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FRENCH AND ANGLO-AMERICAN CONCEPTIONS OF ADMINISTRATIVE LAW

BERNARD SCHWARTZ*

"If you take up a modern volume of the reports of the Queen's Bench Division," asserted Maitland almost half a century ago, "you will find that about half the cases reported have to do with rules of administrative law."¹ Yet, if this truth was apparent in 1908 to the great legal historian, there were few who could see as clearly as he at that time. Anglo-American legal thought has been almost completely under the influence of what Mr. Justice Frankfurter has termed the "misconceptions and myopia"² of A. V. Dicey. In Dicey's view administrative law was completely opposed to the first principles of the English Constitution, and he accordingly denied its very existence in the common-law world. "In England, and in the countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown."³

The failure to take cognizance of administrative law as a recognized rubric of Anglo-American law did not, however, prevent administrative law from developing in the common-law world. What it did was to make an orderly development of the system more difficult. Anglo-American administrative law has thus far been characterized largely by the planless nature of its development. "Thus far our Administrative Law has largely 'grewed' like Topsy."⁴ Nor has there been any real attempt at systematization and synthesis by doctrinal writers. Indeed, perhaps the most salient thing about the field of administrative law in the common-law world is the fact that detailed textbooks devoted to it have been almost non-existent. This is most striking, especially when one compares it with the situation which exists with regard to other branches of Anglo-American law. If one seeks to solve a problem—no matter how piddling—arising in a field of private law, he may turn to a plethora of texts to aid him. But let his case refer to the relations of the administration and the citizen, and there is an almost complete dearth of doctrinal writing. As recently stated in a work seeking to explain the fundamentals of the American system to a civil-law audience,

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1. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 505 (1908).

2. Frankfurter, *Foreword*, 47 *YALE L.J.* 515, 517 (1938).

3. DICEY, *LAW OF THE CONSTITUTION* 330 (9th ed. 1939).

4. Frankfurter, *Foreword, Final Report of the Attorney General's Committee on Administrative Law*, 41 *COL. L. REV.* 585, 586 (1941).

"an over-all account of administrative law does not yet exist in contemporary American literature."⁵

In this respect, the situation in the common-law world can be compared to that which prevails in a continental country like France. *Droit administratif* has been recognized as an important branch of French law almost since its beginnings in the post-revolutionary era. And, almost from the beginning, French jurists have turned their attention to the subject, with the result that important doctrinal writings on administrative law have been common in France for over a century. As early as the 1870's, there began to appear the classics of modern French administrative law. With them, came a synthesis and systematization of the *droit administratif* far beyond anything which has been attempted in the common-law world. With the aid of constant classification and analysis by doctrinal writers, the French administrative law has been able to develop in a relatively orderly fashion.

SCOPE OF THE SUBJECT

To the Anglo-American, the term "administrative law" is one which has a comparatively narrow meaning. "The term 'administrative law,'" states Freund, "has in relatively recent times gained acceptance as the best designation for the system of legal principles which set the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other."⁶ The Anglo-American administrative lawyer has been concerned mainly with the delegation of authority to the administration and the judicial control of administrative action. In recent years, his approach to the subject has broadened so as to include the aspect of administrative procedure. This has been brought about by the realization that the exercise of power by the administration is at least of as great importance as the control of such power by the courts. And with this realization has come the emphasis upon procedural safeguards to ensure the proper exercise of administrative authority—an emphasis that has recently found legislative articulation in this country in the Federal Administrative Procedure Act and its state counterparts.

In its emphasis upon procedures within the administration, the Anglo-American administrative lawyer's approach to his subject is undoubtedly wider in scope today than it was a generation ago. To a foreign observer, however, schooled in the administrative law of a civil-law country such as France, the Anglo-American's approach appears still to be unduly narrow.

If one looks at the contents of a recent work on the *droit administratif*, such as the 1951 edition of the *Elementary Treatise on Administrative Law* by Marcel Waline,⁷ the outstanding contemporary treatise on the subject, he will be amazed at its scope, as compared with that of a com-

5. SCHWARTZ, *LE DROIT ADMINISTRATIF AMERICAIN: NOTIONS GENERALES* 231 (1952). This statement was made prior to the publication in 1951 of DAVIS, *ADMINISTRATIVE LAW*.

