Contents

Preface *page* xiii
List of Abbreviations xv
Table of Cases by Date xvii
Table of Cases by Name xxxviii

1 Introduction 1
1.1 French Administrative Law in British Scholarship 1
1.2 What Is '*Droit administratif*'? 4
1.3 The Shaping of *Droit administratif* 5
1.4 The Influence of French Constitutional Law 7
1.5 The Influence of EU Law: French Administrative Law and the Supremacy of EU Law 10
1.6 The Influence of the European Convention on Human Rights 14
1.7 Reform of the Administration 21
1.8 A Note about Case Citation 24

2 The Institutional and Legal Context of Administrative Law 26
2.1 The Central Organs of the State 26
2.1.1 The Executive 27
2.1.2 The Legislature 28
2.2 The Local Organs of the State 30
2.2.1 Regional Administration 30
2.2.2 Département 32
2.2.3 The Commune 32
2.2.4 The Big Cities: Paris, Lyon, Marseille (PLM) 33

2.2.5 The Prefect 33
2.3 Elected Local Authorities 34
2.3.1 Region 35
2.3.2 Département 36
2.3.3 The Commune 36
2.3.4 The Big Cities: Paris, Lyon, Marseille 37
2.4 Independent Administrative Authorities (AAIs) 38
2.4.1 Regulation 39
2.4.2 Decision 40
2.4.3 Independence 40
2.5 Défenseur(e) des droits 41
2.6 Sources of Administrative Law 43
2.6.1 The Constitution 44
2.6.2 Codes and Legislation 46
2.6.3 EU Law 47
2.6.4 European Convention on Human Rights 51
2.6.5 General Principles of Law 53
2.6.6 Case Law (*La jurisprudence*) 55
2.6.7 Legal Scholarship (*La doctrine*) 57
2.7 Conclusion 59

3 Courts and Judges 61

3.1 Historical Context 61
3.2 Administrative Courts 65
3.3 General Courts 65
3.3.1 Tribunaux administratifs 66
3.3.2 Cours administratives d'appel 68
3.3.3 Conseil d'Etat 69
3.3.3.1 The Judicial Role 70
3.3.3.2 The Consultative Role 72
3.3.3.3 Section du rapport et des études 76
3.3.4 Cour nationale du droit d'asile 78
3.3.5 *Cour des comptes* and Other Financial Courts 80
3.3.6 Other Administrative Courts 82
3.4 Administrative Judges 83
3.4.1 Corps of Judges of the *Tribunaux administratifs* and the *Cours administratives d'appel* 84
3.4.2 Corps of the Conseil d'Etat 85
3.4.3 Corps of Financial Judges 88
3.5 Conclusion 88

4 The Procedure for Making Claims against Public Authorities 90
4.1 Principles of the Administrative Court Process 90
4.1.1 The Right to Effective Redress (*Le droit au recours*) 91
4.1.2 The Principle of Contradiction (*Le principe du contradictoire*) 91
4.1.3 The Principle of Openness (*Le principe de la publicité*) 94
4.1.4 The Principle of a Decision within a Reasonable Time (*La durée raisonnable de la procédure*) 95
4.1.5 The Principle of the Written Nature of Proceedings (*Le caractère principalement écrite de la procédure*) 95
4.1.6 The Principle of the Inquisitorial Character of Proceedings (*Le caractère inquisitoire de la procédure*) 96
4.1.7 The Principle of Collegiality (*Le principe de la collégialité*) 97
4.2 How Is a Claim Made? 98
4.2.1 Prior Administrative Redress 99
4.2.2 Alternative Dispute Resolution 100
4.2.3 Obligatory Legal Representation 103
4.3 Interim Measures (*Le référé*) 104
4.4 The Investigation (*L'instruction*) 110
4.4.1 Request for Information 111
4.4.2 Expert Report (*L'expertise*) 112
4.4.3 Site Visit (*La visite des lieux*) 113
4.4.4 Witness Hearing (*L'enquête*) 114
4.4.5 Amicus Curiae 114
4.5 Rapporteur Public 115
4.6 Preliminary References 118
4.7 The Hearing 120
4.8 The Deliberation 122
4.9 Enforcement 123
4.10 Conclusion 127

5 The Distinction between Public Law and Private Law 128
5.1 The Subject Matter of Litigation at the Constitutional Level 130
5.1.1 Illegality 130
5.1.2 Exceptions to the Separation of Administrative and Ordinary Judicial Authorities 131

5.1.2.1 The Defence of Illegality before the Civil Courts 131
5.1.2.2 Criminal Proceedings 133
5.1.2.3 Protection of Civil Liberties and Private Property 134
5.1.2.4 The Good Administration of Justice 137
5.1.2.5 Legislative Exceptions 138
5.2 Other Categories of Litigation 138
5.2.1 Contracts and Commercial Activities 139
5.2.2 Property 139
5.2.3 Liability of Public Bodies 140
5.3 Voie de fait 141
5.4 Public Persons 144
5.5 General Criteria for Identifying Public Law Matters 147
5.6 Mechanisms for Handling Conflicts over Jurisdiction 150
5.6.1 Positive Conflict 150
5.6.2 Negative Conflict 151
5.6.3 Preliminary Reference by a Court 151
5.6.4 Conflict of Decisions 152
5.7 Conclusion 152

