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## The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared

John Bell  
University of Cambridge

### Abstract

The paper is about the place of doctrinal legal writing in the formation of administrative law. The paper examines the conditions which appear to be necessary in order to bring into existence a distinct new branch of law: a body of distinctive rules, a distinctive court or procedure by which the body of law is adjudicated, programmes of teaching in which the subject is handed down to students and professionals in a coherent manner, and a body of writers who interact with each other and produce works which systematise the law. While the focus is on English and French administrative law, the implications are not limited to those jurisdictions.

### Keywords

Administrative law – French law – English law – doctrinal legal writing – administrative tribunals – judicial review

SUMMARY: 1. Judicial Activity. 2. Legal Education. 3. Models for Legal Writing. 4. Conclusion. Bibliographical references

What is the place of doctrinal writing in legal development? That is a broad question and this paper only tackles it in relation to one aspect. My specific subject is the recognition of administrative law as a distinct branch of law. The basic argument is that the conceptualisation of “administrative law” as a distinct discipline was the result of reflection by doctrinal writers, but not by them alone. They were, in effect, the voice of the legal community.

It was a feature of medieval civil and canon laws that the *communis opinio doctorum* had a special authority in stating the law. That reflects the idea that the law is not just a collection of specific rules and enactments, but is perceived as a coherent body of norms. The citizen expects that she will be required to do things by the law that are consistent and that coherently contribute to the common good. Hence the importance attached within legal reasoning to the values of coherence and consistency<sup>1</sup>. These are the standards by which judicial decisions and legislative enactments are judged. If individual legislative acts and judicial decisions could not provide coherence to the law, then doctrinal debate and writing did so.

If legal arguments are essentially judged by the legal community, then there is a question of how the voice of that community is expressed. Germany is unusual in having had an annual gathering of legal scholars since 1860. The *Juristentag* brings together academics, judges and government legal advisers to deliberate on issues and adopt recommendations for legal development. That has produced influential discussions on topics such as liability for road

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<sup>1</sup> MacCormick, D.N., *Legal Reasoning and Legal Theory*, Oxford, 1978, Chs. 7 and 8.

traffic accidents in 1903 and product liability in 1968<sup>2</sup>. In other countries, the voice of the legal community is more diffuse. This paper looks at the way in which a legal consensus was developed in two countries which are more diffuse, France and in England, and the factors which have shaped the development differentially in both countries. My argument is that the requirements of legal education and the market for textbooks have been the important factors.

The character and quality of doctrinal legal writing is the product of three variables: judicial activity, legal education, and models of analysis and writing. Writing on France, Jestaz and Jamin suggest that the creation of a critical mass of contributions, a certain unity among doctrinal writers, and a certain defensiveness with regard to other academic disciplines are factors in shaping the collective sense of doctrinal writing in France.<sup>3</sup> I think the first of these is important generally, and the second may not have the same organisational form as in France or Germany. In France, there is a national competition for posts as university professor (the *agrégation*). In Germany, the *Habilitation* system also encourages some form of uniformity of outlook. In the UK, there is a sense that academic institutions are not simply in competition with each other, but that they help each other out in peer review and in areas such as sitting on each other's appointment panels. There is also the association of legal scholars, formerly called the Society of Public Teachers of Law (SPTL) and now the Society of Legal Scholars (SLS). That does create a certain kind of collective sense of cohesiveness in the promotion of scholarship. But my own argument is that the cohesiveness given by judicial activity and legal education are more important than the structural cohesiveness that Jestaz and Jamin talk about.

## 1. Judicial Activity

Judicial activity provides an important feature of the practical application of the law. It also provides a focus for the activity of legal professions. If an area is important in legal practice, then this will encourage demand for legal writing (as well as for consultations from academics). Differences in the character of judicial activity in France and in England help to explain why a coherent administrative law was so much later in its development in the latter. There are two main questions: how significant was judicial decision-making in this area?, and was there any coherence to the subject-matter over which the courts adjudicated, in particular could those decisions be seen as directed to the activity of something that could be coherently described as 'the administration'?

The Privy Council lost its internal jurisdiction in 1641, but its homologue, the *Conseil privé du Roi*, continued to judge cases until the Revolution<sup>4</sup>. Indeed, the Edict of St Germain-en-Laye, also in 1641, laid down that the private law courts were not to judge "the State, the administration or the government". Abolished at the Revolution, it was restored as the *Conseil d'État* in 1799 under the framework of the separation of powers established in 1790, which included the re-enactment of the principle of 1641 that private courts should not judge the administration. The *Conseil* was thus the single court to judge the administration. Under the Bourbon Restoration (1814-30), its caseload averaged 400 cases a year; in the 1850s, this

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<sup>2</sup> See *The Development of Product Liability* (S. Whittaker, ed.), Cambridge, 2014, pp. 122-4; *The Development of Traffic Liability* (W. Ernst, ed.), Cambridge, 2014, p. 93.

