It must be said that the *Danistay* performs a function in Turkey very similar to that performed by the Conseil d'Etat in France, though at times in areas different to those in France, this being the natural consequence of different social needs some arising from different historical antecedents. Similar to the French Conseil d'Etat, the *Danistay* protects legitimate interests whether they be of the individual or the State, but above all uses the criterion of "public interest" with the social and political consciousness essential for combating ill-conceived political decisions aimed at party political or financial gain. Whether the balancing act performed by the *Danistay* always leads to satisfactory results for all interests concerned may be dubious, but its role in Turkish political and economic development has always been crucial.

ESIN ÖRÜCÜ*

THE INFLUENCE OF THE CONSEIL D'ETAT OUTSIDE FRANCE

Meeting British lawyers and participating in a comparative reflection on our legal systems has for me a history that goes back to 1966. In 1966 I participated, in London, in the first meeting of British and French administrative lawyers. Among the participants were Nicole Questiaux and Neville Brown; there was also the late President Letourneur, who was a forerunner in the development of the relations of French Administrative lawyers with British lawyers, at a time where these relations were very far from being as extensive as they are today. If I look back to this long period, I think that important progress has been made towards a better mutual understanding of our legal systems. My concern in this paper is with the dynamics and direction of the interactions which the Conseil d'État has had with other legal systems.

It seems to me that, in the beginning, a spirit of intellectual competition was not totally absent. At these initial meetings, the French participants felt that the creation of administrative courts would be a definite improvement in the English legal system, and perhaps, in turn, the lack of an institution such as the Parliamentary Commissioner for Administration was perceived as a deficiency of the French system. (We eventually created "*Le Médiateur*" inspired by the model of the Parliamentary Commissioner,[1] but the creation of a British Council of State, if I am well informed, is not yet on the agenda!)

But, more importantly, it became clear that the really important thing in such exchanges was to examine carefully the problems that administrative judges have to tackle and to see which lessons may be drawn from the solutions prevailing in the other country.

It is clear that the problems put to the lawyer by the modern States are broadly the same from one country to another:[2] how to facilitate the efficient working of

* Professor of Comparative Law, University of Glasgow and Erasmus University, Rotterdam.

1. See L. N. Brown and J. S. Bell with J.-M. Galabert, *French Administrative Law* (5th edn, 1998), pp.32–34.

2. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, 1998, trans. T. Weir), p.40.

the administration and at the same time to ensure that the rights and liberties of the individuals will not be jeopardised by the activity of the State. It is true, however, that institutions and historical traditions are not the same and the existing differences are sometimes aggravated by differences of terminology. I know a British Professor—a political scientist, not a lawyer—who explains that the word "l'État" is devoid of any meaning for a British citizen. However, when you walk from Trafalgar Square to the House of Parliament and look at the impressive buildings of Whitehall, you get the impression that a State does exist in this country... What is true is that the French concept of "l'État", inspired by the centralised, hierarchically organised Napoleonic State may seem to a British mind an abstract concept, very different from the British notion of "the Crown". But fundamentally the problem of reconciling the working of a modern State and the rights of the citizens is the same in most democratic countries.

The nature of the chosen remedies is important for lawyers, but is, in a sense, secondary. A justice of the US Supreme Court said that in his opinion a significant proportion of the cases examined by the US Supreme Court would have been considered in France as involving administrative law and coming within the jurisdiction of the Conseil d'État and the administrative courts.[3] In the same way the development in Great Britain of "judicial review" and the improvement of this remedy as a tool for controlling the administration is, to the eyes of the French lawyer, a phenomenon probably more important than the fact that your country has a certain number of judges specialised in administrative cases but, for the time being, no distinct administrative courts.[4]

Recent developments in various fields have contributed to a better mutual understanding. From this point of view the influence of European unification, of which I will speak later, has been important and positive. One should also take into account factors which have attenuated the image of the strong, monolithic Napoleonic State, such as the important process of decentralisation which has taken place in France since 1981. The partial or total privatisation of some public corporations and the ensuing diminution of the public sector of the economy have also moved France in the same direction.[5]

