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THE CONSEIL D'ETAT,
THE MAJOR LEBANESE ADMINISTRATIVE COURT

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THE LEBANESE COUNCIL OF STATE

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Abstract

The Lebanese Council of State is the highest administrative court in Lebanon. It was first established in 1924 by the French High Commissioner with functions similar to those of the judicial section of the French Council of State. In 1928, the Lebanese Chamber of Deputies passed a law abolishing the Council and turning over its functions to a special section at the Court of Cassation. Then the Lebanese administrative adjudication passed into a period of continuous changes and modifications, which culminated in the reinstatement of the Council of State by an _arrêté_ of the French High Commissioner in 1941. The Council was given at that time both judicial and legislative functions; however, it was relieved from its legislative functions six months later.

The 1941 Council remained with little modification until the year 1950 when a law was passed abolishing it and dividing its functions between the ordinary courts and an administrative section at the Court of Cassation. By a legislative decree issued in 1953, the Council of State was reestablished. It is composed of a president, a vice president, and four councillors. Decisions are given by three members. The government is represented at the Council by a Government Commissioner.

The function of the Council is to hear all administrative cases not assigned by law to another court. The cases heard by the Council are of two main types. Damage suits (RPJ) and suits for the annulment of administrative acts on the ground of illegality (REP). The Council considers also complaints challenging the validity of local elections and of taxations assessments. Damage suits arise from public works, contracts, franchises, disputes over salaries and pensions,

and from the tortious actions of the civil servants in their capacity as public agents.

An administrative act is annullable on four grounds (the same as in France): incompetence, formal error, abuse of power, and violation of the law.

The Council of State is presently offering good protection to the Lebanese citizens against the arbitrary actions of the administration. What this institution needs most is some stability. Since its reestablishment in 1953, it has undergone two changes, and a third change is now under consideration. These continuous changes delay the work of the Council and reduce its efficiency. This instability, however, is not a feature restricted to the Council of State, but it is also typical of most Lebanese institutions.

Table of Contents

			Page
CHAPTER I	-	Introduction	1
		PART ONE	14
		THE DEVELOPMENT OF THE LEBANESE COUNCIL OF STATE 1924 - 1956	
CHAPTER II	-	The French Occupation And The First Council 1918 - 1928	15
CHAPTER III	-	The Reorganization Period, 1928 - 1939	24
CHAPTER IV	-	The War Period And The Second Council	34
CHAPTER V	-	The Post War Development And The 1953 Council	53
		PART TWO	68
		THE FUNCTIONS AND PROCEDURE OF THE COUNCIL OF STATE	
CHAPTER VI	-	The Sources Of Lebanese Administrative Law	69
CHAPTER VII	-	Types Of Administrative Acts	71
CHAPTER VIII	-	The Court of Conflicts	83
CHAPTER IX	-	The Procedure Of The Council	86
CHAPTER X	-	The Types of Cases Heard By The Council	95
CHAPTER XI	-	The Types Of Cases (Continued) The RPJ Cases	110
CHAPTER XII	-	Types Of Cases (Continued) The REP Cases	122
CHAPTER XIII	-	The Decisions Of The Council And Their Execution	151

Page

PART THREE 154

CONCLUSION

CHAPTER XIV - Evaluation, suggestions, and Conclusions 155

BIBLIOGRAPHY 177

Abbreviations

Recueil or Rec. - Collection of the Decisions of the Council of State 1925-1935, 3V.

Repertoire or Rep. - Repertoire de Jurisprudence Libanaise (Juris-dictions Mixtes 1924-1946), 2 V., Beirut, 1947.

La Revue - Revue Judiciare Libanaise, Monthly Publication of the Lebanese Ministry of Justice, 1945-

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CHAPTER I

INTRODUCTION

The purpose of this paper is to study the aspect of Lebanese administrative law that deals with the organization and functions of the Lebanese Council of State, and try to find out to what extent this Council has been successful in providing the Lebanese citizen with a method for the protection of his rights and interests against the arbitrary actions of the administration.

Administrative law is the branch of public law that deals with the administration as an organization and as an activity.[1] As an organization administration denotes all the public agencies excluding the legislature and the judiciary, and all public agents excluding legislators and judges. As an activity, administration denotes all the official dealings of these public agencies and public servants in their relation with one another and with the citizens.[2] Broadly speaking, administrative law includes the law that is made by as well as the law that controls the administrative authorities of government.

This branch of law deals therefore with the relations between the different public agencies, and with the relations between these agencies and the citizens. As such, and especially in the second sense, administrative law is a new development that began after the French Revolution and flourished only in the last fifty years. This branch

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1. André de Laubadère, _Manuel de droit administratif_, 4th ed., (Paris, Librairie Générale de Droit et Jurisprudence, 1955), p. 5.

2. Marcel Waline, _Traité élémentaire de droit administratif_, 5th ed., (Paris, Recueil Sirey, 1950), pp. 8-9.

of the law has followed two different courses: First, a course that was developed in the Anglo-American world and tended to subject the public agents and their activities to the ordinary courts on the same footing as the ordinary citizens and their activities. Here equality before the law was the dominant theme. The second course was developed in France and spread therefrom to other countries in different parts of the world. It is characterized by the creation of special administrative tribunals for adjudicating cases dealing with the administration as a public agency. These two different developments may be due to a difference in the interpretation of the theory of the separation of powers. The judicial function is regarded in the Anglo-American world as belonging absolutely to the judicial courts that should have the final word on all disputes. In France, on the other hand, the separation of powers is interpreted to mean the complete independence of the legislative, executive, and judicial organs from one another. This view was to a great extent based on the impact of Rousseau's ideas on French revolutionary and post revolutionary political thought.

Both views, however, meet in the common purpose of providing some means for the control of the administration and for the protection of the citizens against its arbitrary action. That the governments may be limited legally and effectively by a method other than force is an innovation in the history of political thought. Most writers on political theory before the eighteenth century seem to have failed to see any way for the protection of the citizens against the wrongful acts of the government short of revolution. Some of these writers, like Locke, the Monarchomachs, and perhaps St. Thomas Aquinas,

maintained that a revolution against bad government is right and necessary, while others, like Hobbes, went to the other extreme and maintained that there cannot be a bad government and hence that no revolution can be justified. It is true that the possibility of appeal to the sovereign himself against his own acts has always been possible, at least theoretically. This method, however, does not really provide a means for controlling the acts of the sovereign who would still have the final word in all matters.

As a forerunner in constitutional government, Great Britain seems to have been the first country where the notion of the necessity in a constitutional state, for a judicial interpretation and limitation of the acts of government was developed. This appears as an instinctive and vague notion among several English writers ever since the middle of the seventeenth century.[3] Even at the beginning of that century, in 1601, a plaintiff dared to bring in question the legality of some of the Queen's prerogatives by an action in the Court of Common Pleas;[4] and what is more striking is the fact that this case was won three years later in spite of the Crown's intervention. Throughout that century, England was the scene of two conflicting points of view. The first held that the sovereign had *absoluta potestas* by which he commands, and which cannot be questioned. The second held that such prerogatives constituted a threat against law and jurisdiction and against all legal rights; hence that they must be subjected to legal control. The constitutional issues raised during this epoch making century culminated

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3. Charles Howard McIlwain, *Constitutionalism, ancient and modern*, revised edition, (Ithaca, Cornell University Press, 1947), pp. 134-145.

4. *Ibid*., p. 121.

in the 1689 revolution, with the triumph of the second of these two points of view. By that time the old maxim that "the king can do no wrong" acquired another meaning: not that the king could not break the law, but that no breach of the law could be considered an act of the king. Or as Andrew Amos puts it, "no mismanagement in government is imputable personally to the sovereign, whilst, nevertheless, no wrong can be done to the people without a remedy. Whence it follows as a corollary, that all acts of state must be performed by responsible ministers."[5]

As a result of this development, the courts were empowered to render null and void acts contrary to the law. However, this sanction for individual right did not become really effective until the year 1701 when the tenure of the judges was made independent of the king by the Act of Settlement.[6]

The need for the control of the administration and the protection of the citizen has been gradually increasing with the shift from the individualism of the nineteenth century, which maintained that the legitimate function of government was defense and the maintenance of order, to the socialist tendencies that brought about the development of positive or "welfare" states. Governments are now engaging in many new activities that until a very recent period were considered of a strictly private nature. This development means that governments are nowadays exercising an ever increasing series of controls over the

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5. Cited in McIlwain, op.cit., p. 132.

6. For an interesting treatment of this development refer to McIlwain, op.cit., especially chapters 1 and 6.

citizens in the various spheres of their social life. More intervention means more possibility for tortious acts, and greater responsibility demands greater accountability. Thus, a very important problem facing modern governments is the conflict between administrative efficiency and individual liberty. The first demands freedom of action, and the second requires judicial control. The establishment of a just state of equilibrium between these two is one of the most important tasks facing modern legislators; the administrative tribunals may represent the compromise between these two conflicts. The French have already adopted fully this kind of compromise and the Anglo-American world tends increasingly to accept it. The question is to what extent should exigencies of justice give way to exigencies of rapidity and efficiency. This is the dilemma of efficiency versus liberty: when the rights of the government are unduly stressed, the rights of individuals are often threatened; when the latter are over-emphasized, government becomes too weak to keep order and too inefficient to perform any service. No definite line of demarcation can be made, and reasonableness seems to be the safest directive for maintaining the optimum balance between the two.

The rapid growth of administrative law was therefore an inevitable consequence of the development of positive government. Another factor that has given impetus to this growth is the recently emerging equalitarian spirit. The government is no longer regarded omnipotent or superior. "A government of the people, by the people, and for the people" is a slogan that seems to find echo in the hearts of most of the citizens of democratic countries. The citizen feels that the purpose of the government is to promote the welfare of the people, and that he is the

guardian who should see to it that such a purpose is fulfilled. The governors often share the citizens' feelings. The growth of this spirit has inspired the citizens to demand that the activities of the government be subjected to legal control, and at the same time it has inspired governors to yield willingly to such control.

There are usually only two ways in which the citizen can directly control government acts: administrative review and judicial review.[7] By the former is meant either the _recours gracieux_, which is appeal to the same person issuing the contested act, or the _recours hiérarchique_, which is appeal to his hierarchic superior. This method, though helpful, is not enough, first because it makes the same person or agency judge in its own cause, and second because it does not offer any guarantees that the citizen's claims will be given due consideration.

The second method is appeal to the courts. Here we have seen that there is a difference between the Anglo-American and the French practice.