<sup>3</sup> Jestaz, P., and Jamin, C., *La Doctrine*, Paris, 2004, pp. 165-6.

<sup>4</sup> Mestre, J-L., *Introduction historique au droit administratif français*, Paris, 1985, pp. 189-96.

rose to 1,000 cases a year, and by the end of the century, the caseload was over 4,000 cases<sup>5</sup>. The size of this work made administrative law an important part of professional activity even before 1830, and the concentration on a single court enabled it to provide a coherent direction. Coherence of caselaw was helped by consistency of reporting. Initially reports were produced in a commercial journal edited by one of the *conseillers d'État*, Macarel from 1819, but an official collection was published regularly (what is now known as the *Recueil Lebon*) from 1831. Having a coherent collection of cases, indexed, enabled commentaries in journals such as the *Revue Thémis* (1819-24) and the *Revue de législation et de jurisprudence de Wolowsky* in the 1820s<sup>6</sup>.

By contrast, in England the prerogative writs each had their own rules dealing with different problems: some dealing with judicial (and by extension “quasi-judicial”) decisions and some relating very clearly to broader executive duties (mandamus). Works did not necessarily link all of them together. Furthermore, even in 1959, the use of the prerogative writs was not large<sup>7</sup>. The rules on declarations were seen as distinct and not really brought together with other administrative remedies until *Shaw* in 1951<sup>8</sup>. Very importantly, there was a plethora of administrative tribunals and appeals to ministers, as well as cases stated from the administrative functions of the justices of the peace (e.g. on licensing)<sup>9</sup>. Looked at in this functionalist way, administrative litigation was significant in England, even from the early 20<sup>th</sup> century, but it was not perceived to be a coherent activity. Certainly, no one in the professions would have specialised in it, except clerks to the local authorities<sup>10</sup>. The unification of procedural rules took until 1977<sup>11</sup> which encouraged the courts to develop their own conception of the distinctiveness of public law proceedings in *O'Reilly v Mackman*<sup>12</sup>. Arguably, it has taken until the *Tribunals, Courts and Enforcement Act 2007* to get a fully developed and coherent idea of administrative justice that might be seen as comparable to what emerged in France by the 1880s<sup>13</sup>.

Of course, the process of the English recognition of administrative law had not been helped by what De Smith called an “individualistic bias” among the judges who read the powers associated with social reform legislation narrowly in the early 20<sup>th</sup> century<sup>14</sup>. This led to

<sup>5</sup> Fortsakis, T., *Conceptualisme et empiricisme en droit administratif français*, Paris, 1987, p. 250.

<sup>6</sup> Touziel-Divina, M., *La doctrine publiciste 1800-1880*, Paris, 2009, p. 57.

<sup>7</sup> De Smith, S.A., *Judicial Review of Administrative Action*, London, 1959, p. 24

<sup>8</sup> *R v Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 KB 711 (Goddard LCJ), *R v Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 KB 338 (CA). This approach was already well established in the US: Borchard, E.M., *Declaratory Judgments* 2nd edn., Cleveland, 1941.

<sup>9</sup> Anderson, S., *The Oxford History of the Laws of England*, Oxford, 2010, vol. XI, Part II, Ch. VI, pp. 498-502; Stebbings, C., *Legal Foundations of Tribunals in Nineteenth Century England*, Cambridge, 2006, Ch. 6. De Smith (*Judicial Review of Administrative Action*, p. 14) wrote “A complete account of the functions of the courts in administrative law would require a voluminous catalogue of these statutory provisions for appeals”.

<sup>10</sup> Anderson, *Oxford History*, vol. XI, pp. 486-7 suggests that there were only three barristers of significance in administrative law throughout the whole 19<sup>th</sup> century.

<sup>11</sup> Rules of the Supreme Court, Order 53 and Supreme Court Act 1981.

<sup>12</sup> [1983] 2 A.C. 237.

<sup>13</sup> Especially the *Cadot* decision which finally rejected the idea of ‘retained justice’, that the administrative courts merely advised the minister, rather than having judicial authority: CE 13 December 1889, Leb. 1148 concl. Jagerschmidt.

<sup>14</sup> De Smith's *Judicial Review of Administrative Action*, p. 59; Jennings, W.I., “Courts and Administrative Law” (1936) 49 *Harvard Law Review*, p. 426.

attempts to exclude courts from adjudicating on the exercise of powers and the provision of alternative remedies in ministries and tribunals.