6. Quoted in DAVIS, *ADMINISTRATIVE LAW* 2 (1951).

7. WALINE, *TRAITE ELEMENTAIRE DE DROIT ADMINISTRATIF* (6th ed. 1951).

parable Anglo-American work. Thus, to take the most recent American text on the subject—*Davis on Administrative Law*—as an example, it contains three broad divisions: 1) the transfer of authority from the legislature to the administration (reduced to a minimum in the treatment of the subject by Davis); 2) administrative procedure (the main point of emphasis); and 3) judicial review (still treated as a vital aspect of the subject, though with emphasis more upon the availability than the scope of review).

These headings occupy but a small part of Waline's work on the *droit administratif*. In addition, he treats in great detail of the various forms of administrative agencies (what he terms the "subjects of rights" in administrative law); the exercise of and limitations upon the administrative regulatory power; what we in this country would term the law of the civil service; the acquisition and management of property by the administration; public works; and the obligations of the administration (subdivided into contracts, quasi-contracts, and tort liability).

The Anglo-American administrative lawyer will immediately object that these are matters for the science of public administration, not administrative law. As such, they are primarily the concern of the political scientist rather than the lawyer. As stated by Professor Davis, "Administrative law, as the term is here used, is limited to law concerning powers and procedures; . . . a large portion of the law of public administration is thus excluded."⁸

To the non-American, the approach of the Anglo-American administrative lawyer leaves out much that is essential to a branch of the law which has for its aim the canalization of administrative authority by law. His viewpoint can be seen in the preface recently prepared by a distinguished member of the French Council of State for a book seeking to explain American administrative law to the French lawyer. Such book, says he, written by an American administrative lawyer, "furnishes us with a summary of administrative law in the narrow sense in which that term is understood in the author's country; the reader should not expect a picture of the American administration's machinery, services, jurisdiction and means of action. The book . . . covers a field much less vast than that of an even summary manual of French administrative law."⁹

It must be admitted that French criticisms of the Anglo-American administrative lawyer's approach to his subject contain a great deal of force. As stated by an English writer, who is one of the few to have expressed this view in the common-law world, "Administrative law should be regarded as the law relating to public administration, in the same way as commercial law consists of the law relating to commerce or land law the law relating to land."¹⁰ For the administrative lawyer to abdicate the law of public administration, leaving its development almost entirely to the

8. DAVIS, *op. cit. supra* note 6, at 2.

9. Puget, *Preface to SCHWARTZ, op. cit. supra* note 5, at VI.

10. ROBSON, quoted in DAVIS, *op. cit. supra* note 6, at 3.

political scientist, is to leave a great part of the law governing administration in the same wholly unsystematized state that the field covered by a work such as *Davis on Administrative Law* was in some fifty years ago.

JUDGE-MADE LAW

The Anglo-American lawyer who seeks to pursue research in a civil-law system, such as that in France, soon finds that he must work along lines to which he is wholly unaccustomed. The concepts and techniques which have served him so well in his own law are all too often handicaps to accurate understanding. He is now in a system where the case-law is of secondary significance—where the legislative *ought* is, at least in theory, of more importance than the *is* of the decided case. For he is in a realm where the Code reigns supreme. "Franco-German doctrine rests upon the absolute sovereignty of the written law."¹¹ Legal principles are deduced from the law laid down by the legislator. The role of the judge is limited to interpretation and to filling in the lacunae in the Code. The inductive method, which is second-nature to the Anglo-American, leads only to misconceptions.