The Anglo-American school insists that the judicial function is a function of the ordinary courts and that all citizens are equal before the law. Along with this doctrine, however, goes the doctrine that the king can do no wrong. Thus, the state cannot be sued either in England or in the United States except as expressly provided by statute. Under

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7. The control of government acts through parliament is available to the citizens in all democratic countries. Private bills, petitions to legislatures, referenda, initiative, and recall fall in this category. The controls exercised by the citizens through these methods, however, are indirect rather than direct. Other indirect methods also exist, viz., the press, public opinion, pressure groups, political parties and elections, etc.

an act of 1887 the United States consents to be sued in the Court of Claims on all claims founded upon any contract, express or implied. The Federal Court of Claims was created in 1855 and several states followed in creating similar courts. The civil servants themselves, however, were considered responsible for their actions affecting adversely other citizens even when these actions were made while the officials were performing their governmental duties. This state of affairs was ameliorated by the 1946 Torts Claims Act in the United States of America, and by the 1947 Crown proceedings Act in England. Both of these acts permit the citizen to sue the government for damages in certain limited circumstances.[8] The Anglo-American courts exercise some additional control over the administration through the use of such concepts as constitutionality, reasonableness, due process of law (in England rule of law), and the _ultra vires_. But when it comes to questions of fact, or to the control of the decision making executive, these courts can do little.[9] Such a state of affairs is incompatible with the extensive increase in government activities. The need for some efficient means of control over administrative acts has been felt and proclaimed by many Anglo-American legal writers. Professor Hamson described this picture clearly when he wrote recently comparing the English system and the French system:-

> There is a most important, an increasingly important territory into which the writs of the High Court no longer effectively run,

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8. Henri Puget and Georges Maleville, _Le Revision des décisions administratives sur recours des administrés_, (Bruxelle, I.I.S.A., 1953), p. 36; also refer to James Hart, _An Introduction to administrative law_, 2nd edition, (New York, Appleton-Century-Crofts, Inc., 1950), p. 101; also Glanville Williams, _Crown Proceedings_, (London, Stevens, 1948).

9. Puget, _op.cit._, p. 37.

> if ever they did: a domain which in England the Executive has made its own, in which its own will is paramount and unsubjected to any kind of judicial supervision, or interference as it is called. This domain is in France the province of thé Conseil d'Etat. . . It seems to me essential to the survival of any rule of law in England that the executive be subjected to some rule of law. . . To allow the great and increasing power of the executive to be exercised against the individual arbitrarily . . . runs directly counter to that profound conviction of the paramount importance of a manifest justice which has created and informs our institutions. It is so important that this result be achieved, if the French have achieved it, surely we can achieve it better.[10]

To meet this important need of providing some control over the administration, administrative agencies with quasi-judicial functions have been developing steadily both in England and in the United States, and especially in the latter. The judicial functions of these bodies have been gradually increasing and over-shadowing their administrative functions. This tendency of an agency with both administrative and judicial functions to have its judicial functions preponderate is regarded by Waline as a natural tendency proved empirically by history.[10a] Besides Waline's "natural tendency" as a cause of such development, efficiency requirements and the specialized and complex activity of the administration have been important factors in the growth of these quasi-judicial administrative functions. Appeal from these bodies to the ordinary courts on questions of law is always possible.

In France the tendency has been consistently in the direction of special administrative tribunals. In fact, administrative law and administrative tribunals developed simultaneously in France, and this

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10. C.J. Hamson, Executive discretion and judicial control, (London, Stevens and Sons Ltd., 1954), p. 6.

10a. Waline, op.cit., p. 67.

may be one of the reasons why the term administrative law came to convey to many people only the part of administrative law dealing with the judicial controls over the administration.

The main administrative tribunal in France is the Conseil d'Etat. This council, which originally had mainly consultative functions, was first created by Napoleon in the constitution of 22 Frimaire An VIII, and it was inaugurated on the fourth of Nivose of the same year (December 25, 1799).[11]

It may be worth mentioning here that the French events were taking a course quite opposite to that taken by the events in England or in the United States. The administrative courts were instituted to prevent the encroachment of ordinary courts into the administrative fields. Prior to 1790, the French judicial courts, called Parlements, had direct jurisdiction over all administrative acts. These acts became executory only upon the approval of the Parlements, unless their decisions were vetoed by the king, who was considered the source of all power and justice. They had also the right to try any government official, and to contest the validity and advisability of any administrative act motu proprio.[12]

This state of affairs was an important obstacle in the way of any administrative attempt at reform before the revolution. Thus, one of the first steps in the post revolutionary reforms was the "law of separation of powers" of August 24, 1790. Article 13 of this law stated that the judiciary functions were to be always separated from the administrative functions.[13] This law prevented the judiciary from

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11. Le Conseil d'Etat, Livre Jubilaire, (Paris, Recueil Sirey, 1952), p. 31.

12. Waline, op.cit., pp. 41-42.

13. Ibid., p. 142.

interfering in any way with the executive. The only controls that remained over the administration between this period and the establishment of the Council of State in 1799 were the administrative appeals. Such a state of affairs was not satisfactory, especially after the seventh year of the revolution, when the administrators were no longer recruited by elections. Napoleon saw the deficiency, and unwilling to return to the prevolutionary practice of subjecting the administration to the control of the ordinary tribunals, he established the Conseil d'Etat to advise him on all matters of administrative adjudication. So the main idea behind the establishment of the administrative courts in France was the protection of the administration from the intervention of the ordinary courts. The Conseil d'Etat was thus originally an agent of the government. By slow evolution, however, this council had gradually changed from an agency for the protection of the interests of the government to an agency for the effective protection of the citizens against the arbitrary acts of the administration. This evolution culminated in the law of May 24, 1872, which separated the administrative function of the Council from its judicial function by establishing La Section du Contentieux (the judicial section), and by giving the Council the function of delegated justice.[14] This judicial section has developed ever since so that it now includes the majority of the members of the Council (42% of the councillors, 50% of the Maîtres de Requêtes, and 64% of the auditors).[15]

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14. M. Letourneur and J. Méric, Conseil d'Etat et juridictions administratives, (Paris, Armand Colin, 1955), p. 35.

15. Waline, op.cit., p. 67.

The Lebanese Council of State

This paper deals mainly with Lebanese administrative law; in fact it deals with a special branch of this law, which is the judicial control over the administration. The organization of the Lebanese administrative justice has been made after the French pattern. Unlike France, however, where there are provincial administrative courts of first instance alongside the Conseil d'Etat, Lebanon has never had local administrative courts; this may be justified by the smallness of Lebanon, both in size and population. There exist in Lebanon, however, some specialized administrative courts such as the Court of Accounts, the committees on taxes, and the newly created Special Administrative Tribunal.

The history of the Lebanese Council of State is one of continuous change and instability. Changes have been frequently introduced into it ever since its establishment in 1924 by an act of the French High Commissioner. Twice it was abolished and its functions turned over to the ordinary courts. Other modifications of its functions, jurisdiction, procedure and composition were also frequent. These changes were sometimes made to meet the special needs of the country, and at other times, they were introduced to serve the personal interests of the rulers. On the whole, the functions of the Council have been confined to administrative adjudication. Only once, in 1941, was it given the legislative function that has been continuously possessed by the French Council of State, namely that of the control and elaboration of the government bills and administrative decisions. The Lebanese Council was relieved of this function after exercising it only for a period of a few months by an arrêté of the French High Commissioner.

The history of the development of the Lebanese Council of State

may be divided into two periods:- 1. The mandate period, and 2. the independence period. During the first period the real authority was in the hands of the French High Commissioner, who could issue arrêtés having the power of law. It is true that Lebanon had throughout most of this period a representative assembly, but this assembly was never powerful enough to stand effectively in the way of the French authorities, or to pass a law distasteful to these authorities. Thus, it can be safely assumed that during the French period the Lebanese Council of State was framed and reshaped by the French authorities.

In the second period, that is, the period of the independence, changes continued to be introduced into the Council. These changes culminated in the establishment of a new council by a decree law in 1953.

In spite of these continuous modifications, the Lebanese Council has always had a certain degree of continuity, because its main functions and basic rules of procedure have not been affected very much by these changes. Even when its functions were taken over by the ordinary courts, these courts followed the rules of procedure of the Council of State when hearing administrative cases. There is one exception to this rule, however, namely the 1950 change that gave the damage suits to the ordinary courts to be heard according to the rules of civil procedure. In this case, the Lebanese Legislator may have been influenced by the similar Italian practice.

In the following chapters, I shall first discuss the development of the Council of State and of its functions from its establishment until our present day; then I shall try to evaluate this organ, primarily on the basis of its own achievements, and secondarily on the

basis of the achievements of similar organs in other countries. It may be worth mentioning here that a legal subject cannot be fully understood in isolation from the socio-political setting in which it works. So, I shall be referring to these fields where necessary, admitting that a full treatment of that subject is outside the scope of this paper.

The literature on the Lebanese administrative law in general, and on the Council of State in particular, is quite limited. Besides a few essays here and there, the main written sources on the subject are the laws and regulations and the reports of the cases heard by the Council. Besides these, I shall depend largely on personal investigations and interviews.

PART I

THE DEVELOPMENT OF THE LEBANESE

COUNCIL OF STATE 1924 - 1956

One of the most pronounced characteristics of Lebanese administrative life is the instability of its institutions. The Lebanese administration seems to be passing a trial and error period that has lasted for more than thirty years. An institution is created one day sometimes to be given a short period of trial, and at other times to be modified the next day, abolished the day after, and then recreated, remodified, and reabolished by a continuous flow of legislation.

The Council of State, like most other Lebanese institutions, has passed through this experience. In this part a full account of the stages of development of the Council is given. The many modifications that were continuously introduced into this institution and the several times it was abolished may be confusing. Reading through this part may thus be difficult and it may appear somewhat unrewarding to the casual reader. But a full understanding of the Lebanese Council of State, and a valid evaluation of its achievements throughout the last three decades require a thorough knowledge of the different stages in which this Council has passed. The present Lebanese Council is not the 1924 Council, nor the 1941 Council, nor the 1953 Council; and its achievements are not the achievements of any one of these. All of them are manifestations of the Lebanese Council of State in its different phases of development; and the achievements of the Council are the sum total and the synthesis of its achievements during these different phases.

CHAPTER II

The French Occupation and The First

Council 1918-1928

On October 24, 1918, the French authorities began issuing decisions and regulations reorganizing the part of Syria and Lebanon that they first called "the Northern zone of the occupied enemy's territory" and later the "Western Zone". This district included a large part of the present Lebanese territory and the Latakia district. This nomenclature continued until August 31, 1920, when the French High Commissioner, General Gouraud, declared the creation of the State of Greater Lebanon.[16]

On February 12, 1920, arrêté No. 1027 was issued, according to which the legal functions of the Ottoman Council of State were provisionally transferred, without modification, to the Supreme Tribunal performing the function of the court of cassation. The functions that this council had as an administrative court for the adjudication of civil servants were to continue to be held by the Délégué Administratif de la Zone Ouest. Decisions taken by the Ottoman Council of State prior to October 1, 1918 were to be enforced in all the territory of the Western Zone, and all cases arising after October 1, were to be dealt with according to the provisions of this arrêté.[17]

The Ottoman Council of State, was formed in 1866 after the pattern of the French Council of State. It had a judicial section and several administrative sections. Its main functions were: 1. to examine and

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16. Arrêté 318 of August 31, 1920, Recueil des actes administratifs du Haut Commissariat de la République Française, I, (1919-1920), p. 132.