The other important feature of judicial activity was the coherence of the notion of “the administration”. In France, the State undertook not only defence and public order but, under the Empire, public education, hospitals and the state-supported religion. Ministries controlled such matters in a way which did not happen in England really until after 1945. Even more than under Louis XIV, local government was under the supervision of the State inspector, the prefect who could annul its decisions for illegality (and whose decision could then be challenged before the *Conseil d’État*). Subsequently State inspectors of factories or work would report to ministries. There was an organisational reality to the unified idea of “the administration”. By contrast, in England local bodies ran the Poor Law (justices of the peace and then from 1834 the Poor Law Commissioners), education (the School Boards from 1870), hospitals, utilities, and so on. Local government was not fully in place until the 1890s. The fragmented state of government was only broken by the creation of ministries during the First World War. Despite Dicey’s emphasis on the equality of all before the law, the real distinction existed between the Crown and its subjects. Before the Crown Proceedings Act 1947<sup>15</sup>, there were distinct protections for the Crown, but the rules governing legality and fair procedure were imposed on all bodies deriving their powers from statute or royal charter. For instance, the leading cases that continue to be cited by Wade and Forsyth on legality are from a railway company and local government<sup>16</sup>. Whilst Wade and Forsyth are right to point out that governmental activity was significant by the end of the 19<sup>th</sup> century<sup>17</sup>, the conceptualisation of the different activities as connected was really the work of the 1920s. William Robson, a professor of political science at LSE drew attention to the scale of administrative activity in England and the range of different forms of redress before ministers, tribunals and other bodies<sup>18</sup>. This fragmentation of remedies which was examined by the Donoughmore Committee in 1932<sup>19</sup> resulted from the creation of specific forms of redress in relation to very specific decisions by different public bodies. That Committee effectively legitimated the conception of ‘administrative’ discretionary power. But that Committee’s proposals were never implemented and it took until the Franks Committee in 1957 to bring some coherence into the range of remedies<sup>20</sup>. In a typical common law fashion, the coherence of substantive law emerged from greater coherence in procedure for remedies.

In 1959, De Smith argued that “Dearth of authority and the prevalence of uncertainty on so many issues have led to a tendency among all commentators to read a too general significance into isolated recent decisions relating to administrative law”<sup>21</sup>. The quality of doctrinal writing was related to the critical mass of judicial decisions and the coherence perceived in the subjects with which the courts and the legal professions were dealing. When that coherence emerged from the 1960s onwards, it was indeed the result of doctrinal

<sup>15</sup> See Williams, G., *Crown Proceedings*, London, 1948.

<sup>16</sup> Wade, H.W.R., and C.F.Forsyth, C.F., *Administrative Law*, 11<sup>th</sup> edn., Oxford, 2014, p. 177 n. 1: *A-G v Great Eastern Railway* (1880) 5 App. Cas. 473 and *A-G v Smethwick Corpn.* [1932] 1 Ch., p. 563.

<sup>17</sup> *Administrative Law* see previous note), pp. 1-2.

<sup>18</sup> Robson, W.A., *Justice and Administrative Law. A Study of the British Constitution*, 1st edn., London, 1928, p. xii.

<sup>19</sup> *Report of the Committee on Ministers Powers*, Cmd. 4060, London, 1932.

<sup>20</sup> *Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd. 218, 1957.

<sup>21</sup> De Smith, *Judicial Review of Administrative Action*, p. 26.

coherence imposed on a diffuse mass of material by doctrinal writers such as De Smith and Wade.

## 2. Legal Education

There are two main questions about the place of legal education in the development of doctrinal legal writing. First is there a recognised subject of study?, and then is there a body of people to teach it? France and England started in the same position, since the answer to both questions was “No!”

If we take France, the Revolution led to the closure of the universities, given their religious foundation. They were re-opened under the Empire with a very clear, centrally dictated programme of study. The *loi du 22 ventôse XII* (2 March 1804) prescribed the study of various aspects of the civil code and “the civil law as it relates to public administration”. Of course, like any centrally designed policy, the idea was one thing, implementation was another. There simply were no people trained at university level to deliver this programme. Unlike in civil law, there had been no university programmes on the topic before the Revolution, and so they were really starting from scratch. Given the absence of a code and of a coherent set of rules, the members of the law faculties did not take the requirement seriously when these reopened in 1807 and it took time for the teaching of administrative law to happen in practice.

The term “administrative law”, first appears in 1807 and the very first course in 1808<sup>22</sup>. The appointment of a professor in Paris in 1819 (Gerando)<sup>23</sup> and then in various provincial universities was the real starting point for legal education in administrative law. From the 1830s, there was regular teaching in the universities, leading to the permanent foundation of administrative law chairs in all universities in 1838<sup>24</sup>. A national programme for university courses in administrative law was imposed by decree in 1862 justified by the need to ensure equality for all students<sup>25</sup>! From 1855, there was a national recruitment of university professors (the *agrégation*). The result was that there was teaching of students from an early date and they were required to obtain a law degree in order to become an *avocat* from 1810. So there was demand for textbooks and a body of teachers across the country required at least to produce their courses, often in printed form. In addition, the training of senior civil servants started after 1830. Teaching in administrative law was established in 1831 at the *École des Ponts-et-Chaussées*, the leading college for the administration’s engineers. The teachers were leading members of the *Conseil d’État*, such as T.-A. Cotelle, L. Aucoc and E. Laferrière<sup>26</sup>. After 1872, the *École libre des Sciences Politiques* followed the same pattern for generalist administrators with teachers such as J. Romieu, R. Odent and G. Braibant. The written versions of the courses taught in those institutions became the major texts of