And I would even say that the evolution of the French administrative courts during the same period has, for different reasons, made the understanding easier. Until World War II, the Conseil d'État was the only real administrative court; the creation of the *tribunaux administratifs"* in 1953 and the creation of the *Cours administratives d'appel* in 1987, even if they were mainly due to technical reasons, resulted in the creation of a complete system of administrative courts, spread throughout the country.[6] At the same time, the psychology of the administrative judge has undergone an important evolution. Faithful to their historical origin,

3. See also G. A. Bermann, in CERAP, *Le Contrôle Juridictionnel de l'Administration* (1991), pp.57 *et seq.* who discusses the role of the administrative law judge as well as the Supreme Court.

4. See the presentations made by English judges to the Conseil d'État in *Etudes et Documents du Conseil d'État* no.38, pp.239–270 and no.44, pp.267–332 and the comparative discussion reported there.

5. See C. Graham and T. Prosser, *Privatizing Public Enterprises* (1991).

6. See Brown and Bell, *op. cit., supra* n.1, pp.50–55.

many administrative judges had a tendency to consider themselves as the natural defenders of the administration; the claimant and the administration were not completely equal parties before such a judge. Of course when the administrative decision was clearly illegal or the administrative action clearly faulty, the claim was allowed, but in more marginal cases this psychology of the judge could play a role in rejecting the claim.

This attitude has completely disappeared. Recent generations seem to be strongly attached to individual rights, and, it is particularly the case with the new generation of administrative judges. The pressure of public opinions works in the same direction, and it is clear for instance that in some painful cases of physical injury incurred after an operation in a public hospital, the dismissal of the claim would have deeply shocked public opinion.[7] The administrative judge appears now as a specialised judge much more than a natural defender of the administration.

I. THE SPECIFICITY OF THE FRENCH APPROACH

For the purpose of a comparative study, it appears that the two main features of the French systems of administrative courts are the following:

- the French administrative courts form a special order of courts (1.1)
- the French administrative judges are not members of the ordinary judiciary but are civil servants (1.2).

I will argue that these two features remain central to the French conception of administrative justice today.

A. The French Administrative Courts as a Special Order of Courts

We have in France two orders of courts: the judicial courts, handling all the litigation between private persons (and the criminal cases) under the control of the *Cour de Cassation*, and the administrative courts handling—roughly speaking—all the litigation between the public authorities and the private persons under the control of the Conseil d'État.[8] This existence of two systems of courts is the result of technical and of political reasons.

The technical, theoretical reason lies in the idea that the relations between the State (and other public authorities) and private persons cannot be governed by the same legal principles as relations between private persons. Relations between public authorities and private persons are created by the functioning of the administration, of *les services publics*; it follows that the legal principles applying to these relations must take into account the necessities of the public service. Of course a balance has to be struck between these necessities and the legitimate rights of the private persons, but the underlying assumption is that the good working of the public services is of paramount importance, which introduces in

7. See CE Ass., 10 Apr. 1992, *Epoux V, Actualité juridique—droit administratif* (AJDA) 1992, 355 concl. Legal; CE Ass., 26 May 1995, *Consorts Nyguen*, AJDA 1995, 508.

8. However one should not forget that for many decades the activity of the so-called *services publics industriels et commerciaux* or the public enterprises and their relations with their employees have been ruled by private law and come under the jurisdiction of the ordinary courts: see Brown and Bell, *op. cit.*, *supra* n.1, pp.133–134.

the legal relations of the public authorities and of the private persons a certain flavour of inequality.

Having affirmed the somewhat different nature of the legal rules applying to relations between private persons and of the legal rules applying to relations between the administration and the private citizen, it was deemed logical to have a different judge to handle the cases ruled by the so-called "administration law".