17. Recueil des arrêtés et décisions du Zone Ouest, I, (1918-1920), p. 6.

prepare government bills and regulations, 2. to decide conflicts arising between the judicial and the executive branches, 3. to advise the sovereign and the various administrative departments, and 4. to act as an administrative court.[18]

On May 1, 1922, the French High Commissioner, General Gouraud, issued arrêté No. 1396[19] provisionally instituting the Conseil du Contentieux Administratif in Greater Lebanon. This council had been mentioned previously in Articles 67 and 68 of arrêté 1307 of March 10, 1922 concerning the elections of the members of the chamber of deputies, where it was given final authority over disputes concerning the validity of elections.[20]

According to arrêté 1396 the Council for Administrative Cases was to be composed of a president, two members, and a government commissioner. Adib Pacha, Sécrétaire Général du Grand Liban was appointed President, M. Laloe, Conseiller Judiciaire of Greater Lebanon, and Mr. Nessib Solh, Judge at the Court of Appeals, were appointed members. The Director General of the Interior was appointed Government Commissioner. In cases of impeachement of any member of the Council or of his absence, the Governor General of Lebanon, by a special order, appointed a substitute. Three members constituted a quorum. The decisions of this Council were to be final. The Council was to follow any procedure and methods of verification it deemed suitable.

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18. George Young, Corps de droit ottoman, Vol. I, (Oxford, at the Clarendon Press, 1905), pp. 1-26.

19. Recueil des actes administratifs du Haut-Commissariat de la République Française, III, (1922), p. 310.

20. Ibid., p. 195.

On September 11, 1924, General Vandenberg, Governor of Greater Lebanon, issued *arrêté* No. 2668 establishing a council of state in Lebanon and abrogating all previous orders incompatible with the provisions of the new *arrêté*.[21] According to this *arrêté* the Council, to be located at Beirut, was to be composed of a Lebanese president, of two members, one Lebanese and one French, and of two assistant members, *membres suppléants*, one Lebanese and one French. They were all to be appointed by the Governor, who would determine their salaries. The *membres suppléants* were not to participate in the decision making except in the absence of one or more of the original members.

The functions of this Council were: -

1. To give final judgement on all cases resulting from the execution of the public functions of the State; and particularly:

   a. cases dealing with direct taxes.

   b. cases dealing with the salaries and pensions of government employees.

   c. cases regarding the occupation of public property.

   d. cases dealing with indemnities for damages resulting from the execution of public works by the state or the municipalities.

   e. claims against government departments whether dealing with contracts or franchises for the establishment or administration of public services, or with any action of the state causing injury to others.

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21. *Lebanese Official Gazette*, (1924-1926), No. 1801.

f. claims made by the government departments against these contractors and concessioners.

2. To give final judgement on all disputes regarding the validity of elections for all the local councils.

3. To deliberate on claims of annulment for excès de pouvoir. The Council might annul a decision of the local councils or of the directors or heads of the public departments for one of four reasons: 1. violation of law; 2. formal error; 3. incompetence, and 4; abuse of authority (détournement de pouvoir). Action may be brought by any person claiming that he was adversely affected in his rights or interests by an executory administrative decision.

Actions seeking the annulment of the acts of the Governor General were to be brought to the Supreme Court at the Haut Commissariat. Cases of conflicts between the judicial tribunals and the Council of State were to be solved by the Court of Conflicts at the Haut Commissariat.

The details of the procedure to be followed by the Council of State were laid down by an arrêté of the High Commissioner[22] a few months after the establishment of the Council. According to this arrêté action is started by filing a petition with the clerk of the Council. The petition and all documents must be written either in Arabic or in French with certified translations into the other language. Cases contesting an administrative decision must be brought to the Council within a period of two months of the official notification of the decision to the plaintiff. If the decision is of such a

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22. Arrêté Réglémentaire No. 2979 of February 9, 1925, Lebanese Official Gazette, (1924-1926), appendix to No. 1850.

general nature that individual notification is not needed, the two months period is counted from the date of the official announcement or publication of the decision.

Upon receipt of the petition, the clerk gives it a serial number. Each page of the petition is stamped with the date of receipt. The petition, signed by the plaintiff or his counsel, must show the date at which the action is brought and the name, occupation, and residence of the petitioner. It must also contain a summary statement of the facts, the grounds on which relief is claimed, the relief sought, and a list of the supporting documents submitted with the petition. A number of copies equal to the number of defendants must be submitted with the petition. If the number of copies submitted is found insufficient, the petitioner is officially informed to submit the needed copies within a period of fifteen days. If he fails to do so, the Council will dismiss the petition.

After the registration of the petition at the office of the court, the President orders the notification of the defendants. In the mean time, he appoints one of the members or assistant members as a <u>rapporteur</u>, whose function is to study the case, determine the facts and report to the Council. All the briefs of the defendants are joined to the file and notified to the parties concerned. The file of the case is available to both parties at the office of the court; however, no document may be taken out of the court except for a specified period of time upon an order of the President, in accordance with a decision of the Council and by the consent of both parties.

If the parties are not residents in Beirut, they have to choose some domicile there, where they can be located.

When the <u>rapporteur</u> completes his study of the case he submits

it to the clerk who, after receipting for it in the official record of the court, transmits it to the President, who will fix and announce the date for the public hearing.

For determining the facts, the Council may appoint experts motu proprio or upon the request of a party. In such cases, each party chooses one expert, and a third is chosen by the court. The parties may agree to have only one expert. In this case, the expert is chosen by the parties if they both agree on one; otherwise the Council chooses him. These experts must take an oath before the Council or before some other body designated by the Council. Both parties are notified of the time when the experts will make their investigations. If the experts do not agree on a single decision, the dissentors may write their own opinions with the grounds on which such opinions were based. The experts' decisions are not binding upon the Council.

The parties may present witnesses on their own responsibility, or they may officially request the President of the Council to subpoena witnesses. In the latter case the parties concerned have to deposit a sum covering the necessary costs (witnesses fees, stamps, etc.). Evidence of relatives and servants is not accepted.

The Council may of its own accord or upon the request of the parties or of one of them, carry out on the spot investigation. The Council decides also to have this investigation made by all, some, or any one of its members. Both parties are to be notified of the dates and times when such investigatory visits are to be made. The result of the investigation is to be officially reported to the Council. The parties must be officially notified that they may view the reports on the investigations at the office of the Council. Copies of these reports may be secured for a fee.

If either party claims that a document is forged, the Council gives the other party a certain period of time either to withdraw the contested document or to insist on its validity. In the latter circumstance, unless the Council decides that this document has no bearing on the case at hand, it postpones the consideration of the case until the competent court decides on the validity of the contested document.

The sessions are public except when the Council decides otherwise for special reasons. Notification to both parties should take place at least one week before the day appointed for trial. The parties or their lawyers may supplement the written documents and petitions by brief oral statements. The Council may ask the representatives of the public agency concerned to appear for questioning in the public sessions. Decisions are taken in secret sessions that the assistant members do not attend. Three councillors including the President give the decision. This decision may be written in either French or Arabic; certified translations into the other language must be made.

For questions of procedure during trial, the Council applied Articles 35-40 of the Ottoman Law of Civil Procedure.[23] This law was abrogated on February 1, 1933, when the Lebanese Law of Civil Procedure was promulgated.[24]

Methods of Judicial Review

The decisions of the Council were subject to two main types of review:-

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23. The Arabic text of this law is found in Youssif Ibrahim Sader, ed., Collection of laws, 2nd ed., Vol. I, (Beirut, el-Ilmiyyeh Press, 1928), p. 203.
يوسف ابراهيم صادر ، مجموعة القوانين ، الطبعة الثانية — بيروت المطبعة العلمية ، ١٩٢٨ ، ص ٢٠٣
For the French text refer to Young, op.cit., Vol. VII, p. 171.

24. Decree-law No. 72 L of February 1, 1933, The Lebanese Official Gazette, (1933), No. 2988.

1. Requests for reconsideration made to the Council of State itself; these include three forms:

a. Opposition - i.e. appeal to the Council itself.

b. Tierce-opposition - i.e. opposition by a third party.

c. Recours en revision - i.e. a request for revision.

2. Appeal to the Supreme Court of Administrative Cases at the Haut Commissariat; this appeal had to be made in the form of a recours en cassation.

Below, I shall explain briefly each of these types of reviews:-

Recours en Opposition

Decisions of the Council given contumaciously could be contested by means of a recour en opposition. This means an appeal to the same court that issued the decision. Parties who submitted their written defenses and "**replies**" were not considered absent even though they did not attend the session in which the decision was declared, and so they could not have recourse to this action. This action automatically stayed the execution of the challenged decision unless that decision expressly stated otherwise. The action had to be taken within one month of notification of the Council's decision.

Tierce Opposition

Third parties who were adversely affected by the Council's decision could have recourse to this action, provided that these parties had not been previously notified of the case. This was the same as the Opposition, except that the Tierce Opposition was open to persons who were not party in the case, while the Opposition was open to parties who for some reason or another, had failed to attend the trial or to

submit their briefs to the court.

Recours en Revision

The third possibility for review was the *recours en revision*, i.e., a request for reconsideration. This was possible in the cases specified in Article 27 of the appendix to the Ottoman Law of Civil Procedure.[25] According to this Article a request for reconsideration was possible in the following circumstances:-

1. If the decision of the Council violated the principle of *res judicata*.

2. If the defendant had deceived the court by fraud or misrepresentation in a way that influenced the decision of the court.

3. If it was discovered that the court based its decision on false documents.

4. If important pertinent documents and facts were discovered that were not available to the court at the first trial.

The *recours en revision* had to be made within a period of two months after the Council's decision in the first case, or within two months after the discovery of the fraudulence, the false documents, or the new documents in the latter three cases. This action stayed the execution of the contested decision unless the defendant requested the execution and gave bond that was accepted by a special decision of the Council.

Recours en Cassation

The *Recours en Cassation* differs from the methods of review

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25. *Supra*, p. 21.

mentioned above in that it is an appeal not to the Council itself, but to a higher court; it differs from ordinary appeal in that the higher court does not decide the case, but it either approves the decision of the lower court or rejects it. In the latter instance the case is remanded to the lower court for further proceedings not inconsistent with the higher court's opinion. This action had to be made within a period of two months after the date of notification of the Council's decision when both parties were present, and within two months after the expiration of the statute of limitations for _opposition_ in _ex parte_ proceedings.

The _recours en cassation_ against the Council's decisions were to be taken to the _Conseil Supérieur du Contentieux_ at the _Haut Commissariat_. This tribunal was established by an _arrêté_ of the High Commissioner a few days after the establishment of the Council of State.[26] It was to be composed of the highest French magistrate in Lebanon as President, of the Assistant Secretary General and an official of the _Haut Commissariat_, chosen by the President from a list prepared by the Commissariat, as members, and of a secretary. In case of need, the President might be displaced by a French councillor from the Lebanese Court of Cassation. The main functions of this tribunal were:-

1. To hear the _recours en cassation_ against the decisions of the Council of State in Syria and Lebanon. Such cases could not be accepted except for violation of law, formal error, or incompetence.

2. To hear _recours en annulation pour excès de pouvoir_ against the decisions of the governors or the presidents of these states.

