term trend, as, if we compare the present annual number of complaints to what it was 40 years ago, the increase has been almost tenfold. This evolution is all the more significant in France since, at the same time, the number of cases submitted to civil courts, as well as to commercial or labour courts, has remained pretty stable, and has even slightly decreased in recent years.

The sharp increase in litigation that affects specifically administrative justice is due to a combination of factors. The claims administrative courts have to determine in their traditional capacity are expanding by thousands, especially in certain fields, such as taxes, town-planning or immigration. But, at the same time, we can also notice a rapidly growing number of cases in other, and less traditional, fields of litigation, such as, for instance, environmental law, media or biotechnologies. So I could sum up the present situation by saying that French administrative justice is a victim of its own success.

One of the ominous consequences of this massive increase in litigation is that it could lead to a deterioration of the time framework in which courts determine cases. According to the latest statistics, a first instance case being submitted to an administrative tribunal is settled in the average time, at the national level, of 1 year and 2 months, whereas an appeal is determined in the average time of 1 year and 1 month and, in the Council of State (which has less cases to deal with), the average is 9 months. These figures are actually better than they used to be some years ago, as, fortunately, administrative justice has received a considerable input of extra budgetary means and has undergone notable management efforts, in recent years, that allowed it not to be overwhelmed by the soaring volume of litigation submitted to courts. But these results remain very fragile and struggling to keep the duration of procedures within acceptable limits is, for us, a daily concern.

This is the reason why we try to develop more efficient and expeditious procedures to settle cases, like the ones I previously described. But we have, of course, to be even more mindful of the necessity to maintain, at the same time, the quality of our rulings, which remains, like for any other judge, our first goal. And this makes the challenge twice as difficult to take up.

Fortunately, as Sigmund Freud used to put it, the pursuit of two objectives by the same man at the same time does not necessarily make him schizophrenic...

Thank you very much for your attention.