The French Code was, however, promulgated at a time when legal thought was concerned primarily with the field of private law. Public law, in the modern sense, had only begun to develop. Codification was hence largely a codification of the rules of private law. The result was that when the need arose for a system of public law and, above all, with the diffusion of the democratic ideal, for a system of legal principles to govern the relations of the State with the citizen, such a system had to be developed without the aid of a detailed set of authoritative principles laid down in a code. If such a system was to be developed at all, in the absence of legislative intervention, it had to be done by the judges, along the lines which are so familiar to the Anglo-American lawyer. In this field, the judicial role was not limited to one of filling in the gaps in the Code. The judge was confronted with a *tabula rasa*, much as were the creators of the common law.

The normal reluctance of the judge in a civil-law system to make law, in the Anglo-American sense, has had to give way in the face of the need for defined rules in the field of public law. The need for such rules has been at least as pressing in countries governed by the civil law as it has been in the common-law world. "How to fit ancient liberties, which have gained a new preciousness, into solution of those exigent and intricate economic problems that have been too long avoided rather than faced, is the special task of Administrative Law," wrote Justice Frankfurter in 1941.¹² An adequate system of administrative law fulfills the task referred to by ensuring that governmental functions will be exercised "on proper legal

11. ALIBERT, *LE CONTROLE JURIDICTIONNEL DE L'ADMINISTRATION* 15 (1926).

12. See note 4 *supra*.

principles"¹³—"according to the rules of reason and justice"¹⁴ and not at the mere caprice of the magistrate. It affords a remedy to the citizen who has been adversely affected by improper governmental action.

It is in the modern State that the need for an adequately developed system of administrative law has become especially apparent. At the time of the promulgation of the French Code, the role of the State was, after all, not nearly as important as it is today. Government was then but one of many competing power structures. In the contemporary State, on the other hand, "there is not a moment of his existence where . . . man does not find himself in contact with government and its agents."¹⁵ Government today tends more and more to become the all-dominant factor in society, by taking over or controlling the functions heretofore performed by private institutions. As it does so, it comes into ever-increasing contact with the individual life. "It is in this ceaseless contact of the individual with the State that the danger of arbitrariness has especially arisen."¹⁶

As has been indicated, the development of a system of administrative law to help minimize this danger has, in France as in the common-law world, been largely the handiwork of the judge. In this respect, the *droit administratif*, unlike most other branches of French law, bears a close resemblance to the kind of law prevalent in the Anglo-American system. The French administrative lawyer, like his confrère in the common-law world, is accustomed to derive the basic principles of his system inductively from the decided cases. Since these principles have not been clearly expressed by the legislature, they have had to be worked out by "the gradual process of judicial inclusion and exclusion,"¹⁷ much as they have in Anglo-American law. The judge, having to seek a correct solution in the infinite variety of cases presented to him, and finding no clear guide in a code enunciating the fundamentals of administrative law, has had to establish these himself.¹⁸ It is this which gives to the Anglo-American seeking a comparative understanding of the *droit administratif* a facility of comprehension which is his in almost no other branch of a civil-law system. French administrative law, like that of the system in which he has been grounded, is judge-made law.

SEPARATE ADMINISTRATIVE COURTS

There is, however, an essential difference between the judge who has made the *droit administratif* and the judge who has made Anglo-American administrative law. In the common-law world, the basic principles of administrative law have been worked out by the ordinary courts of law by analogy

13. *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue*, [1940] A.C. 127, 136.

14. *Sharp v. Wakefield*, [1891] A.C. 173, 179.

15. DUGUIT, *MANUEL DE DROIT CONSTITUTIONNEL* 39 (1923).

16. *Id.* at 40.

17. *Davidson v. City of New Orleans*, 96 U.S. 97, 104 (1877).