3. To hear all administrative cases concerning the Departments

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26. _Recueil des actes administratifs_, _op.cit._, V (1924), p. 340.

of Customs, the Office of the Protection of Industrial and Commercial property, the Quarantines, and all cases arising from the High Commissioner's regulations concerning the Post Office Departments. All these services were of vital importance, especially because their activities extended beyond the Lebanese territory; that is why they were kept under the direct control of the French High Commissioner.

4. To hear all cases brought against the concessionary public services and their activities.

5. To advise the French High Commissioner on various other issues.

This Superior Council never came into being,[27] and it seems that the French High Commissioner and his assistants assumed its functions throughout the mandate period.

Cases of Elections, Excès de Pouvoir, and Direct Taxes

The arrêté establishing the 1924 Council of State gave special rules of procedure for administrative cases concerning elections, annulment for excès de pouvoir, and direct taxes. These special rules have been kept, with little change, in the rules of procedure of all subsequent Lebanese councils of state. Below, I shall describe briefly these rules as given in the 1924 Council.

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27. Fuad Chebat, Syrian and comparative administrative law, 1948, p. 197.
الدكتور فؤاد شباط، الحقوق الادارية السورية والمقارنة، دمشق مطبعة الجامعة السورية — ١٩٤٨، ص. ١٩٧ .

1. Cases concerning elections

Anybody who is eligible to vote or to be elected in a certain constituency may file a petition contesting the result of the elections within ten days of the official announcement of the results of the elections. The Governor also may file such a petition with the Council of State within a period of one month. The persons whose election is thus contested must be notified by the President of the Council; they have to file their briefs with the Council within ten days of their notification. The Council's decision is final and not subject to any form of review whether or not the defendants have filed their briefs.

2. Excès de pouvoir

All petitions seeking annulment of acts for excès de pouvoir must be immediately communicated by the President of the Council to the director of the public department concerned. Within one month of his notification, the director must file the briefs of the case with the Council. If he fails to do so within that period of time, the Council hears the case without waiting any longer for the answer.

The decisions of the Council rejecting the petitions about elections and excès de pouvoir are not enforceable except against the plaintiff; decisions of annulment, on the other hand, are absolutely enforceable. Thus, the rejection of the Council of an action for annulment or of an action contesting the validity of the election of some one, does not imply that the contested act is legal or that the challenged election is valid. The Council's rejection of the case may be due to some formal error in the required proceedings, or to that the petitioner is not qualified to bring action. Another petitioner

may have a better case, or he may be more successful in proving to the Council that he has a good case.

If, on the other hand, the plaintiff wins such a case, the Council declares null the contested act. This means that the act is applied no more not only with respect to the plaintiff, but also with respect to all other persons.[28]

3. Direct taxes

Recours en matière de contributions directes, that is, petitions against the assessment of direct taxes, must be brought to the Council within thirty days of the publication of the tax assessments; these petitions must be made on a special form that can be secured from the Ministry of Finance. The petition is filed with the highest financial official in the district of the petitioner. In Beirut, it should be filed with the chief comptroller. The finance official, after making any necessary investigations, should submit the file of the case including his own report and comments to the highest administrative official in the district within a period of twenty days from the date of his receipt of the petition.

This higher official adds his comments and transmits the file to the Ministry of Finance. The Ministry puts down its conclusion and turns the case over to the Council of State where the case is registered without any fee. The Council must give its decision within one month

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28. The Lebanese legal provisions correspond in this respect to the French case law - see Léon Duguit, Traité de droit constitutionnel, 2nd ed., vol. 2, (Paris, Ancienne Librairie Fonte moing, 1924-1928), p. 496.

of receipt of the case; however, such petition does not stay the collection of the disputed tax.

The costs

The court costs were to be borne by the losing parties; where the circumstances of the case so required, the costs might be distributed, evenly or in any suitable proportion, among the different parties. These costs were fixed and announced in the Council's decision. Briefs had to be made on stamped paper; electoral cases and briefs of the administration were free of charge.

When the Council, or some of its members, left their posts to carry out on the spot investigations, they were entitled to a transfer allowance ranging from 80 to 120 piasters daily plus increments for higher cost of living.[29]

A fee of 2% was charged if the matter in dispute could be assessed in terms of money; otherwise a charge of one Lebanese pound in cases of *excès de pouvoir*, and of five Lebanese pounds in other cases, was imposed. In all cases half the fee had to be deposited at the time of filing the petition.[30]

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29. *Arrêté* No. 640, of July 9, 1924, in *Recueil des lois et décrets du Grand Liban*, III (1924-1925), p. 105.

30. A Lebanese pound was officially equivalent to a quarter of an English gold pound, or to $1.25; *arrêté* 2831 of September 4, 1924, *Ibid*., 316; the salaries of the councillors at that time ranged from 75 to 120 Lebanese pounds; now they range from 960 to 1440 pounds.

CHAPTER III

The Reorganization Period,

1928 - 1939

The Council of State continued to function from September 11, 1924, until March 24, 1928 when the President of the Republic promulgated a law abolishing it.[31]

According to this law, the functions of the Council of State were to be taken over by the Court of Cassation, whose decisions were to be final. All actions brought against the administration concerning contracts and concessions, and cases of excès de pouvoir against presidential decrees or ministerial acts were to be heard by the General Assembly of the Court of Cassation, made up of at least five of its members.

The main reason for the abolition of the Council seems to have been a financial one. In its message introducing this bill to the Chamber of Deputies,[32] the government stated in justification of its proposal that in fulfilment of the policy of economy adopted in its program, the government found that it was possible to turn over the duties of the Council of State to the Court of Cassation. This, the government added, would make the bill introduced in the Chamber by decree No. 684 of October 29, 1926, unnecessary because the new bill gave the General Assembly of the Court of Cassation the power to hear cases of excès de pouvoir against the decisions of the President and

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31. The Lebanese Official Gazette, (1928), No. 2152.

32. Proceedings of the Chamber of Deputies, (1927-1928), session of March 9, 1928.
مجلس النواب، العقد التشريعي الثاني، (١٩٢٧ ــ ١٩٢٨)، جلسة ٩ آذار ١٩٢٨ .

the ministers.[33] The message stated further that the government appreciated the importance of the separation of administrative justice; however, the administrative courts in countries adopting such system are staffed with experienced administrative officials especially trained for this function; in Lebanon, on the other hand, the ordinary judges were appointed to administer justice in the administrative courts; so, the government believed that giving these functions to the Court of Cassation would by no means lessen the validity of the decisions. The savings from such an arrangement, the message continued, would amount to 3408 Lebanese pounds, the sum allocated to the Council of State in the budget. None of this sum would be needed because the Court of Cassation could handle its new functions without any addition to its staff.

The Parliamentary Judicial Committee found that the docket of the Court of Cassation was not overcrowded and that it had only 358 still undecided civil and criminal cases; the committee felt sure that the court could easily take on the administrative cases in addition to its ordinary work. It reported favourably on the bill recommending its acceptance with one modification. The second Article of the bill was modified to include cases dealing with the contracts and franchises

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33. Decree 684 mentioned above introduced a bill for modifying arrêté 2668, concerning the Council of State, to give this Council jurisdiction over presidential decrees. All government bills are introduced to the Chamber by decrees in the following form: "The President of the Republic, in accordance to the Lebanese Constitution, upon the recommendation of the President of the Council of Ministers, and after hearing the Council of Ministers, decrees the following:
1. A project law on . . . is transmitted to the Chamber of Deputies.
2. The President of the Council of Ministers must execute this decree.

The decree is then signed by the President of the Republic, the President of the Council of Ministers, and the Minister concerned (e.g. in this case the Minister of Justice).

among the category of cases to be decided by the General Assembly of the Court, "because of the great importance of those cases, and because the decisions of the Court were to be final."

The Prime Minister at that time, Sheikh Bshara el-Khoury, agreed to the modification, but requested that it be mentioned in the law that five members instead of seven would be enough to constitute the General Assembly. The Prime Minister explained the necessity of this provision by saying that the law of July 20, 1926,[34] providing that seven members constituted a general assembly, was made when the Court of Cassation was composed of nine members, seven Lebanese and two French; but after the Law of February 17, 1928[35] reorganizing the judiciary, the Court of Cassation was to be composed only of seven Lebanese members, and so five of them would be enough to constitute the General Assembly. The Prime Minister's suggestion was accepted and the law was passed. The only deputy who opposed was Habib Basha es-Sa'ad who later became President of the Republic (from 1934-1936).

By decree-law No. 6, of December 4, 1930, the Court of Cassation was merged into the Court of Appeal, and the functions of the Council of State were turned over to the Chamber for administrative cases of the combined court, called the Court of Cassation and Appeals. Article 55 of this decree law states that cases of _excès de pouvoir_ against the actions of the President and of the ministers were to be decided by five judges; other cases, by three judges.[36]

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34. _Lebanese Official Gazette_, (1928), No. 2152.

35. _La Revue Juridique_, _op.cit._, VIII (1928), p. 19.

36. _Recueil des arrêtés_, _op.cit._, III (1929-1930), p. 73.

The Court of Cassation was reestablished by arrêté No. 178 LR of August 10, 1934, reorganizing the judiciary.[37] It was to be composed of two sections - The Civil and Commercial Section, and the Criminal Section. It had two presidents, one Lebanese and the second French, and seven members, four Lebanese and three French. Counsel was obligatory. Administrative cases were to be taken over by the Civil and Commercial Chamber.

On September 16, 1939, arrêté No. 239 LR was issued modifying arrêté 178 LR mentioned above, and reorganizing the judiciary for the war period.[38] According to this arrêté, the Court of Cassation was abolished, and administrative cases were to be decided by civil courts according to the laws of civil procedure, except in cases of recours en annulation pour excès de pouvoir raised against the acts of the President of the Republic and in electoral cases, both of which were to be brought to the Civil Section or to the Mixed Section in the Court of Appeals.

On November 22, 1939, a Supreme Council of State was reestablished to be an administrative court of first and last instance.[39] It was to be composed of a president, two rapporteur judges, a Government Commissioner, and a General Assistant. If one of the litigating parties was a foreigner, the President and one member were to be displaced by a French president and a French member.

The new council was to apply the laws and the procedure of the

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37. Recueil des lois et decrets de la République Libanaise, VII (1934), p. 75.

38. The Lebanese Official Gazette, (1939), No. 3725.

39. Article 18-21 of arrêté No. 324 LR of November 22, 1939, Ibid., No. 3747.

1924 Council of State as given in arrêtés No. 2668 and No. 2979 mentioned above.[40] Thus, by 1939 Lebanon was again given a court for administrative adjudication separate from the ordinary court system. This court, however, was even more short lived than its predecessor, the 1924 Council of State. We shall see in the following chapter how, less than two years after its establishment, this Supreme Council of State was abolished and a new Council of State was created.

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40. Supra, pp. 17-18.

CHAPTER IV

The War Period and The Second Council

At the outbreak of the Second World War, Lebanon was still in the midst of the long interval of changes and modifications in her court system. We have seen that the Lebanese Council of State was finally reestablished a few weeks after the outbreak of the war, on November 22, 1939.