Historically however, the main reason for the creation of administrative courts has been political. Before the French Revolution of 1789, the higher judicial courts existing in the regions of France had constantly fought the efforts made by the successive kings to create a united and centralised state. These courts—*les parlements*—were moved in their opposition by the desire to safeguard the privileges of the social groups of which they were part.[9]

The lesson was not lost. During the Revolution, the Directorate and Napoleon rejected any idea of control by the ordinary courts of the working of the administration. They admitted that the administration needed a judge to control its action and protect the rights of the individuals. But this judge had to be an insider, to be part of the administration; to speak the language of the separation of powers he had to be part of the executive branch and not of the judiciary. It was the main reason why, 200 years ago, the Conseil d'État was created as an administrative court.

B. The French Administrative Judges as Civil Servants

Not being part of the judiciary, the French administrative judges have the status of civil servants. For instance, the members of the Conseil d'État, in contrast to the ordinary judges (*les magistrats*) do not enjoy the privilege of irremovability. This privilege was granted, in 1986–87, to the members of the local administrative courts (*tribunaux administratifs and cours administratives d'appel*); but—although these members of the local administrative courts are correctly called *magistrats administratifs*—they are not part of the judiciary. Like the members of the Conseil d'État they are civil servants with judicial functions.

The situation of the French administrative judges as insiders in the administration involves more than a mere definition of legal status. They have the same training as the civil servants, and during their career they have opportunities to partake in administrative activities.

The members of the Conseil d'État and of the local administrative courts are recruited through the *Ecole Nationale d'Administration*. Their training in this school is not specifically a legal one; they receive the general training of people who may be called to serve later in the different ministerial departments; there are some periods of practical experience spent for instance in the local administration (*les préfectures*).[10]

It is at the end of their studies in the *Ecole Nationale d'Administration* that the choice of career is made and in fact the specialisation of administrative lawyers is

9. See "Le Conseil d'État avant le Conseil d'État" (1999), *La Revue administrative*, at pp.82 *et seq*.

10. On the role of the *grands corps* (of which the Conseil d'État is one), see V. Wright, *The Government and Politics of France* (3rd edn, 1989), pp.112–114.

acquired in the Conseil d'État or the local administrative courts by those who choose this orientation.

During their career administrative judges have opportunities to be seconded to active jobs in the administration or in the European and international institutions. Even when they remain in their courts the administrative judges are generally members of administrative commissions and communities.

These personal experiences of the working of the administration are very important for the administrative judges. Nicole Questiaux in her article explained how the consultative role of the Conseil d'État was useful for the Conseil d'État as a court: to have been associated in the preparation of a draft law or decree helps the administrative judge, when called to review the implementation of these texts, to better understand their spirit and the will of their authors. In a different way, it is equally important for the administrative judge, who has to review a decision taken by the administration in a particular case, the manner in which the affair was handled, or the procedure followed, to have personal experience of the working of the administration.

This experience of the administration, this expertise in its functioning tend to become the main argument for the existence of a separate administrative judge. Originally conceived to protect the administration from the excessive control of the judiciary, the administrative judge has for a long time been viewed with distrust by the liberal thinkers. More recently the idea has developed that his better knowledge of the administration could lead the administrative judge to control the correctness of its action more efficiently than an ordinary judge. The administrative judge could eventually become a useful worker of *L'État de droit*.

II. THE EXPANSION OF THE FRENCH MODEL[11]

Coming to the international influence of the Conseil d'État, and to the expansion of the French model of administrative courts, it is necessary to summarise the factors of the expansion before trying to describe the varied ways in which the French model has been reproduced or adapted in different countries.

A. Factors Behind the Expansion of the French Model

There have been three elements, corresponding to three different periods, in the expansion of the French legal system and so especially of the administrative courts: the Napoleonic conquest, colonisation and international co-operation.

Even if it did not last long the conquest by Napoleon of an important part of Europe had the consequence of spreading in European countries French legal principles as well as the model of a centralised and hierarchically organised State. Several countries adopted a "Code Civil" directly inspired by the French "Code Civil". Although it took place later, the creation of Conseils d'État in different countries of Europe was a consequence of the Napoleonic influence. This influence made itself felt indirectly in countries around the world that had been

11. For the following development, I am indebted to J. Massot and T. Girardot, Le Conseil d'État, collection "Les Etudes de documentation Française" (1999), pp.47–57. The various special issues of *La Revue Administrative* published for the bicentenary of the Conseil d'État show this influence in Africa and Latin America, as well as in Europe. I will only select a few salient features here.

under the colonial authority of European countries; in Indonesia for instance, the influence of the French legal system was introduced by the Netherlands.