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<sup>22</sup> As part of the proposals drawn up by the inspectors of the faculties : Mestre, J-L., “Aux origines de l’enseignement du droit administratif: le *Cours de législation administrative* de Portiez de l’Oise (1808)”, *Revue française de droit administratif* (1993), pp. 244-246

<sup>23</sup> Touzeil-Divina, *La Doctrine Publiciste*, p. 263.

<sup>24</sup> Fortsakis, *Conceptualisme et empiricism*, pp. 44-48.

<sup>25</sup> Touzeil-Divina, *La Doctrine Publiciste*, pp. 237-40.

<sup>26</sup> Touzeil-Divina, *La Doctrine Publiciste*, pp. 116-20; Gonod, P., *Édouard Laferrière, un Juriste au Service de la République*, Paris, 1997, 38-9.

administrative law scholarship (and the work of their successors remains such today)<sup>27</sup>. Furthermore, *commissaires du gouvernement* (as they were then known) would not only teach, but would develop legal doctrine in their *conclusions* in judicial proceedings. These would provide the court with a dispassionate and extensive survey of the law, together with clear recommendations as to its development. Their role in negotiating the listing of cases for hearing enabled them to plan the grouping of decisions favourable to dealing with important issues of law and thus in shaping legal doctrine<sup>28</sup>.

This need for teaching materials required original attempts to put together different rules applying to the administration in terms which were based on some general principles. While many professors operated like crammers just summarising the work of others or presented pedestrian summaries of legislation and cases, Touzeil-Divina shows that this was not the case for all<sup>29</sup>. As we will see shortly, the writing of summaries needed to be principled and this led to reflection on principles which was really only fully developed in the last 15 years of the 19<sup>th</sup> century. To a great extent, this picture of administrative law mirrored that of private law. The approach of the early teachers and writers adopted a legalistic view of interpretation, as guardian of the Civil Code and thus of legal certainty, a service thus of synthesis and dissemination of the law<sup>30</sup>. It is only with the 1880s that doctrinal writing becomes fully developed.

So, we have a national programme of instruction in administrative law developing over the first half of the 19<sup>th</sup> century. This was then followed by professorial appointments often imposed by the Ministry of National Education and a national curriculum for administrative law studies. This central direction gave the subject a clear place in the law curriculum and encouraged a systematisation which did not occur in England to much later.

English legal education is the product of the market, not of central direction. All the same, it did take a Royal Commission to get Oxford and Cambridge out of their torpor in 1852. The Oxford law degree (in English law) dates from 1850 and Cambridge's from 1858. London's degree dated from 1829, but only produced 134 graduates by the end of the century (a rate of barely 2 a year). Even as late as 1933-4, there were only 1809 law degree students in England and Wales and 130 teachers in universities and university colleges<sup>31</sup>. Graduates did not exceed half the number of newly enrolled solicitors until 1960<sup>32</sup>. The majority of barristers

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<sup>27</sup> See Gonod, P., "Les membres du Conseil d'État, auteurs de manuels de droit administratif", *Le Conseil d'État et l'Université* (J. Caillosse, ed.), Paris, 2015, pp. 1-27. She states that the three 'Bibles' of administrative law are all by *conseillers d'État*: *Les grands arrêts de la jurisprudence administrative*, the course of Odent (1970) and the treatise of Laferrière (1887). As Rivero put it, "le juge écrit et le juge enseigne": "Jurisprudence et doctrine dans l'élaboration du droit administratif", *Etudes et Documents du Conseil d'État* 27 (1955), at p. 29.

<sup>28</sup> See Stirn, B., "Les commissaires du gouvernement et la doctrine", *La Revue Administrative* 1997 *numéro spécial: Le Conseil d'État et la Doctrine*, p. 41. The nearest equivalent in the English common law was the lengthy judicial decision which, unlike the French judicial decision, is discursive and fully argued.

<sup>29</sup> Touzeil-Divina, *La Doctrine Publiciste*, esp. pp. 122-135. He also argues that even those producing summaries had some theoretical ideas which provided structure to their work.

<sup>30</sup> Hakim, N., *L'autorité de la doctrine civiliste française au XIXe siècle*, Paris, 2002, pp. 61-69.

<sup>31</sup> Cocks, R., and Cownie, F., 'A Great and Noble Occupation!', *A History of the Society of Legal Scholars*, Oxford, 2009, p. 55. Of these 1010 were in Oxford and Cambridge and 307 in London (at that time law was taught in 11 universities and 4 university colleges: drawing on Jenks, E., "English Legal Education" *Law Quarterly Review* 51 (1935), pp 162 ff., at p. 179.