Conditions remained unchanged until April 21, 1941, when General Dentz, French High Commissioner during the Vichy régime, established a new Council of State in Lebanon,[41] and cancelled arrêtés 2668 and 2979 concerning the establishment and organization of the 1924 Council. Article 21 of arrêté No. 324 LR mentioned above[42] stating that in case one of the parties was a foreigner the Lebanese President and one member would be displaced by two French judges, was also abrogated.

The newly created Council of State differed from its predecessor in some important respects:

First and foremost, Article 7 of the arrêté creating the Council of State defines it as "an administrative body charged with the control and the elaboration of the legislative and the regulatory texts (textes réglémentaires), and with the function of an administrative court."

Thus for the first time in the history of Lebanon, the Council of State was given a legislative function in addition to its judicial function. However, the Council did not retain its new function for

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41. Arrêté 89 LR of April 21, 1941 in Lebanese Official Gazette, (1941), No. 3892.

42. Supra, p. 32, footnote 39.

long; after a few months this new function was abolished by a special decree-law.[43] During that period the Lebanese constitutional life was suspended by the French High Commissioner for exigencies of war. The Council was relieved of its new legislative functions before the restoration of constitutional life and hence before it was possible to put those functions into full application.

The newly established Council of State was to be directly attached to the office of the President of the Council of Ministers. It was to be composed of a president, three councillors, and three assistants. The qualifications for membership were given in detail. All members were to be Lebanese, (the previous Council had French members),[44] over forty years of age, graduates in Law, and of good character. No one who had been convicted for a felony or for an infamous crime might be a member.

The councillors were to be appointed by a decree of the Council of Ministers and not by the Governor as in the previous Council. They had to be judges of the first or second class, or professors at the school of Law for at least ten years, or lawyers admitted to practice at the Court of Appeal for at least ten years, or Assistant Governor Commissioners for at least six years. The Assistant Councillors to be appointed by decree from the first or second class judges, were not considered as members of the permanent cadre of the Council.

Councillors could not have any other position or salaried public office. They were to have the same rank as the heads of chambers in the Court of Appeal; they were to be subject to the same laws controlling

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43. Infra, p. 50.

44. Supra, p. 17.

the judicature with the following reservations:-

The President and the councillors could not be tried except by a special disciplinary body consisting of a president who had to be the President of the Council or his substitute, of a member of the Council, and of a judge from the Court of Appeals appointed by the First President of that court.

Felonies and offences committed by councillors when off-duty were to be dealt with in the ordinary way provided that the Prosecutor General informed the "head of the government"[45] about such incidents within twenty-four hours of their occurrence. Councillors committing such crimes when on duty could not be prosecuted except by authorization of the disciplinary council. If arrest was urgently needed for reasons of public safety, the head of the government might authorize it.

Any court decision concerning a councillor whether one of conviction or acquittal was to be reported to the disciplinary council, which would, in the light of that decision, give its final judgement about the future of the concerned councillor.

Any councillor under trial in a court was to be suspended provisionally by the head of the government; a councillor under trial in the disciplinary council might also be suspended by the head of the government upon the proposal of the rapporteur of the disciplinary council.

The new Council had a Government Commissioner and an Assistant Government Commissioner. The Commissioner had the function of public prosecutor in all administrative cases; he was also qualified to give

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45. The head of the government is the President of the Council of Ministers.

his opinion on all legislative matters presented to the Council. He had to be of French nationality and was appointed by a decree upon the recommendation of the Inspector General of Justice.

The Assistant Government Commissioner, appointed by a decree from the judges of the third, fourth, or fifth class, could take the function of public prosecutor in the absence of the Government Commissioner; but he could not substitute for the Government Commissioner in the General Assembly of the Council of State, which was to be composed of the president or the _rapporteur_ as president, and of the Government Commissioner, a member of the Council, an assistant member, a member of the Court of Appeals or a professor at the School of Law to be appointed for one year upon the recommendation of the Inspector General of Justice, and of a member from the Permanent Accounting Commission or an Inspector of Finance to be appointed by a decree for a period of one year.

This assembly might be supplemented by adding to it some high government officials appointed by the head of the government to participate in the study of cases related to their departments. These temporary members had the right of voting, but not more than two of them might participate in one session.

The Secretariat of the Council was to be composed of a chief clerk, a translator, a clerk, a typist, and a court crier, all to be appointed by decrees.

The Functions of the New Council

The functions of this Council were divided into two parts; the legislative functions and the judicial functions.

The Legislative Functions

The issues on which the government was to consult the Council were of two types; in one type, consultation was obligatory, and in the other it was optional:[46]

1. The government was required to consult the Council on all government bills and general administrative rules and regulations issued to supplement skeletal legislation. In case of conflict between the government and the Council the head of the government had to ask the Council, within fifteen days of its first decision, to review the case; the government was not, however, bound by the second decision of the Council.

2. The government might seek the advice of the Council on all drafts of regulatory decisions or of administrative contracts, on all projects of circulars and administrative instructions of a general nature, and on conflicts of jurisdiction between different agencies.

The Council deliberated on legislative matters upon the demand of the head of the government. These matters were to be studied and reported on by the President or a member appointed by him. The report and the file of the case were then to be handed over to the Government Commissioner, who had to put down his observations and then turn the complete file back to the President of the Council. Then the case would be discussed by the General Assembly of the Council of State, which was to be convoked by the President. Decisions were to be taken by majority votes and in case of a tie the President would have a casting vote.

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46. This is similar to the French practice; refer to De Laubadère, Traité, op.cit., p. 263.

The sessions were to be always private; and the proceedings, written by the *rapporteur*, were not to be published.

The legislative procedure of the Council was modified on June 6, 1941, by *arrêté* No. 133 LR.[47] The new modification was concerning urgent cases. If the head of the government deemed a case urgent and the French High Commissioner agreed, the Council of State had to give its opinion within four days; in case of conflict between the government and the Council on a case declared urgent, the head of the government might ask for an immediate second deliberation on the case by the Council; in such instances the Council had to give its decision within twenty-four hours.

The Judicial Functions

The judicial functions of the 1941 Council were, on the whole, similar to those of its predecessor. There are, however, a few important differences both in jurisdiction and procedure. I shall attempt hereby to point out these differences, implying that what is not mentioned remained unchanged.

First, the new law makes an important reservation concerning the jurisdiction of the new Council: Article 30, the first Article in the section dealing with the administrative functions, states that the Council of State is the ordinary administrative tribunal for all administrative cases dealing with the structure, organization, and functioning of public agencies to which the law does not assign a special administrative

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47. *Lebanese Official Gazette*, (1941), No. 3895.

court. This proviso is a new one, and it, in a sense, makes the Council of State the common law court for administrative cases.

The Council was given the new function of hearing cases for annulment of decisions based upon the recommendations of administrative disciplinary committees; however, decisions based upon the recommendations of disciplinary committees for judges and assistant judges could not be contested before the Council of State. This new function had been performed by the previous Council as an ordinary *recours pour excès de pouvoir*, though it was not specifically provided for as in the present *arrêté*. Annulment of decisions in disciplinary cases was possible only for reasons of incompetence or of violation of law or regulations. The Council could not rehear the facts of the case or the culpability of the civil servant. Such appeals had to be made by the civil servant concerned within ten days of his notification. Administrative acts referring the civil servant to a criminal court could not be contested before the Council of State.

The Council was also given the new function of accepting petitions for the interpretation of an administrative act, (*recours en interprétation*). The judicial courts had to postpone the deliberation upon any case requiring such an interpretation; the interested party was to bring such a case to the Council of State whose decision was binding on the courts.

The judicial section of the Council was to be composed of the President or his substitute, and of two members or assistant members. The President or the member who studied and reported on the case would not participate in giving the Council's decision.

The interval after which the silence of the administration to an application was considered an implicit rejection was reduced from four to two months.

An important innovation is the necessity of appointing a lawyer. The affidavit naming counsel had to be submitted together with the petition. The petition had to include also a certified copy of the contested decision, or in case of an implied rejection, the official receipt of the application submitted to the administration. No mention is here made about the language in which the petition was to be made, and the implication is that petitions could be made in Arabic or in French.

All legal points and supporting arguments were to be mentioned in the initial petition. All new requests and legal points brought to the Council during the course of trial would not be considered. However, the Council might consider legal points of public interest even if they were not mentioned in the petitions. Petitions did not stay the execution of the contested administrative acts except when the Council, upon a formal request of the interested party, ordered the staying of the execution. The Council gave such an order if it found that grave harm would result from the execution of that act, and that the petition was based on serious and important reasons.

The case had to be turned over to the _rapporteur_ within three days of the submission of the petition to the Council. There was no specified limit in the previous Council.

The authority of the _rapporteur_ was also increased by the new _arrêté_. The President himself might act as _rapporteur_. The _rapporteur_ could order the carrying out of any investigation he deemed helpful; he also notified the defendants and fixed the dates for receiving the

pleas and replications. His decisions concerning the performance of investigations were to be given in the form of interlocutory decrees that could be appealed by the party concerned to the Council; in this case the Council had to hear the case in a private session in which the *rapporteur* participated, and to give its final judgement within a period of eight days. If the Council found that the appeal was not founded, and that it was made just to stay execution, it would penalize the plaintiff in appeal with a fine of twenty-five Lebanese pounds. A deposit of this fine had to be made at the time of filing the appeal with the Council.

When all the information was complete, the *rapporteur* had to send the case to the Public Prosecutor. The judgement of the Council had to be given orally at the first session; however, the President could, upon the request of one of the defendants, postpone the declaration of the judgement until a subsequent session if the request was justifiable.

The new Council was competent to hear cases concerning any administrative acts including those of the President of the Republic; the latter's acts could not be heard before the previous Council and petitions concerning them had to be taken to the Supreme Court of Administrative Cases.[48]

There were four possible ways of review for the decisions of the new Council. Three of them were the same as those of the previous Council, namely, *Opposition*, *Tierce Opposition* (i.e. appeal by a third party), and Revision.[49] The new way of review was the petition requesting the

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48. *Supra*, p. 18.

49. *Supra*, p. 21-22.

correction of a formal error in the decision of the Council.

Article 70 gave four grounds on which a recours en revision could be made. (In the 1924 Council the grounds were those found in the Ottoman Law of civil procedure).[50]

1. When the court decision was based on false documents.

2. When one of the parties was sentenced because he could not present to the court an important document held by the opponents.

3. When the investigation and the judgement were not made in accordance to the prescribed legal form and procedure.

4. When the Council omitted the consideration of a legal point raised by one of the parties.

A fine of fifty Lebanese pounds was to be imposed on any party that lost a recours en revision. This, no doubt, deterred people from attempting this remedy except when they were reasonably sure of the grounds on which they based their petition.

An important difference from the previous Council was the fact that decisions of the new Council could not be appealed in cassation as was the case in the previous Council.[51]

Another innovation was the introduction of summary procedures. The same rules of ordinary procedure applied to summary procedures with the following exceptions:

1. A private party might bring a damage suit to the Council without the existence of a previous administrative act.[52]

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50. Supra, p. 23.

51. Supra, p. 21.

52. that is, without the necessity of establishing the dispute with the administration.

2. The plaintiff was exempted from paying the required deposit and from appointing legal counsel, but the Council could not suspend execution in these cases.