18. WALINE, *op. cit. supra* note 7, at 21.

from principles of private law. In France, on the other hand, the law courts which are concerned with the dispensation of justice between individuals have played only a minor part in this field. French administrative law has been the work of a series of administrative courts, a group of tribunals which have been created outside the ordinary judicial system. Under the Anglo-American system, the State is subject to the same law and the same judges as is the individual. The citizen who is adversely affected by administrative action has his remedy before the ordinary courts. The *droit administratif* is based upon the existence of a special law for cases involving the administration and of special administrative courts to decide such cases.¹⁹

To the Anglo-American, the term "administrative court" is one which appears self-contradictory. A court, to his way of thinking, is an organ "discharging judicial power with all the implications of the judicial function in our constitutional scheme."²⁰ An organ characterized as *administrative* stands on a wholly different footing. As was aptly pointed out by Lord Greene, a court in the common-law world is ill-fitted for the determination of the type of dispute which is normally conferred upon an administrative body. "Certain types of questions are not so suitable for decision by courts of law as by a different type of tribunal. A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this the law becomes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law by which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so."²¹ The advantages of decision by administrative organs—directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively expressed policy²²—can only be bought at the cost of many of the traditional checks which obtain upon courts. Certainty and predictability, the technique of decision according to authoritative principles, and the bridling of the individual will of the magistrate by formalized rules of procedure—these must inevitably be lessened as freer play is given to administrative discretion.

The apparent self-contradiction in the term "administrative courts" has led Anglo-Americans who have examined the *droit administratif* into a fundamental error with regard to the nature of the French administrative courts. They have assumed that these bodies are not true judicial tribunals, but are instead, to a considerable extent, merely official or governmental bodies, "the members of which, when acting in the discharge of quasi-judi-

19. LAUBADERE, *MANUEL DE DROIT ADMINISTRATIF* 12 (3d ed. 1951).

20. Frankfurter, J., dissenting in *Penfield Co. v. SEC*, 330 U.S. 585, 604 (1947).

21. *LAW AND PROGRESS* 20 (Haldane Memorial Lecture, 1944).

22. See Pound, *Justice According to Law*, 14 *COL. L. REV.* 1, 24 (1914).

cial functions, were likely to be swayed by ministerial or official sentiment."²³ It was his view that the French administrative courts were more administrative than judicial in nature that led A. V. Dicey to his famous denunciation of the *droit administratif*. His attack upon the French system was based largely upon the assertion that administrative action in France was not subject to any judicial control. "The slightly increasing likeness between the official law of England and the *droit administratif* of France must not conceal the fact that *droit administratif* still contains ideas foreign to English convictions with regard to the rule of law and especially with regard to the supremacy of the ordinary Law Courts."²⁴

Yet, even if we admit with Dicey that freedom of administrative action from all judicial control is inconsistent with the rule of law, it does not follow that the French system must necessarily involve the negation of the constitutional principle. For the review of administrative action may be entrusted to a series of tribunals distinct from the ordinary law courts, but which are themselves organized upon judicial lines. This is, in fact, the situation which prevails in present-day France. The so-called administrative courts there are today wholly judicial tribunals. They are vested with the power to render judicial decisions in cases arising between the administration and private individuals. They are composed of judges who are appointed in roughly the same manner as are the judges of the French law courts; their members are secure in their tenure and insulated from political pressures and prejudices; and their decisions are rendered in accordance with judicial technique and procedure.

A realization of the fact that the so-called administrative courts in France are today courts and not merely administrative agencies is the beginning of knowledge for the Anglo-American seeking to understand the essentials of the *droit administratif*. One who realizes this will immediately perceive that, in the modern French legal system, there are in reality two distinct sets of courts—one to dispose of disputes between individual citizens and the other to deal with cases in which the administration is involved. If the French legal system is considered in this manner, as containing two orders of courts disposing of two different types of cases—the first concerned with private and the other with public law disputes—it is one whose working the Anglo-American should not find difficult to comprehend. Such a system should not seem singular to one who is familiar with the history of courts of law and courts of equity in the common-law world. For, just as in the French system today, there were two different sets of courts to administer justice in the Anglo-American system until the Judicature Acts and their American equivalents.

COUNCIL OF STATE

By far the most important of the administrative courts in France is the

23. DICEY, *op. cit. supra* note 3, at 353.

24. DICEY, *LAW OF THE CONSTITUTION* xlvii (8th ed. 1915).

Council of State. It is both the base and the apex of the French system, for to it is confided the most important original and appellate jurisdiction in the *droit administratif*. The modern Council of State was set up in 1799. An outside observer seeking to comprehend its organization and functioning need not, however, tarry long over its historical development.