<sup>32</sup> Abel, R., *The Legal Profession in England and Wales*, Oxford, 1988, Table 2.3.

were graduates in the mid-19<sup>th</sup> century, but few studied law<sup>33</sup>. The Bar did not have a high proportion of law graduates until much the same time. Administrative law was taught in London before the Second World War<sup>34</sup>. But in Cambridge it only became a distinct subject as ‘General Principles of Administrative Law’ in the LLB from 1949. At undergraduate level, there was one question in eight on judicial review within the Constitutional and Administrative Law paper, until an optional paper on “Administrative Law” was introduced in 1975. Even in 1964, only 14 of 19 law schools offered an option in administrative law and Professor Wilson noted that this reflected the rapid rise of a subject “which would generally have been regarded as unsuitable for study at undergraduate level a few years ago”<sup>35</sup>.

In part, the low place of administrative law in the university curriculum was the product of the subjects required after 1895 in order to give students exemptions to the professional examinations for entry as a solicitor or barrister. At that time, the subjects were Roman law, contract and tort, property, constitutional history and law, and criminal law<sup>36</sup>. The dominance of professional requirements did not assist the development of sophisticated legal writing on administrative law in the same way as it developed on contract, tort and property. But there was equally some hostility within the academy. At the 1938 meeting of the SPTL, Professors Jennings and Robson of LSE and Wade of Cambridge wrote pleading that “the more important principles of administrative law... should be a compulsory part of legal education”<sup>37</sup>. In 1953, Street still felt it necessary to write in much the same vein<sup>38</sup>.

A further difference between English and French legal education was the absence of the doctorate. The doctorate (PhD) was imported into British universities from the USA in 1917, but was not a significant part of English legal education before the 1970s. There were only 62 home students obtaining doctorates in law across the whole UK between 1917 and 1959, and 131 foreign students<sup>39</sup>. (The University of London did not begin awarding the PhD in law until 1937.) By contrast, the French Ministry of Education appointed Laferrière to give the inaugural course of lectures on administrative law to doctoral students in Paris (about 40 a year) in 1883-4. This course of lectures subsequently became his path-breaking *Traité de la juridiction administrative et des recours contentieux* of 1887, which is considered one of the masterpieces of French administrative law<sup>40</sup>. It was his vision of the formation of administrative law, notably the place of case law, which shaped the further development of the subject<sup>41</sup>. Whereas significant development of doctrinal writing would come out of

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<sup>33</sup> Polden, P., *The Oxford History of the Laws of England*, Oxford, 2010, vol. XI, Part 4, pp. 1022, 1185.

<sup>34</sup> Jenks, “English Legal Education”, p. 172.

<sup>35</sup> Wilson, J.F., “A Survey of Legal Education in the United Kingdom”, *JSPTL* (NS) 9 (1966) 1, pp. 46 ff.

<sup>36</sup> Polden, *Oxford History*, vol. XI, p. 1196.

<sup>37</sup> Jennings, W.I., Robson, W.A., and Wade, E.C.S., “Administrative Law and the Teaching of Public Law”, *Journal of the Society of Public Teachers of Law* (1938), pp. 10 ff., at p. 13.

<sup>38</sup> Street, H., “Law and Administration: Implications for University Education”, *Political Studies* (1953), pp. 1 ff., at p. 97.

<sup>39</sup> Simpson, R., *The Development of the PhD Degree in Britain, 1917-1959, and Since*, Lewiston NY, 2009, p. 590. There were only 30 doctorates in law in the UK before 1930 (p. 297).

<sup>40</sup> Paris, 1887, 2 volumes. A second edition was published in 1896-1897: see Gonod, *Édouard Laferrière*, pp. 38-39.

<sup>41</sup> *Ibidem*, pp. 44-48.



published theses (the most common form of French legal monograph), English law would have to wait a long time for the equivalent<sup>42</sup>.

The demand for study materials that the place of a subject within the law curriculum creates provides a major impetus to systematisation. If you have to write about a subject simply and clearly, this encourages thought about the general principles which underpin the subject. In addition, the creation of academic positions focused on a subject (often as a result of it being significant to education) creates a critical mass of scholars who can debate with each other and refine legal thought. It is that notion of debate which is seen as central to French conceptions of legal doctrine. That community is reinforced by the presence of doctoral students who contribute extensive study to the mix of arguments within the legal community. Although the practitioner professions are important, both as writers and readers, the existence of a developed place for education in a subject as part of legal education is a significant driver both to the demand for scholarly works and for writing them.