The countries formerly colonised by France, or placed under its protectorate, have generally kept after independence a system of courts inspired by the French model even if they generally included judicial courts and administrative courts inside a single order of courts.

I will not go into the details of French international legal co-operation, which takes, as in most countries, various forms—being organised on a bilateral basis or through world and European organisations. In many cases this legal co-operation is part of a more general technical and economic co-operation. It may be due, also, to a tradition of influence of French legal thought, as in Thailand where French academics played an important role in the foundation and growth of the local universities. And one should not forget that the countries needing technical assistance in the legal field generally prefer to address themselves to different partners at the same time, to choose better from different models the solutions best adapted to their situation and to avoid being too dependent on the assistance of a particular country. In fact international co-operation has become a field of lively competition between countries as well as between States (or public agencies) and private firms.

Public law—constitutional law and administrative law—and the working of the administrative courts are in any case important elements of French legal co-operation either with developing countries or more recently with the countries of Eastern Europe. Numerous members of the Conseil d'État and of the best administrative courts are called to go to these countries for short missions or larger assignments. Bearing in mind the distrust in which the institution of administrative courts has long been held by liberal thinkers, it is interesting to observe that the creation and the developing of such courts are generally considered now as a natural component of *l'Etat de Droit* which many of these countries are trying to build.

B. The Adaptation of the French Model by other Countries

An introductory remark before trying to describe the systems of the courts which have some likeness to the French system is necessary: it would be excessive to assume that this likeness is always the result of a direct or indirect influence of the French system and many countries may have been led to adopt such systems for reasons purely of their own.

The main distinction seems to be between the countries where there exist separate administrative courts and the countries where the administrative courts are part of a single order of courts.

1. Countries with Separate Administrative Courts

Among the countries with separate administrative courts, a further distinction has to be made between the countries where the administrative court has both judicial and consultative functions, and the countries where the role of the administrative court is exclusively judicial.

In the first category we find most of the countries where, during the nineteenth century, or sometimes more recently, Councils of State have been created on the

model of and generally with the same name as the French Conseil d'État. There may be differences of organisation from one country to another, but in all these countries the Conseil d'État is at the same time a judicial and consultative institution.

Among these countries, we find Belgium, Netherlands, Italy, Greece, Turkey, Lebanon, Egypt, or in South America, Colombia. It is equally the case, with some qualifications, of Tunisia and of African countries such as Gabon, Guinea and Senegal.[12]

The case of Thailand has to be mentioned, although this country opted for a different solution. Thailand has long had a Council of State with a consultative function; it wanted to create a supreme administrative court and in recent years there have been lively debates between the advocates of the "French" solution of creating the supreme administrative court inside the Council of State and the advocates of the solution, which eventually prevailed in 1997, of leaving the Council of State with its purely consultative function and creating a distinct supreme administrative court.

Among the countries with separate administrative courts which have no consultative role, the most interesting case is probably Germany. One feature of the German system deserves particular attention.[13] In France there are two main branches of administrative litigation: the first is the control of the legality of the administrative action by judicial review, the second concerns the liability of the administration when damage is caused by an action or a decision of the administration. The German administrative courts are only competent to control legality; claims to compensation for damage caused by the administration are brought before the ordinary courts. It is an interesting point because even in France it has often been contended that the only specifically administrative litigation concerned the control of legality. It has been argued that there is no difference between the damage caused by an administrative activity and the damage caused by a private person; the damage suffered by a person run over by a private car and by a person run over by a car belonging to the administration is the same, and the faulty driving of a private person or of an administrative employee is of the same nature. This may be debatable insofar as litigation relating to the liability of the administration gives the administrative judge the opportunity to control the working of the administration, and to define certain standards of correct functioning. Nevertheless, this idea that litigation relative to the liability of the administration does not need to be brought before a specifically administrative judge is not without strength; even in France a law passed in 1957 decided that actions for the compensation of any damage caused by a vehicle should be brought before the ordinary courts, whether the vehicle be "private" or "administrative".[14] Even if this observation is made about the administrative

12. Special issues of *La Revue Administrative* published in 1999 cover this influence in Africa and Latin America and Lebanon specifically.