6 Judicial Review of Administrative Action: Procedure 154

6.1 Who Can Challenge an Administrative Decision? 155
6.2 What Kinds of Decisions Can Be Challenged? 158
6.2.1 The Need for a Prior Decision 158
6.2.2 Circulars and Soft Law 159
6.2.2.1 Circulars 159
6.2.2.2 Guidelines 160
6.2.2.3 Other Soft Law and Information 161
6.2.3 Internal Measures 162
6.2.4 Actes de gouvernement 164
6.3 Is Judicial Review Inappropriate? 166
6.4 Time Limits 167
6.5 Can Judicial Review Be Excluded? 168
6.6 Remedies 169
6.6.1 Nullity 169
6.6.1.1 What Is the Effect of Nullity? 169
6.6.2 Can Nullity Be Avoided? 170
6.6.3 Injunctions (*Injonctions*) 172

6.6.4 Declaratory Judgments 173
6.6.5 Correcting a Decision 174
6.7 Costs 174
6.8 Penalties 175
6.9 Conclusion 176

7 **Maintaining Legality: The Grounds of Review** 178
7.1 Grounds of Review 179
7.1.1 Non-existence (*Inexistence*) 179
7.1.2 Lack of Competence (*Incompétence*) 181
7.1.3 Breach of an Essential Procedural Requirement (*Vice de procédure et vice de forme*) 182
7.1.4 Abuse of Power (*Détournement de pouvoir*) 185
7.1.5 Illegality 188
7.1.5.1 Error of Fact 188
7.1.5.2 Error of Law (*Erreur de droit*) 190
7.1.5.3 Manifest Error in Evaluation (*Erreur manifeste d'appréciation*) 191
7.1.5.4 Proportionality 195
7.1.5.5 The Sliding Scale for Review 199
7.2 Values Enforced through Judicial Review 203
7.3 Fundamental Rights 203
7.3.1 Constitutional Rights 204
7.3.2 European Convention on Human Rights 208
7.3.3 General Principles of Law 210
7.3.4 Modern Emerging Principles 219
7.4 Principles of Good Administration 221
7.4.1 The Conduct of Public Officials 222
7.4.2 Transparency and Data Protection 224
7.4.3 The Handling of Requests from the Public 225
7.4.4 Time Limits and Appeals 227
7.4.5 Principles Governing the Decision Taken 228
7.4.6 Legitimate Expectations and Legal Certainty 228
7.4.7 Duty to Give Reasons 230
7.5 Conclusion 231

8 **State Liability** 233
8.1 Introduction 233
8.2 Theories of Liability 234

8.3 Liability for Public Works (*Responsabilité pour les travaux publics*) 236
8.4 Fault Liability 238
8.4.1 The Nature of Fault 239
8.4.2 Faute de service 240
8.4.3 Faute personnelle 242
8.4.4 *Faute simple* and *Faute lourde* 245
8.4.5 Fault and Unlawfulness 248
8.4.6 Fault in Regulation 250
8.4.7 Types of Fault 251
8.5 No-Fault Liability 252
8.5.1 Liability for Exceptional Risks 252
8.5.2 Assistance to the Public Service 256
8.5.3 Equality before Public Burdens 257
8.5.4 Other No-Fault Compensation 261
8.6 Controls on Liability 263
8.6.1 Categories of Harm 263
8.6.2 Causation 264
8.6.3 Measure of Damages 266
8.7 Conclusion 268

9 Claims Relating to Public Contracts 270

9.1 What is a Public Law Contract? 270
9.1.1 Criteria Laid Down by Administrative Courts 272
9.1.1.1 Criteria Linked to a Public Service Mission 272
9.1.1.2 Criteria Based on a Clause Unusual in Private Law 273
9.1.2 Criteria Laid Down by the Legislator 275
9.2 Specific Rules Applicable to Public Law Contracts 278
9.2.1 Rules Applicable to the Formation of the Contract 278
9.2.1.1 Validity of the Contractual Consent 279
9.2.1.2 Validity of the Contractual Content 281
9.2.2 Rules Applicable to the Performance of the Contract 283
9.2.2.1 Exceptions to the Binding Force of Contracts Benefiting Public Authorities 284
9.2.2.2 Exceptions to the Binding Force of Contracts Benefiting Private Contractors 287
9.3 Remedies for Public Law Contracts 289
9.3.1 Remedies for Third Parties to Public Law Contracts 290

9.3.2 Remedies for Parties to Public Law Contracts 291
9.4 Concluding Remarks 293

10 Conclusion 299

10.1 Path Dependence 299
10.2 The Constitutional Turn 301
10.3 The European Environment 303
10.4 Social Change 305
10.5 Renvoi 306

Index 307