### 3. Models for Legal Writing

Polden explains that in the nineteenth century, absent a substantial body of academic lawyers, the junior barristers produced law books in England. This role of the profession in producing doctrinal legal writing (work on theory and system), rather than purely professional works, remains a distinctive feature of English doctrinal legal writing. The demand for books increased as the profession grew and examinations for entry were introduced<sup>43</sup>. In administrative law, books were written especially for the lawyer and administrators involved in hospitals, the poor law, local government and so on, there was no demand to look at ‘the administration’ as a whole. Even in the post-1945 era, many of the early works had a practitioner market in mind<sup>44</sup>. So where did English doctrinal writers look for their models? Dicey’s model of writing on constitutional law came from constitutional history, and he denied the need for ‘administrative law’, by which he meant the French conception of a set of rules distinct from private law. The submission of officials to private law (such as the law of torts) was an important feature of the rule of law<sup>45</sup>. All the same, he did provide some principles which could govern the role of the executive: the rule of law and respect for the sovereignty of Parliament. They are principles which found their way into Wade’s first edition of his treatise on administrative law in 1961<sup>46</sup>.

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<sup>42</sup> The first monograph from a Cambridge Ph.D. in Administrative Law was Schwartz, B., *Law and the Executive in Britain*, New York, 1949.

<sup>43</sup> Polden, *Oxford History*, vol. XI, p. 1036.

<sup>44</sup> E.g. Williams, G.L., *Crown Proceedings*, London, 1948; Friedmann, W., *The allied military government of Germany*, London, 1947; Hart, W.O., and Beattie, D.J., *Hart’s introduction to the law of local government and administration*, 3<sup>rd</sup> edn, London, 1946.

<sup>45</sup> This did not prevent him recognising that: “On the whole it appears to be true that if administrative law is to exist it is seen at its best as French *droit administratif*”: Dicey, A.V., *Lectures on Comparative Constitutionalism* (J. Allison, ed.), Oxford, 2013, p. 314.

<sup>46</sup> Wade, H.W.R., *Administrative Law*, 1<sup>st</sup> edn., Oxford, 1961, p. 2. He rejected the separation of powers and cites Bagehot for a better understanding of the close relationship of executive and legislative powers.

The first proper text on administrative law was Robson which was essentially a political science account of the relationship of law and administration<sup>47</sup>. This was closely followed by Port<sup>48</sup>. Port described French administrative law where he discusses the theories of M. Hauriou, G. Jèze, and of L. Duguit<sup>49</sup>. He then used the French categories to describe American administrative law. Even if neither author subscribed to Dicey's approach to administrative law, they retained his idea that France was the primary reference point for conceptual ideas, a point supported by the content of journal articles and by the contributions of Robson and Laski to the Donoughmore Committee<sup>50</sup>. This continued with the work particularly of Hamson in his Hamlyn lectures in 1954<sup>51</sup>. But it is clear that the point of reference shifts to the US during the 1930s and then after 1945. Jennings, Wade and Robson expressed themselves as impressed by the teaching and scholarship in the US in the mid-1930s<sup>52</sup>. Robson's third edition of 1951 praises American authors, notably Walter Gellhorn and Kenneth C. Davis. Gellhorn influenced the Administrative Law Procedure Act of 1946 and Davis published his treatise *Administrative Law* in 1951<sup>53</sup>. That reference is also seen in Griffith and Street in their textbook of 1952<sup>54</sup>. American administrative law was popularised by Schwartz during his stay in Cambridge and then Paris at the end of the 1940s. He got to know the French system, but argued strongly in favour of the distinctiveness of the common law approach. For him the absence of a distinctive public law in the continental European sense was a great strength and not a weakness of English law<sup>55</sup>. It is perhaps significant that both the Vice-President of the *Conseil d'État* and Professor Schwartz gave evidence to the Franks Committee and the French approach was not adopted. As in many branches of law, the American education and visits of British academics from the 1950s ensured that America has remained a major reference point for British academic scholarship in administrative law<sup>56</sup>. The place of foreign reference points and the following of American styles of scholarship (casebooks and treatises and journal articles) were significant. That scholarship also was based on constitutional principles and this was influential (even if they differed from the UK). The primary sources of influence reflect the view of much current comparative

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<sup>47</sup> Robson, W.A., *Justice and Administrative Law. A Study of the British Constitution* 1<sup>st</sup> edn., London, 1928.

<sup>48</sup> Port, F.J., *Administrative Law*, London, 1929.

<sup>49</sup> He cites Duguit's works translated in English: "French Administrative Courts", *Political Science Quarterly* (1914), pp. 390 ff., and *Law in the Modern State* (trans. Laski F. and H.), London, 1921). He also cites Brissaud, J., *A History of French Public Law*, London, 1915.

<sup>50</sup> See Mestre, A., "Droit administratif", *Cambridge Law Journal* 3 (1929), p. 355; Committee on Ministers' Powers, Cmd. 4060, London, 1932.