13. See the special issue of *La Revue Administrative* comparing the French and German systems. On the liability of the administration, see W. Rüfner, in J. Bell and A. W. Bradley, *Governmental Liability: A Comparative Study* (1991), chap.11.

14. Certain malicious commentators have said that for the administrative judge this law had been a useful inducement to be more generous in the evaluation of the damages in order to avoid other transfers of competence to the ordinary courts!

courts of Germany, when studying the international influence of the French administrative law and administrative courts one should not forget that in many countries there prevails the idea that there is no real specificity in actions for damage caused by the action of the administration and so no reason for this compensation to be tried before a specialised administrative judge.

Although it is limited to the control of legality, administrative litigation is very important in Germany, a noticeably greater number of cases being brought before the administrative courts of first instance and of appeal than in France. The psychology of the German administrative judge deserves notice. He does not incur the often made criticism that an administrative judge is by definition a systematic defender of the State and of the administration; the experience of the excess of the national-socialist system has led to a certain distrust towards the action of the State and the tendency of the German administrative judge is often to emphasise the need to safeguard of the individual's rights and liberties.

The system of separate administrative courts without consultative functions is of course not limited to Germany and may be found in different countries, among others, Austria, Switzerland, Sweden, Finland and Portugal.

2. *Countries Without Separate Administrative Courts*

The system of administrative courts organised inside a single hierarchy of courts is widely spread. It prevails not only in the majority of the countries formerly placed under the authority of France, but in a certain number of other countries among which I may mention Indonesia. The idea is to have a separate administrative jurisdiction without the complexity or practical difficulties inherent in the existence of two separate orders of courts.

The organisation is generally as follows. Claims concerning the legality of administrative decisions are brought directly before the Administrative Chamber of the Supreme Court. Claims relative to compensation for damage are first brought before the ordinary courts, and it is only the decision of the ordinary court of appeal which may be contested before the Administrative Chamber of the Supreme Court. Such a system formerly prevailed in Morocco, until the late Sultan Hassan II decided in 1990 to create first degree administrative courts to replace the ordinary courts as judges of administrative litigation. Originally recruited among the ordinary judiciary, the judges of the administrative courts will progressively come from a special recruitment and receive a double legal and administrative training.

III. EUROPEAN INFLUENCE OF AND ON FRANCE

Concerning the process of European integration, the influence of the Conseil d'État and of the French administrative law on the European Court of Justice and the European law is certain, but this influence has never been unilateral and the European Court of Justice as well as European law and the European treaties exert on the legal systems of the member countries an influence which tends to attenuate the differences or the conflicts existing between these legal systems.

France was one of the six countries which were the founders of the European Community. French lawyers—among which were members of the Conseil d'État—participated in the elaboration of the European treaties and played an important role in the European institutions. I can refer, for instance, to the influence exerted in the first years of the European Court of Justice by the French Advocate-General Maurice Lagrange, who was a member of the Conseil d'État. It is quite clear that, through these French lawyers, French legal concepts or ways of reasoning exerted an influence on European law or the jurisprudence of the Court of Justice. But from the beginning this influence was not exclusive, and combined with the influence of the other five countries, and particularly of Germany and Italy.