The Council of State is composed of some 150 members, a number which is explained by the facts that only part of the Council is really a judicial body and that the Council is not only the ultimate appellate tribunal in the French system of administrative law, but has also the most important jurisdiction of first instance. In its organization, the Council is divided into five sections. The first four are known as the administrative sections. It is they who perform certain important legislative and administrative functions conferred upon the Council. In this respect, its role is primarily that of a consultative organ. Thus, the government asks its advice on drafts of bills which it intends to submit to the legislature. It must also be consulted before certain important administrative regulations are promulgated. In addition, statutes often provide that the Council must be consulted before certain decisions can be made.

The fifth section of the Council of State is the judicial section. It is in it that the administrative lawyer is primarily interested. To it is entrusted the task of dealing with litigation that arises between the public and the administration and it is the judicial section alone, rather than the Council as a whole, that can properly be designated as an administrative court.

Over half of the Council's members are assigned to its judicial section. With so many members, the latter is too unwieldy a body to function as one judicial tribunal. In fact, it is divided into a number of smaller units, each of which constitutes a separate court with full powers of decision in the cases that come before it. These units within the judicial section are known as sub-sections. There are eight of them, designed according to number. These sub-sections are the normal organs of judgment in the judicial section. They deal with the more or less ordinary cases that may come up. When a case of greater difficulty arises, it is reserved for the decision of the judicial section as a whole.

The jurisdiction of the French Council of State differs from that of the judicial tribunals with which the Anglo-American lawyer is familiar. With us, the courts are generally divided into tribunals of first instance and those of appeal. The Council of State, on the other hand, is neither exclusively a court of first instance nor a court of appeal. It is entrusted with both original and appellate jurisdiction and, in both respects, its jurisdiction is the most important in the French system of administrative law.

The basic principle in the French system is that the Council of State itself is the tribunal of general jurisdiction (*juge de droit commun*) in the field of administrative law. This means that the Council is competent in

every administrative law case, except where jurisdiction is expressly conferred upon some other tribunal. And in all cases, it should be noted, the decision of the Council of State is final, for there is no appellate tribunal above it in the French system.

It is only where an express statutory provision gives the citizen an adequate remedy in some other tribunal that the original jurisdiction of the Council of State is barred. Yet, even here the Council is vested with appellate jurisdiction. The decisions of every other French administrative tribunal are subject to appeal to the Council of State, either full appeal on the law and facts (*appel*) or an appeal more or less limited to points of law (*cassation*).

COURT OF CONFLICTS

The basic difference between the French and the Anglo-American systems of administrative law is, as has been indicated, to be found in the organs in each system in which are vested the task of controlling the legality of administrative action. With us, control of administration is maintained through the same institutions that administer the ordinary law of the land, *i. e.*, the ordinary law courts. In France, on the other hand, the law courts have been barred from exercising a review power like that asserted by common-law courts. The authority to review administrative action has instead been vested in the Council of State and other administrative courts in the French system.

This has been true in France ever since the enactment of the basic law of August 16-24, 1790, which provided: "Judicial functions are and always will remain distinct from administrative functions. Judges may not, under penalty of forfeiture of office, interfere in any manner with the workings of administrative bodies, nor summon administrators before them in connection with the exercise of their functions." It was the enactment of this provision that restrained the French law courts from asserting a control over administrative action similar to that which has been exercised by Anglo-American courts.

The mere enactment of the law of 1790 did not, however, resolve the problem of how effectively to deal with conflicts of jurisdiction between the law courts and the administrative courts in France. Since the French law courts were not subordinate to the Council of State, there was nothing to prevent them from taking cognizance of administrative-law cases, in violation of the statutory prohibition. To deal with this problem, the French system has established another tribunal, known as the Court of Conflicts. It is composed of nine members, four of whom are chosen from the Court of Cassation, the supreme law court in France, four from the Council of State, the supreme administrative tribunal, and one, its president, is the Minister of Justice.