3. The *rapporteur* had to study the case in the shortest possible time and his interlocutory decisions were not susceptible to appeal. The defendants had to turn in their briefs within a period ranging from eight to fifteen days.

4. The *rapporteur* had to write a brief report and send it along with the file of the case to the Prosecutor General whose answer had to be sent to the Council within eight days.

The cases in which summary procedure was applied were:

1. All damage suits (R.P.J.),[53] provided the disputed sum did not exceed fifty Lebanese pounds. The value of the dispute would be determined by the President of the Council either of his own accord or upon the request of one of the parties.

2. Cases concerning the validity of elections to local councils.

3. Cases concerning the decisions of disciplinary committees.

4. Cases concerning the interpretation of the validity of an administrative act.

The President might, on the request of one of the parties and the consent of the Prosecutor General, by a special decision, apply summary procedure to the *recours pour excès de pouvoir*, if such action would not prejudice the rights of the other party; the existence of a previous administrative act, however, remained a requirement.

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53. *Supra*, p. 17.

A new ground for annulment of a decision *pour excès de pouvoir* was violation of the *chose jugée*. The other four grounds remained unchanged.[54]

As in the previous Council, the costs were to be borne by the losing party. These costs consisted of three items: the fees for judicial proceedings, the expenses of investigation (e.g. expert's fees and witnesses fees), and fines.

An important innovation was the establishment of the Committee of Judicial Assistance whose function was to decide upon the exemption of poor litigants from paying all or part of the required fees. This committee was to be composed of a president who was to be appointed by the President of the Council from among its members, a representative of the Ministry of Finance who was to be appointed by the Director of Finance, and a lawyer appointed by the Council of the Bar Association.

Another important innovation was the requirement that the President of the Council had to send a yearly report to the head of the government; in that report the President had to give a full account of the Council's work for the year with the number of cases received and decisions given; the report also had to include the Council's opinion about the functioning of the government departments as reflected from the cases heard by the Council, and the suggestions for reform which the Council deemed desirable in that light. No such report, however, was ever made because this provision was cancelled a few months later.[55]

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54. *Supra*, p. 18.

55. *Infra*, p.

The Mixed Tribunals

The abrogated article concerning the appointment of a French president and a French member when a foreign person was one of the litigants before the Council[56] was soon replaced by a new article to the same effect: on April 30, that is one week after the abrogation of this article by *arrêté* 89 LR, the French High Commissioner issued a new *arrêté* stating that the above mentioned abrogated article was to be supplanted by a new article providing for the appointment of a French president for the Council whenever the case involved "a real foreign interest."[57] The new article added that if a French majority was requested *in limine litis*, that is at the beginning of the trial, another French member would be appointed in place of one of the two Lebanese members. These French judges were to be appointed by the Inspector General of Justice whenever their services were needed.

The subject of mixed courts and of special immunities given to foreigners had been a serious and continuous problem throughout the French period. In fact, the system was a modified continuation of the capitulations that prevailed in this part of the world during the Ottoman period. Many changes were being constantly introduced by the French into the system of mixed adjudication. The first act on this matter was *arrêté* 1109 of November 16, 1921 creating in Syria and Lebanon special courts by the name of *Juridictions des Causes Etrangères* for cases involving

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56. *Supra*, p. 34

57. *Arrêté* No. 97 LR, *The Lebanese Official Gazette*, (1941), No. 3891.

foreigners.[58] These courts, composed of French and native judges, were to be responsible directly to the French High Commissioner. The publication of this arrêté produced a wave of disappointment. A general strike was proclaimed by the lawyers, and many protests by the Bar Association and by different legal bodies were sent to Paris. But these protests were to no avail, and on July 7, 1923, arrêté 2029 was issued abrogating arrêté 1109 and imposing direct French control over the Lebanese courts.[59] According to this arrêté, the Beirut courts of first instance and of appeal, and the Lebanese Court of Cassation were to be presided over by a French magistrate whenever one of the litigants was a foreigner; a French majority could also be requested in such cases.[60] These mixed courts were implicitly given jurisdiction over administrative cases involving foreigners.[61] A few months later, on October 13, 1923, the French High Commissioner abolished the old capitulations system,[62] and consequently all cases involving a foreign interest fell within the jurisdiction of the newly established mixed courts.

The Lebanese courts experienced a more direct control two years later, when on March 9, 1925, permanent French members were appointed to the Court of Cassation, the Court of Appeals, and all Lebanese courts

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58. Recueil des actes administratifs, op.cit., II (1920-1923), p. 416.

59. The Lebanese Official Gazette, (1924-1926), No. 1698.

60. Arrêté 2028 of the same date provided the same system for the Syrian courts.

61. Fouad Chebat, Les étrangers devant la justice en Syrie et au Liban, (Paris, Librairie du Recueil Sirey, 1938), p. 198.

62. Arrêté No. 2226, The Lebanese Official Gazette, (1924-1926), No. 1708.

of first instance.[63] These members were to participate in hearing not only cases involving a foreign interest, but also all other cases. By subsequent laws and arrêtés, beginning with the law of February 17, 1928,[64] the Lebanese courts were gradually freed from permanent French members; the latter were resorted to only when a foreigner was involved in the case. A full account of this subject is outside the scope of this paper; what is important, however, is its pertinence to the administrative adjudication.

The Council of State followed almost the same pattern of the other Lebanese courts in its composition. The first Council had permanent French members, and a French majority could be requested in certain cases.[65] When the Council was abolished in 1928 and its functions were taken over first by the Court of Cassation and later by the Court of Cassation and Appeals, the practice of having French members, when a foreign interest was involved, was extended to include the administrative cases. We have seen that the same practice was provided for in the 1941 Council. This system of mixed adjudication continued in force for some time after independence. On December 31, 1946 a "very urgent" law[66] was passed abolishing the mixed courts and abrogating all previous laws conflicting with the new law;[67] among the abrogated regulations was arrêté

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63. Arrêté No. 69, of March 9, 1925, in the Lebanese Official Gazette, (1924-1926), No. 1854.

64. The Lebanese Official Gazette, (1924-1926), No. 2142.

65. Supra, p. 17.

66. A "very urgent bill" is one that is debated and voted directly in the Chamber without conforming to the ordinary time consuming procedure of preliminary study by the parliamentary committee concerned. An "urgent bill", on the other hand, is studied by the parliamentary committee, but it is given priority over the other bills.

67. Lebanese Official Gazette, (1947), No. 2.

97 LR,[68] which provided for a mixed tribunal in the 1941 Council of State. And thus at long last, Lebanon was relieved of this burden that dominated its courts during both the Ottoman and the French régimes;[69] the Lebanese courts have finally become completely independent with a full jurisdiction over all the Lebanese territory. Such a state of affairs is essential for the dignity of an independent country.[70]

The 1941 Council Reshaped

The 1941 Council was not destined to remain undisturbed for a long time. About eight months after its formation, changes began to be introduced into it; some of these changes were really drastic.

The First Change

The first change came on December 15, 1941 when decree law No. 126/NI[71] was promulgated by the President of the Republic on the basis of General Catroux's declaration of the Lebanese Independence on November 26, 1941, making the Council of State a part of the Judiciary and attaching it to the Ministry of Justice with the function of judging administrative cases.

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68. *Supra*, p. 46.

69. For a full account of the debate of this law in parliament refer to the *Proceedings of the Lebanese Chamber of Deputies*, (1946-1947), p. 216.

70. For a full historical account and legal analysis of the subject of foreign adjudication in Syria and Lebanon, refer to Chebat, *Les étrangers*, *op.cit*.

71. *Lebanese Official Gazette*, (1941), No. 3950.

The Second Change

On January 28, 1942, another decree law was issued abrogating Articles 1-29 and 100-105 of decree 87 LR.[72] Articles 1-29 defined the Council of State, its structure, and its legislative functions. Articles 100-105 contained the requirement that the Council had to send the yearly report explained above, and a few other transitory provisions.

This decree law may be considered a law establishing a new Council of State. According to this decree the Council was to be composed of a president and three councillors; decisions were to be taken by three members; the Council was to be helped by a government commissioner; it was to be an administrative court attached to the Ministry of Justice. Its members were to be considered as part of the judiciary and subject to the same regulations. The modified council could be asked by the government to give it advice on legislative texts and on the interpretation of laws, but in such instances the Council was to have only a consultative capacity.

The judicial functions of the Council, as defined in Articles 30-98 of *arrêté* 87 LR establishing the 1941 Council, were retained with the following modifications:-

1. The government was given the right to bring a *recours en opposition* in case it did not send its defense in time for the first trial. (Both the 1924 and the 1941 *arrêtés* did not give this right to the government).

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72. Decree-law 1371, *The Lebanese Official Gazette*, (1942), appendix to No. 3960.

2. The French judges were to be appointed by the Minister of Justice and not by the Inspector General as in the previous Council.

3. The costs that were to be decided according to a schedule to be made by the President of the Council and promulgated by a decree, were to be determined in accordance with the ordinary regulations regarding the judicial fees.

4. The actions contesting the assessments of direct taxes were modified. This subject will be discussed separately later on in this paper.[73]

The Third Change

On December 10, 1942, a decree law modifying the procedure followed in the Council of State was issued.[73a] According to this decree, Articles 59-62 of *arrêté* 89 LR were abrogated. These Articles stated that Council had to hold public sessions for hearing the parties and for giving its decisions. According to the new decree law both the deliberation and the giving of the decision had to be made *en chambre du conseil*, i.e. in private sessions. The parties were to be notified of the deposit of the *rapporteur*'s report and the government commissioner's observations at the Council's Secretariat. They had to send their written briefs within a period of five days from the date of their notification. The Council's decision was to be based on the *rapporteur*'s report and the other papers and documents of the case.

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73. Infra, p. 104.

73a. Decree Law No. 267 NI, of December 10, 1942, *Lebanese Official Gazette*, 1942, No. 4052.

The Fourth Change

On October 10, 1944, a law was promulgated reorganizing the judiciary. According to this law, the members of the Council of State were no longer to be considered as members of the judicial cadre.[74]

With the exception of the abolition of the Mixed Council in 1946,[75] no changes were introduced to the Council of State as it stood on October 10, 1944, until May 10, 1950. The Council was during this period an independent body attached to the Ministry of Justice. Its function was that of a supreme administrative court, with a mere consultative capacity on legislative matters, to be exercised at the option of the government.

The actual achievements of the Council during this period will be left to another chapter; and now we turn to trace the development of the Council from May 10, 1950, until today.

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74. The Lebanese Official Gazette, (1944), appendix to No. 45.

75. Supra, p. 48.

CHAPTER V

The Post War Development And

The 1953 Council

On May 10, 1950, a law was promulgated reorganizing the Lebanese Judiciary. According to this law, the Council of State was again abolished and its functions were divided between the Court of Cassation newly created by this law, and the ordinary courts.[76] The Court of Cassation[77] was to hear cases of excès de pouvoir and electoral cases; when performing this work, it was to follow the same procedure that used to be followed in the Council of State. The courts of first instance were to hear all administrative cases of pleine juridiction according to the rules of ordinary procedure.