<sup>51</sup> Hamson, J., *Executive Discretion and Judicial Control. An Aspect of the French Conseil d'Etat*, London, 1954; and later Garner, J.F., and Brown, L.N., (with the help of Questiaux, N.), *French Administrative Law*, 1<sup>st</sup> edn., London, 1967; Mitchell, J.D.B., "The State of Public Law in the U.K.", *International and Comparative Law Quarterly* 15 (1966), p. 133.

<sup>52</sup> See above, n. 37.

<sup>53</sup> Davis, *Administrative Law*, K.C., St Paul, Minn., 1951; Gellhorn, W., *Administrative Law: Case and Comments*, Brooklyn, 1947, noted by Schwartz, B., *Cambridge Law Journal* 10 (1948), p. 137.

<sup>54</sup> Griffith, J.A.G., and Street, H., *Principles of Administrative Law*, London, 1952.

<sup>55</sup> Schwartz, B., *Law and the Executive in Britain*, New York, 1949, p. 151. His work was translated into French in 1952 and he published Schwartz, B., *French Administrative Law and the Common Law World*, New York, 1954.

<sup>56</sup> Wade, H.W.R., *Towards Administrative Justice*, Ann Arbor, 1963; Craig, P.P., *Public law and democracy in the United Kingdom and the United States of America*, Oxford, 1990; Harden, I., and Lewis, N., *The Noble Lie: the British Constitution and the Rule of Law*, London, 1986; Birkinshaw, P., Harden, I., and Lewis, N., *Government by Moonlight: The Hybrid Parts of the State*, London, 1990.

scholarship that, however fascinating foreign law may be, the main influences are from cognate legal systems (i.e. within the same legal family)<sup>57</sup>.

As with other aspects of English law, administrative law scholarship has not been confined to academics and there have been notable contributions from practitioners who have sought to shape principles<sup>58</sup>. That scholarship has often managed to put order into the caselaw and has sometimes involved Commonwealth cases, but it has been the academic writers who have made most use of more extensive comparative law.

Those writing on French administrative law had no prior education in the subject and no models of pre-Revolutionary writing to copy. There were two established models available. On the one hand, there was the long tried and tested scholarly model of Roman law. Many of the early writers used the framework and structure of Roman law to present administrative law: persons, things and actions<sup>59</sup>. For those educated on the (then) new Civil Code, the more obvious model was that of the *Code Napoléon* and there were many attempts to develop a ‘code’ of administrative law in terms of principles. Yet another model was that of legal history. Both of these provided *structure* rather than *content* to the presentation of administrative law. The great *principled content* of administrative law and judicial review came with the work of Laferrière in 1887 and with those academics such as Hauriou and Duguit who wrote at the turn of the 20<sup>th</sup> century. But Touzeil-Divina notes the way in which principles did underpin the structure of the earlier summaries of caselaw and legislation, or of presentations of specific areas of law, such as public works. Some libertarians wanted to restrict the role of the state. There was thus a strong emphasis on express competences<sup>60</sup>. Others, such as Foucart (1834) emphasised the importance of protecting the civil liberties of citizens against public power<sup>61</sup>. The rule of law meant something more than just ensuring respect for the competences given by the legislator. But these different ideas served as the beginning of a theory of administrative law. The contribution of Laferrière’s *Traité* (1887) and Hauriou’s *Précis* was to present a much greater and more principled systematisation of administrative law and judicial review<sup>62</sup>. This gradual evolution of French doctrinal writing shows some of the difficulties of an autonomous development of styles and concepts. By coming later, English law was able to make use of foreign models at least as reference points in shaping its own development.

Comparison between the US, the UK and France is not novel. Goodnow<sup>63</sup> used those reference points in the 1890s. In the end, the French model served to help the common lawyers to determine what they were not, rather than to influence the shape of the content and

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<sup>57</sup> Bell, J., “Researching Globalization: Lessons from Judicial Citations”, *Cambridge Journal of International and Comparative Law* 3(3) (2014), pp. 1 ff., at pp. 17-19; esp. Gelter, M., and Siems, M. “Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe”, *American Journal of Comparative Law* 62 (2014), pp. 35 ff., at pp. 51 and 58-60.

<sup>58</sup> For an early example: Gordon, D.M., “The Relation of Facts to Jurisdiction”, *Law Quarterly Review* 45 (1929), p. 459.

<sup>59</sup> Touzeil-Divina, *La doctrine publiciste*, pp. 160-162.

<sup>60</sup> Touzeil-Divina, *La doctrine publiciste*, p. 179.

<sup>61</sup> *Ibidem*, pp. 181, 197.

<sup>62</sup> Fortsakis, *Conceptualisme et empiricisme*, Part 1, Ch. 2.

<sup>63</sup> Goodnow, F.J., *Comparative Administrative Law: an analysis of the administrative systems, national and local, of the United States, England, France and Germany*, New York, 1893. See also von Stein, L., *Handbuch der Verwaltungslehre und des Verwaltungsrechts mit Vergleichung der Literatur und Gesetzgebung von Frankreich, England und Deutschland*, Stuttgart, 1870.

conceptual structure of administrative law. This applied to judges and to academics (as well as to ministerial committees on the subject).