The Court of Conflicts is entrusted with the task of ensuring the prac-

tical efficacy of the principle under which the French law courts are barred from exercising jurisdiction in administrative-law cases. If a case arises before a law court which may involve an administrative-law question and the court refuses to decline jurisdiction, the appropriate administrative official may move to have the case removed to the Court of Conflicts. The latter then decides whether the case does, in fact, fall only within the jurisdiction of the administrative courts. If it so decides, the law courts are completely divested of jurisdiction and the plaintiff must bring his case all over again before the appropriate administrative court. This tends, of course, to make things difficult for the litigant in France, especially since the rules of jurisdiction marking out the respective competences of the administrative courts and law courts have never been defined with mathematical precision. But such difficulty for litigants appears to be inherent in a country where remedial justice is divided into two systems, as the Anglo-American can well appreciate from his own experience with a two-court legal system prior to the merger of law and equity in the common-law world.

ANGLO-AMERICAN ADMINISTRATIVE COURT PROPOSALS

Enough has been said to give the reader a general idea of the essentials of the French system of administrative law. To the common-law observer, the most striking feature of the *droit administratif*, as compared with his own system, is the existence in it of a separate set of administrative courts to decide cases involving questions of administrative law. The Anglo-American has normally felt that one of the great virtues of his system has been the fact that control over administrative action is maintained in it through the same institutions that administer the ordinary law of the land, and on the same fundamental principles of justice. This has been seen to be the basis of the rule of law in the common-law world and its absence in the French system led to the well-known criticism of the *droit administratif* by A. V. Dicey.

With us, Dicey insisted, it must be the law courts that are to determine questions of administrative law, and the applicable principles are those that have been worked out from the ordinary private law by the method of judicial empiricism. This, indeed, is implicit in his third meaning of the rule of law in his classic definition of that concept. The "law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts; . . . in short, the principles of private law have with us by the action of the courts and Parliament been so extended as to determine the position of the Crown and of its servants."²⁵ This is the cardinal principle under which administrative power is controlled in our polity. "Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the

25. DICEY, *op. cit. supra* note 3, at 203.

authority of the ordinary courts, and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power, and whether the orders under which he has acted were legal and valid."²⁶

The French lawyer, on the other hand, has been no less attached to what are seen to be the virtues of a system in which the control of administrative authority is vested in special administrative tribunals rather than in the ordinary courts. "In reality," states a leading contemporary treatise on the *droit administratif*, "for France, the system is, on the whole, satisfactory. It is wise not to submit cases involving the knowledge of administrative law and of the necessities of administrative life to the law courts. The law courts do not possess this knowledge. They would be inclined either to exaggerate the prerogatives of the Administration or to neglect them through ignorance or partisanship. The administrative judge knows administrative law. By reason of the manner of his recruitment, he can understand the facts and grasp their reality and complexity. From this, his decision acquires the authority needed to make an Administration naturally disposed to abuse its prerogatives defer to it."²⁷

Complacency on the part of the Anglo-American with regard to his system of administrative law is much less justified today than it was when Dicey wrote. Many in the common-law world are, in fact, coming to realize this. Thus, "jurists and lawyers of divergent political views have become deeply disturbed at the trend of constitutional development in Britain during recent decades. Their anxiety is caused partly by the immense administrative powers of a discretionary character acquired by the central government; partly by the vast increase in the legislative powers delegated to ministers; partly by the decline in local government and the tendency towards centralization; but chiefly by the decline or elimination of judicial control as an effective barrier against arbitrary or irresponsible public administration."²⁸

The supposed inadequacy of the law courts in effectively controlling administration has led many in the common-law world to propose that control be vested in specially created administrative courts. Thus, a bill now before the Congress would set up a five-judge court, to be known as the Administrative Court of the United States. Upon this court would be conferred jurisdiction (1) in cases involving the judicial review of administrative action, otherwise cognizable in any other federal court, other than the Supreme Court, and (2) in cases involving the civil enforcement of the rules, orders or investigative demands of administrative agencies.²⁹ It should be noted that the jurisdiction of this proposed Administrative Court would be permissive and not mandatory. Persons adversely affected by administrative action

26. *Id.* at 389.