It is interesting to mention here that this division of jurisdiction was strictly legislative in origin. The original bill that was referred to the House of Representatives by decree No. 732 of December 23, 1949, had given the Chamber of Administrative Cases of the Court of Cassation all the functions of the Council of State. The parliamentary committee that studied the bill modified it by dividing the functions of the Council between the two courts in the manner explained above.[78]

In justification of the abolition of the Council, the government maintained that the Council of State is a French institution that is justified in France on the basis of the doctrine of the separation

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76. The Lebanese Official Gazette, (1950), appendix to No. 19.

77. This newly created court had the function not only of approving or quashing lower courts' decisions, but of rehearing cases and giving new decisions, ibid.

78. The Proceedings of the Chamber of Deputies, (1949-1950), p. 623.

of powers; since in Lebanon the Council of State was composed of judges from the judicial cadre liable to the same laws and regulations as the other judges, they did not have any special qualifications that would make them better for exercising administrative adjudication than the ordinary courts.[79]

The report of the parliamentary judicial committee modifying this bill expressed the belief that the administrative cases that concern the state as a legal person and not as a public authority, such as those involving contracts, salaries, taxation assessments, and damages caused by public works, could well be taken by ordinary courts. The government bill had proposed the abolition of the Council and the creation of single judge courts in the districts to render the courts more easily accessible to the citizens. The committee stated that as long as the doctrine of the separation of administrative courts from the ordinary courts was to be discarded, it would be much wiser to give jurisdiction over administrative damage suits to the newly proposed single-judge courts; because this would help in serving to a greater extent the purpose for which those courts were created, namely, rendering the courts more easily accessible to the citizens.

The first deputy to speak in the debate that followed the reading of the committee's report was Mr. Habib Abi Shahla, then member of the judicial and administrative committee, and several times Minister of Justice. Mr. Abi Shahla did not agree to the committee's suggestion

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79. Compare with the message of the 1928 government bill, <u>Supra</u>, p. 29.

80. <u>The Proceedings of the Chamber of Deputies</u>, (1949-1950), p. 655.

of dividing the functions of the Council of State between the Court of Cassation and the local courts. He said that the Council should remain an independent organ qualified for the legal control of all administrative cases. He added that the Council had performed very valuable services, and dividing its functions would be a grave mistake and a serious risk that should not be taken. Mr. 'Adel Useyran, present Speaker of the House, was the first speaker in the second session held for the discussion of the bill for reorganizing the judicial system. He said that the Council of State should not be abolished, because it was composed of eminent impartial judges who were far from political influence; he added that giving the single-judge courts the function of hearing certain administrative cases would be harmful to the interests of both the government and the citizens. He then suggested that the Lebanese courts of appeal might be given first instance jurisdiction over such cases provided that their decisions were susceptible to appeal to the Court of Cassation. Kamil Shamoun, who was then a member of the House of Representatives, agreed with Mr. Usayran that the ordinary courts should not decide administrative cases finally and that appeal to the Court of Cassation should be always possible. Several other deputies spoke on the bill, but they emphasized other aspects that did not pertain to the Council of State.

Then came the spokesman of the government who, strangely enough, was not the Minister of Justice but the Minister of Agriculture, Mr. Bahij Taky Deen, a lawyer with a good deal of legal training and the best qualified member of the cabinet to speak on a legal issue.[81] He

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81. Such things happen often in the Lebanese politics because the

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said that giving the ordinary courts jurisdiction over administrative cases besides the excès de pouvoir cases would be a very good idea and that Mr. Usayran need not fear such a practice because all financial administrative cases were liable not only to one but also to two degrees of appeal (appeal and cassation).

The deputies voted on the government bill, article by article, and the bill was passed by the majority. The law was promulgated on May 10, 1950. Between May 10, 1950 and December 9, 1953 when the present Council of State was established, the administrative cases were thus divided between the Chamber of Administrative cases in the court of Cassation and the ordinary courts. The first had jurisdiction over cases of excès de pouvoir, including electoral cases and appeals against the decisions of disciplinary committees. The other administrative cases were to be taken up by the ordinary single-judge courts, the decisions of which would be final on all cases assessed at three hundred Lebanese pounds or less.

What the effect of this reorganization on administrative adjudication was, is a question that I shall leave to another place in this

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81. (Cont.)
cabinet seats are not distributed among the different ministers according to their abilities and field of specialization; religious factors and personal factors play a decisive role in determining this matter; the Prime Minister, for example, is always a Sunni Moslem; the Vice-Prime Minister is a Greek Orthodox, and the Minister of Foreign Affairs is a Maronite or a Catholic. Influential deputies insist on taking important ministers; different districts expect to be represented in the cabinet. All these factors often result in an illogical distribution of cabinet seats. A physician may be the Minister of Agriculture and a land owner the Minister of Health such as was the case in the third ministry of the independence when Dr. Jamil Talhook was the Minister of Agriculture and Mr. Ahmed el-As'ad the Minister of Health. In our present ministry we have a similar case; Mr. Jamil Makkawi, previous ambassador and with a wide experience in foreign affairs, is Minister of Public Works
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p a p e r. We shall now turn to the last stage in the development of the Lebanese Council of State, namely, the establishment of the 1953 Council.

The 1953 Council

On October 15, 1952, a law was promulgated giving the government of Emir Khalid Chéhab the right of issuing decree laws on a number of specified items where the need for reform seemed to be urgent.[82]

One of the fields to be included in the prospective reforms was the judicial system. Accordingly, on December 9, 1953, decree law No. 14 was issued, establishing a new Council and abrogating all previous acts in conflict with the new provisions.[83] Thus came into existence the present Lebanese Council of State. It is a judicial body in the Ministry of Justice, with the function of an administrative court. It has a president, a vice president, four councillors and a government commissioner; all are appointed by decrees in the Council of Ministers upon the recommendation of the Minister of Justice. The President and the Government Commissioner are ranked judges of the first category and the other members judges of the second category. No councillor may be transferred or discharged except by the decision of the special disciplinary committee composed of the President or Vice President of the Council

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81. (Cont.)
and of Finance; Mr. Salim Lahhood, an engineer and a successful businessman is, on the other hand, Minister of Foreign Affairs; Mr. Makkawi is a Moslem, and Mr. Lahhood a Maronite. (January 1956).

82. The Proceedings of the Lebanese Chamber of Deputies, (1951-1952), p. 2564.

83. Ministry of Justice, Collection of the 1952-1953 decree laws, Vol. 2, p. 851.

as President, and of the most senior councillor and a judge appointed by the Minister of Justice with a rank equal to that of the councillor under trial as members. The government commissioner acts as a prosecutor general in this committee.

Promotion of the members is also regulated by a special committee composed of the President, the Vice President, and the Government Commissioner.

The secretarial work of the Council is to be fulfilled by five judicial assistants. The Council has also two chamberlains and one court crier.

The new Council differs from all its predecessors in that it is not only a court of first instance, but also a court of appeal and a court of cassation. With the exception of these new functions, which will be explained below, the functions and procedure of the new Council were on the whole similar to those of the previous councils. The new decree law is, however, more systematic and precise than the previous _arrêtés_, and it introduces a few minor changes and details.

One of these changes is in the financial field:- The new court is qualified to hear cases related not only to direct taxes but also to indirect taxes. The court costs and fines were modified to correspond to the currency inflation. The maximum amount of damages for which a case may be heard according to the rules of summary procedure was raised from fifty to five hundred Lebanese pounds.

Another change is in the field of time limitations. _Tierce Opposition_ can be made within a period of five years after the Council's decision. This is a more logical provision than the corresponding one of the previous _arrêté_ that limited the period to two months after

the notification of the third party, because it is quite possible that the third party is never notified for the reason that the Council may be unaware of his existence. Briefs may be sent within a period of one to two months after notification, while in the previous council this period was between fifteen and thirty days. If a request is made to an administrative agency that meets in definite periodical sessions, the silence of such agency to the request cannot be considered an implicit rejection until the end of the first session after the submission of the request. The period for bringing electoral cases was shortened from ten to eight days after the official announcement of the results.

A few minor changes were also introduced into the procedure of the new Council:- A recours en opposition is not accepted if it is submitted by a defendant who has failed to be represented before the Council in the first trial, and whose interest is identical with the interests of the parties who were represented. This is a useful provision, because first it relieves the Council from rehearing cases previously decided, and second, it bars the way to persons who like to resort to such methods in order to gain time and stay the execution of the Council's awards as long as possible. Another minor change was the deletion of the fourth instance in which a recours en revision was permitted according to the previous arrêté (when the Council omits the consideration of a legal point brought by one of the parties).[84] In summary procedure, the previous Council could not stay the execution of the administrative act while hearing the case; nothing is mentioned about this subject in the new decree law. The case law of this Council shows that it tends

84. Supra, p. 43.

to admit stay of execution where needed, even in summary procedure. In cases of excès de pouvoir, the bases for annulment are still the same as in the previous arrêté, namely, incompetence, violation of law, formal error, and détournement de pouvoir; however, the new decree law states that the Council must annul an act for such a deficiency while the previous arrêtés stated that the Council was "qualified" to annul an act for such reasons. The two provisions were meant to have exactly the same effect, but the new decree law is more precise.

The provisions for disciplinary cases are here the same as in the previous arrêté. However, the grounds on which the court may annul such decisions are not enumerated as was the case with the previous arrêté.

The Council As A Court Of Appeal And Of Cassation

The establishment of the judicial section in the Court of Accounts on November 21, 1952,[85] and of similar quasi-judicial administrative bodies, resulted in giving the newly established Council of State its new functions as a court of appeals and of cassation. Justice demands that the decisions of these quasi-judicial bodies should not be final. In the United States of America, the decisions of the quasi-judicial administrative bodies are appealable to the ordinary courts, because the theory of the separation of powers is interpreted in the Anglo-American world to mean essentially that final judicial power must be wholly in the hands of the courts. In France and countries following

85. Decree law No. 9, of November 21, 1952, in Collection of 1952-1953 decree laws, op.cit., Vol. I, p. 139.

the French system, on the other hand, the separation of powers is interpreted to mean that the administration must be independent from the judiciary. So, the Council of State, being the highest administrative court, is given the final word in all administrative cases. It is thus qualified to hear cases appealing the first instance decisions of quasi-judicial administrative bodies in accordance to the rules specified in the rules and by-laws of the said bodies; however, the appeal does not stay the execution of the appealed decisions.

All decisions of quasi-judicial bodies not subject to further administrative appeal may be appealed in cassation to the Council of State "even if the law does not mention such possibility." A _recours en cassation_ is not accepted unless it is brought by one of the two parties within two months of their notification of the decision. The _recours_ must be based on one or more of the following reasons: 1. incompetence, 2. violation of the substantial formalities prescribed by the law or regulations, and 3. violation of law or of _res judicata_. It is clear that these are three of the four reasons for which the Council annuls an administrative act for _excès de pouvoir_; the fourth reason, _détournement de pouvoir_, is not mentioned here, because such a violation cannot take place in a quasi-judicial body.