But the use of comparative law is not the only difference. Whereas the French administrative law was driven by the *Conseil d'État* as both judge and doctrinal writer, supported by university academics, the English system gives an important place to committees and commissions which bring together judges, the profession, academics and public figures as the voice of the legal community. In many ways, it could be said that three determining moments in the history of administrative law were the result of committees. The Donoughmore Committee in 1932 legitimated the role of discretion in administrative power and recognised the place of administrative law within English law. The Franks committee in 1957 encouraged a greater judicialisation in the control of governmental powers and introduced principles of good administration. Each of these committees created an ethos for the way in which governmental power was exercised and controlled. The Law Commission, created in 1965, wanted to look at the whole of administrative law in its 1969 proposed programme. But the government restricted it to looking at remedies. Its 1976 Report recommended the unification of the different remedies<sup>64</sup>. These recommendations were taken forward by changing the Rules of the Supreme Court, Order 53, in 1977 and the Supreme Court Act in 1981<sup>65</sup>. That set of reforms has ushered in an element of exclusivity in the treatment of public law matters, of which *O'Reilly v Mackman* was but the harbinger. With the ability to consult and receive feedback, the Law Commission is well placed to discern and articulate the opinion of the legal community in a more authoritative way than a single legal commentator. Paul Mitchell has drawn attention to the role of such bodies in the development of private law<sup>66</sup>. I think that their place in administrative law is even more significant in creating a social consensus and setting a lead for the academic community consensus. H.W.R. Wade is rather symbolic of this. He was a member of the Council on Tribunals set up following the Franks Committee to develop principles of good administration and he pioneered the development of administrative law doctrinal writing, especially after the premature death of De Smith.

#### 4. Conclusion

Paul Mitchell has argued that “the reality of legal change is not accurately captured by the crude idea of a hierarchy of lawmakers with Parliament at the top, the courts second, and academics nowhere. The picture is more complicated, subtle, and interesting than that”<sup>67</sup>. The argument of this paper has been that doctrinal legal writing has been important, both in France and in England, in identifying administrative law as a subject and in shaping the principles of its development. Piecemeal caselaw and legislation needed other sources in order to develop an understanding of administrative law as a system with its own issues and principles. But it has operated in different ways and at different paces in France and in England.

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<sup>64</sup> Law Commission, *Remedies in Administrative Law*, Law Com., No. 73, Cmnd. 6407, 1976.

<sup>65</sup> Rules of the Supreme Court, Order 53; Supreme Court Act 1981, section 31.

<sup>66</sup> E.g. Mitchell, P., “Legal Change”, *Current Legal Problems* (2012), pp. 177, 199-200.

<sup>67</sup> *Ibidem*.

A valuable feature of German and French understandings of doctrinal legal writing is that they stress doctrine is a collective, not just an individual activity. As Hakim suggests, “Doctrine is thus a body made up of independent personalities working together in the direction of a community of lawyers”<sup>68</sup>. Whereas in Germany, doctrine does visibly operate in a collective manner in the Juristentag, neither France nor England have the equivalent formal gathering. But it is not the case that, scholarly writing is simply a mass of wise monologues<sup>69</sup>. There is a sense of collective endeavour. This comes in part from the expectation that a scholarly contribution has to engage with what others have said, an expectation reinforced by peer review. Furthermore, in each country, there is leadership of the academic community. In France, the institutional lead role of the *Conseil d’État* has been significant not only because it has provided leading judicial decisions, but also because its senior members have provided leading contributions to scholarship, and also because they have served within the academy either as teachers or as members of the *jury d’agrégation* in selecting future professors. There is an administrative law legal community which operates in comfortable dialogues between leading judges and academics teaching across the universities and civil service schools. The Conseil holds its own events in which it invites academic participation from academics<sup>70</sup>.

In one sense, the universities in England have had a more formal lead role in developing administrative law than in France. They have been the institutions who have held seminars and have brought the professionals and judges together. They may well provide the forum for formal lectures or seminar contributions by judges. But the role of the committees, ad hoc or standing, has been an important way of creating a dialogue within the scholarly community and thus in shaping legal doctrine. Arguably, these create episodic but very significant moments in the shaping of administrative law.

Doctrinal writing thus operates differently in different countries, with different lead bodies. But the vectors of the coherence of the subject have been the extent of any coherence within judicial activity in deciding cases involves the power of the administration and the systematisation necessary to conduct effective legal education.

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<sup>68</sup> Hakim, *L’autorité de la doctrine civiliste*, p. 374.

<sup>69</sup> *Ibidem*, p. 340.

<sup>70</sup> See <http://www.conseil-etat.fr/Actualites/Colloques-Seminaires-Conferences>.

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