27. ROLLAND, *PRECIS DE DROIT ADMINISTRATIF* 279 (9th ed. 1947).

28. Robson, Book Review, 21 *POL. SCI. Q.* 411 (1950).

29. Caldwell, *The Proposed Federal Administrative Court: The Arguments for Its Adoption*, 36 *A.B.A.J.* 13 (1950).

would still have a choice of bringing their review action before the ordinary courts of law.

Similar proposals have been made with regard to the British system, although they have not yet reached the stage of proposed legislation. Perhaps the earliest suggestion along this line was that of Professor Robson in his evidence before the Committee on Ministers' Powers.³⁰ He advocated the creation of an administrative Appeal Court, "grafted on to the Privy Council," a proposal which involved the abolition of both the supervisory and the appellate jurisdiction of the English High Court in matters pertaining to administration and the vesting of such jurisdiction in the proposed tribunal. Although the Committee on Ministers' Powers saw fit to advise "without hesitation"³¹ against the adoption of Dr. Robson's proposals, his views have recently been re-affirmed both by himself³² and other British writers.³³

The student of administrative law who examines these proposals of Anglo-American jurists for the creation of specialized administrative courts cannot help but conclude that they represent a significant step in the direction of the *droit administratif*. "The main difference between the English and the French method of judicial control lies in the fact that in England the general jurisdiction over litigation to which the administration is a party belongs to the ordinary Law Courts, whereas in France it belongs to administrative Tribunals and foremost to the Council of State."³⁴ The setting up in the Anglo-American world of separate administrative courts to perform the function of controlling administration, which has heretofore been vested in the common-law courts, would go far towards eliminating this basic difference between the French and the Anglo-American systems.

The lawyer in the common-law world, influenced by the distrust which Anglo-Americans feel for French governmental institutions in general and by his own antipathy towards foreign legal institutions in particular, tends cavalierly to reject any proposal which would result in a *rapprochement* between his system and the *droit administratif*. With Lord Hewart, he feels that *droit administratif* is "completely opposed to the first principles of our Constitution,"³⁵ and that is enough, in his view, to condemn suggestions that may involve any implantation of the French system in the common-law world.

One wonders, however, whether the time has not come for the Anglo-American lawyer to abandon his insular prejudice and to appraise the working of the *droit administratif* upon its own merits. An objective appraisal of the French system would, more than anything else, give to the Anglo-

30. COMMITTEE ON MINISTERS' POWERS, MINUTES OF EVIDENCE 58 (1932).

31. REPORT OF THE COMMITTEE ON MINISTERS' POWERS 110 (Cmd. 4060, 1932).

32. ROBSON, JUSTICE AND ADMINISTRATIVE LAW 327 (2d ed. 1947).

33. See, e.g., STECHART, GOVERNMENT BY DECREE 317 (1950); Fitzgerald, *Safeguards in the Exercise of Functions by Administrative Bodies*, 28 CAN. BAR REV. 538, 556 (1950).

34. STECHART, *op. cit. supra* note 33, at 72.

35. HEWART, THE NEW DESPOTISM 41 (1929).

American the foundation for a proper judgment, on the value of proposals to create administrative courts in the common-law world. What better basis can there be for an assessment of the merits of the proposed tribunals than an equitable examination of the workings of an actual system of administrative courts, such as that which prevails in France?

If he wishes properly to conduct such an examination, the Anglo-American administrative lawyer will have to forego the legal isolationism that has previously characterized him. It is not enough today to declaim with Dicey that the principles of the *droit administratif* are foreign to the spirit and traditions of common-law institutions.³⁶ Though the common-law world is not necessarily obliged to imitate the French system, it should at least take the trouble of understanding it before thanking God for having been preserved from it.³⁷

36. DICEY, *op. cit. supra* note 3, at 332.

37. Compare Morgan, *Introduction to ROBINSON, PUBLIC AUTHORITIES AND LEGAL LIABILITY* ixii (1925).