

SHORTER ARTICLES, COMMENTS AND NOTES

CELEBRATING 200 YEARS OF THE CONSEIL D'ETAT

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On 13 December 1999, the Conseil d'Etat celebrated 200 years since its creation in the Constitution of An VIII. Much has been written over the year on the judicial functions of the Conseil, but far less has been written on its consultative functions or on its influence on the administrative law of other jurisdictions. In one sense, this is not surprising. Since 1818, the case law of the Conseil has been published regularly and commented upon by French lawyers, as well as by those from abroad. But the consultative functions of the Conseil are not a matter of public record in the same way. The advice given to the government on draft legislation and on other matters is private. We know that the government has received advice on certain matters, but the content of the advice or opinion is not made public, except on the rare occasions in which the government chooses to make it public. (In very recent years, this is becoming more frequent.) As to the influence of the Conseil, while certain obvious influences have occurred, many of the mechanisms are not recorded and rely on actions by individual conseillers d'Etat. The following four papers try to reflect on these areas of the Conseil's activity.

The first two papers deal with the Conseil's consultative function, something which is not often copied even in countries influenced by the French model. My own article tries to use the activity of the Conseil as a point of reference for examining whether there are deficiencies in the current British procedures of scrutiny of legislation. The purpose is to identify issues which we should address in our own way, rather than to suggest that we should copy the institutional structures which the French have adopted, any more than we should copy their legislative style. The confidentiality of the advice given to the government makes it difficult to document the influence the Conseil has had on the eventual text of legislation. For this reason, Mme Questiaux's paper is deliberately a personal "testimony" by a past President of an administrative section of the Conseil d'Etat. Whilst respecting confidences, it tries to present an overview of the kinds of influence which the Conseil exercises and the kinds of question which would be fruitful to follow when more evidence does become public.

The second two papers reflect on the influence of the Conseil on the development of administrative law abroad. In some countries, the French model has served as one explicit point of reference for the development of a national administrative court. Professor Örüclü's article presents to us the less well-known example of the Turkish administrative courts. Like many systems to which the French model has been exported, it has had to adapt to a radically different social and ideological environment. But much of the influence is less easy to document

and, again, one has to resort to “testimony” as a starting point for reflection.¹ As M. Galabert makes clear, there are a number of semi-formal, as well as informal, ways in which the Conseil has sought to engage with lawyers in other countries and this has led to changes in the local system. All the same, the local system, like that of Turkey, has developed in its own way. We are not faced here with transplants, but with cross-fertilisation of ideas.²

The papers presented here were delivered to the UKNCCL Colloquium in September 1999.

WHAT IS THE FUNCTION OF THE CONSEIL D'ETAT IN THE PREPARATION OF LEGISLATION?

I. INTRODUCTION

A. What are the Basic Problems: A Comparison with the State of the British Debate

Consideration of the Conseil d'Etat and its role in the preparation of legislation helps us in Britain to appreciate how our own legislative process might be improved. The Hansard Society Report¹ suggested in 1992 that Britain needed to look beyond just improving the drafting of legislation and needed to reform the legislative process, both before a bill is presented to Parliament and in its passage through Parliament. My reflection on the French process is to suggest that this offers us a further focus of attention—the questions which should be asked during the scrutiny process. There are two areas where we need to ask questions—on fundamental rights and practical effectiveness. I think that the British trust too much to the political process to ensure that questions concerning respect for fundamental values and also administrative workability are addressed before a bill is passed by Parliament. This paper is influenced by observations made in 1986 of the Interior Section of the Conseil d'Etat in its scrutiny of a number of government bills at the beginning of the Chirac premiership.

The French process as comparator

It is traditional in Britain to look to the Conseil d'Etat for an example of how to conduct the process of drafting legislation differently and, it is thought, how to produce less complex texts. This has been the focus of the discussions promoted by Sir William Dale.² Much has been written on this aspect. Such discussion focuses on the role of the Conseil as a legal technician. But the French process of

1. A summary of the international activities of the Conseil d'Etat can be found on its website: <http://www.conseil-etat.fr>. But the information given does not really enable the reader to assess the impact of the activity.

2. See my “Mechanisms for Cross-fertilisation of Administrative Law in Europe”, in J. Beatson and T. Tridimas (Eds), *New Directions in European Public Law* (1998), chap.11.

1. Hansard Society, *Making the Law* (Report 1992) (hereafter “*Making the Law*”).

2. See especially, Sir William Dale (Ed.), *British and French Statutory Drafting* (Institute of Advanced Legal Studies, 1986).