The legislation and the administrative regulations of the member states had to conform to the European treaties and regulations. This conformity was ensured by the European institutions and the Court of Justice. The result was that French law and particularly French administrative law were deeply influenced by European law and by principles which had their origin in the legal systems of different countries and had been admitted into European law or the jurisprudence of the Court of Justice. There are presently many discussions before the French administrative courts on the application of principles such as the "*principe de précaution*" or the "*principe de confiance légitime*": Such principles are not of French origin, but are now admitted in European law. This indirect influence of the legal systems of foreign countries through European law and institutions is an important phenomenon, which has naturally increased with the entry into Europe of new countries with characteristically different legal systems and from this point of view too the arrival of Great Britain has been an important event.

Beyond this complex network of mutual influences, the process of European integration has tended to oblige the different countries to reflect on the relationship of their own legal system to foreign systems. It has also submitted the legal systems of the different countries to a common discipline, resulting in of the authority of the European law and of the European institutions.

The consequence has been, I think, to attenuate and to relativise the differences between the national legal systems of the different countries, and particularly of Great Britain and France.

In the early days of the European Community and as a result of to the influence exerted by French law and lawyers on the formation of European law and institutions, the French administrative lawyer appeared to fare better than his British counterpart. However, the evolution of European law has obliged French lawyers to undertake some re-appraisal. One knows, for instance, of the profound difference existing between the notion of "service public", which is the traditional basis of the French administrative law and the European "*service d'interêt général*".[15] The essential difference existing in French law between what is "public" and what is "private", which may be a source of difficulty for the understanding of the French system by the British lawyer, is far from having the same importance in European law. And this difference is relativised by the

15. See V. Champeil-Desplats, "Services d'intérêt économique général, valeurs communes, cohésion social et territoriale," 1999 AJDA, 959.

obligation imposed on economic activities run either by public authorities or by private persons to observe the principles of free competition.

Through different processes—ranging from the obligation to transpose the European directives to the binding nature of the European treaties—important parts of the legal rules applying in the different countries will be common to all. And there will be the obligation to observe the same superior European rules: the procedure followed before the French administrative courts or before the British courts may remain different, but they will have in common the observance of the provisions of Article 6 of the European Convention of Human Rights.

JEAN-MICHEL GALABERT*

SEPARATING LAW FROM FACTS: THE DIFFICULTIES FACED BY THE ITALIAN *CORTE DI CASSAZIONE* IN AN APPEAL FOR ILLOGICALITY OF REASONING

The recent judgment of the *Corte di cassazione*, Italy's highest appeal court in civil and criminal matters, in the so-called "jeans rape case" has caused much controversy and attracted much media attention both in Italy and abroad. The *Corte di cassazione* has been showered with criticism for purportedly establishing a "jeans alibi", according to which a woman cannot be raped if she is wearing jeans as she must have consented to their removal. However, this judgment is of significance not merely for this statement but because it is particularly demonstrative of the difficulties faced by the *Corte di cassazione* in separating law from fact in an appeal on the grounds of illogicality of the reasoning given by the lower court. The *Corte* has been subject to academic criticism recently for exceeding its competence to review on a question of law and entering into the realm of the merits, criticism which this judgment has undoubtedly fuelled. The aim of this article is to explore the nature of the *Corte di cassazione* and, in providing a critical analysis of the "jeans rape" judgment, to examine the difficulties inherent within this particular ground of appeal.

A. Background to the "Jeans Rape" Ruling[1]

In 1992, A, then 18 years old, informed the police that on the previous day at around 12.30 pm, she had been raped by B, her driving instructor. A's version of events was as follows: B had picked her up as usual from her house for her driving lesson and, using the excuse of picking up another girl, had taken her out of the town. Stopping the car on a small country road, he threw her to the ground and after removing her jeans from one leg proceeded to rape her. Afterwards he took her home, threatening her in order to keep her quiet about what had happened. Her parents noticed that she was upset and asked why. She did not tell them what

* Former President of the Section du Rapport et des Études, Conseil d'État, Paris.

1. The facts are taken from judgment of the *Corte di cassazione* of 6 Nov. 1998–10 Feb. 1999, No.1636, reported in *Guida al diritto*, 27 Feb. 1999, No.8, pp.85–86. Hereafter the judgment will be cited as *Sentenza* 1636/99.