The _recours en cassation_ differs from the ordinary appeal in that it does not transfer the case to the Council of State; that is, the Council cannot decide the case. Its function is just to decide whether the judgement of the lower court is valid; thus, it either approves of the lower court's decision or quashes it. In the latter instance, the Council must give a reasoned opinion and then remand the case to the lower court for further proceedings not inconsistent with

the Council's opinion.

The judicial decisions of the newly reorganized Cour de Comptes[86] are appealable to the Council of State within two months of notification of the appealed decision. The Council may quash such decisions for violation of law, incompetence, or violation of the required legal procedure.[87] Appeal to the Council of State does not stay the execution unless the Council decides otherwise. The Council of State either rejects the appeal or remands the case to the Court of Accounts, which must correct its decision in accordance to the opinion of the Council on the legal points of the case.[88]

The Function of the 1953 Council Modified

It seems that introducing changes into the judicial system is a cherished activity of all governments of Lebanon. Between 1920 and 1954 there were introduced forty-four major changes into the Lebanese judiciary, not to mention the minor changes that may exceed a hundred. This desire for making changes still continues, and the 1953 Council could not escape this seemingly inevitable tendency in Lebanese politics. The functions of this Council were modified significantly by the creation

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86. Ministry of Justice, Collection of 1954-1955 decree laws, p. 523.
وزارة العدلية ، مجموعة المراسيم الاشتراعية تشرين الاول ١٩٥٤ ــ كانون الثاني ١٩٥٥ ، (بيروت ، مطبعة صادر ١٩٥٥) ، ص. ٥٢٣ .

87. Ibid., p. 151, Article 46.

88. An illustrating case is arrêt No. 577 of May 25, 1955, La Revue Juridique, XXXV (1955), p. 444; the Council quashed a decision of the Court of Accounts for violation of law and incompetence.

of the Special Administrative Court in 1954; another significant change concerning the methods of review of the Council's decision is now in the form of a government bill at the Chamber of Deputies. Below, I shall discuss briefly each of these two changes:-

1. The Special Administrative Court

The newly established Council of State did not retain all its functions for a long time. On October 18, 1954, the President of the Republic promulgated a law delegating the power of issuing decree laws in certain fields to the government of Mr. Sami es-Solh.[89]

One of the first decree laws issued by the Solh government was a decree law creating a special administrative court and modifying the functions and jurisdiction of the Council of State.[90] This special administrative court is the first instance court for all damage suits that were within the jurisdiction of the Council. (Claims of damages for losses caused by public works, administrative cases dealing with contracts and franchises, and cases dealing with the occupation of public property).

This court is composed of a magistrate as president, and of an engineer and an inspector of finance, as members. The magistrate must be at least of the judges of the Second Category; the engineer must be at least chief of section, and the inspector must be a university graduate. They are all appointed by decrees issued upon the recommendation of the

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89. The Lebanese Official Gazette, (1954), No. 45, p. 749.

90. Decree Law No. 3, of November 30, 1954, in Modern Collection of Laws, (Beirut, Sader Press, 1954), Vol. 5.

Minister of Justice and the approval of the two ministers concerned, (the Minister of Public Works, and the Minister of Finance). The two members take an oath before the Council of State prior to assuming their functions. The President and the members retain their original positions with all the rights and obligations entailed thereform; they are also compensated for the work they perform outside their office hours.

The Special Administrative Court follows the same procedure that used to be followed by the Council of State; the government, however, is not represented by a government commissioner, and the court cannot stay the execution of an administrative act; requests for staying such acts may be made to the Council of State according to the rules of summary procedure.

The decisions of this court are given "on behalf of the Lebanese people", and they are subject to two ways of review: 1. Opposition, that is, appeal to the same court, and 2. Appeal to the Council of State. This appeal, to be made within two months after notification of the court's decision, brings the case to the Council of State, which decides it according to the same principles explained before.

It also seems that this newly established administrative court is not going to be long lived. The government bill for the reorganization of the judiciary, which was recently transmitted to parliament, proposes the abolition of this court. The bill was transmitted to the Chamber on April 28, 1956, that is, one year and five months after the establishment of the Special Administrative Court.

2. The Recours en revision

The government bill mentioned above, proposes the reestablishment

of an administrative section at the Court of Cassation to consider cases appealing the decisions of the Council of State by way of the _recours en revision_. The bill also proposes extending the grounds for accepting the _recours en revision_ to include the following, in addition to the three grounds admitted by the present law of the Council:[91]

1. The failure of the Council to consider a legal point raised by one of the parties. (This ground existed in the 1941 law concerning the Council and was omitted from the 1953 law).[92]

2. If one of the parties or his counsel commits some fraudulence that may affect the court's decision.

3. If the reasons on which the decision is based are not "sufficient".

4. If the Council's decision gives more than the claimed sum, or something that was not claimed.

5. If the decision contains incompatible provisions.

The government justified this proposal by stating that the Council of State gives final judgement in cases that are important both financially and morally, and the ways of judicial review are too scanty and restricted to be of any real value; extension of the grounds on which the remedy of the _recours en revision_ is granted, and bringing such action to another court instead of to the Council itself is a better guarantee for justice. The bill proposed also that the immunities and

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91. _Supra_, p. 59.

92. _Ibid_.

security of tenure enjoyed by judges and councillors[93] be suspended for fifteen days during which period the Council of Justice, presided by the Minister of Justice, takes decisions for filling the vacancies in the judiciary and for discharging or transferring any judges, in the interest of the Judicial Service. These decisions are not to be subject to the pre-audit of the Court of Accounts, nor to any way of judicial review "including the _excès de pouvoir_ action".

The real reason behind these suggestions is the fact that the State has been recently losing many cases before the Council. The government thinks that the Council has been strict with the administration and lenient with private persons, and so it is seeking the protection of the Court of Cassation against the Council of State.

Although the original idea behind the establishment of administrative courts was the protection of the administration from the encroachments of the ordinary courts, the Council of State both in France and in Lebanon has developed more into a threat to the administration and a protection of the citizen than a protection of the independence of the administration. In France the _Conseil d'Etat_ is too deeply imbedded in the history and traditions of the French people and has too high a prestige for its powers to be limited. Conditions are not the same in Lebanon, and an act abolishing the Council or restricting its activities may pass almost unnoticed.

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93. Article 3 of decree law 14 of January 9, 1952 concerning the Council of State tells that no councillor may be transferred or discharged except by decision of the special disciplinary committee.

Thus, the Council of State is now the court of first and last instance for the excès de pouvoir cases, and for suits contesting the result of local elections or the decisions of disciplinary committees, and it is the Court of Appeal or of Cassation for all other administrative cases.

If the government bill now in the Chamber of Deputies is passed, the Council will regain the functions that were turned over to the Special Administrative Court, and many of its decisions will be subject to review by a special section for administrative cases at the Court of Cassation.

In spite of the many changes and modifications that were introduced into the Council of State as was explained in this part, the Lebanese administrative justice has always had a certain degree of continuity. The basic functions and rules of procedure of the courts hearing administrative cases have not been affected seriously by these changes; and there has been an increasingly accumulating body of administrative case law that has helped in strengthening this continuity.

For a discussion of these basic functions, procedure, and case law, we turn to the next part.

PART II

THE FUNCTIONS AND PROCEDURE OF

THE COUNCIL OF STATE

In the last part, we have seen that the function of administrative adjudication in Lebanon has changed hands many times. Sometimes this function was given to a Council of State, sometimes to an administrative section in the Court of Cassation, and at other times it was divided between the ordinary courts and the administrative section of the Court of Cassation. The decisions of all these different courts hearing administrative cases constitute the body of case law of the Lebanese Council of State. By "Council of State" in this part is therefore meant the court that had the function of hearing administrative cases at the time. Thus, a decision of the "Council of State" in 1935 means a decision of the administrative section at the Court of Cassation. This arrangement is necessary to avoid confusion and preserve unity in this chapter, and it is justifiable by the fact that all these different tribunals were performing the function of the Council of State. The Lebanese Ministry of Justice has followed the same procedure in its publication the collection of the decisions of the Council of State, thus naming the administrative section of the Court of Cassation "the Council of State."

Whether a decision was given by the Council of State itself or by another court performing its functions is of no consequence to the argument in this chapter. However, if the reader is interested in knowing which court gave any of the decisions cited in this part, he may refer to the following table showing the dates on which each of the different courts was hearing administrative cases:-

From	To	Name of Tribunal
April 1925	March 24, 1928	Council of State
March 25, 1928	April 23, 1941	Court of Cassation
April 24, 1941	August 10, 1950	Council of State
August 10, 1950	January 9, 1953	damage suits: ordinary courts.
		other suits: Court of Cassation.
January 9, 1953	1956	Council of State

CHAPTER VI

The Sources of Lebanese Administrative Law

Like all Lebanese institutions, the Lebanese system of administrative adjudication is new, and the Council of State does not have that rich heritage of case law possessed by its model, the French Council of State. When the Council was first established in 1924, the Lebanese laws and regulations were still in the making. Thus, many of the Ottoman laws and regulations continued to be applied for some time after the French occupation perhaps in accordance to Article 43 of the Hague Convention of July 29, 1899, concerning the Laws and Customs of War on Land.[94] Gradually, Lebanese laws began to accumulate and to supersede the Ottoman Laws. These Lebanese laws emanated from two sources: From the French High Commissioner, who was competent to issue <u>arrêtés</u> having the force of law, and from the Lebanese legislature. In addition, decree-laws, decrees, and administrative regulations were gradually adding to the Lebanese body of law. In going over the Council's decisions chronologically, one notices that references to the Ottoman Laws gradually decreased with time, until they vanished almost completely. In addition to these sources, the Lebanese Council of State has freely drawn upon the <u>jurisprudence</u>, the case law, of the French Council, and on the

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94. This article states that "the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Cited in John Basset Moore, <u>A Digest of International Law</u>, Vol. VII, (Washington, Government Printing Office, 1906), p. 265.

general principles of law as manifested in the writings of the French legal scholars, (la doctrine). Thus in its arrêt No. 21 of May 27, 1932,[95] the Council decided that because the case at hand was of a new type before the Lebanese courts, it would be advisable to decide it in the light of the French doctrine and jurisprudence, and according to the "general principles of law". Citations from the decisions of the French Council of State and from the writings of French legal writers are frequent in the decisions of the Lebanese Council. This Council also cites and applies the principles of International Law and multilateral treaties and conventions where need for such application arises.[96]

Summing up, we may say that the sources of the Lebanese administrative law are: the Ottoman laws, the Lebanese laws and administrative regulations, the French jurisprudence and doctrine, and the gradually accumulating case law of the Lebanese Council of State.

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95. Recueil, II, 156.

96. Refer for an illustration to the many pension cases that were brought to the Council during the first years of its formation in Rec. I; also see for recent decisions arrêt No. 302 of December 27, 1950, in La Revue, VII (1951), p. 36, and arrêt No. 355 of August 12, 1951, La Revue, VIII (1952), p. 59.

CHAPTER VII

Types of Administrative Acts

An administrative act is a juridical act that emanates from a qualified public administrator, effecting some jural relation. These acts are either not susceptible to any kind of judicial control, or are susceptible to such control through the ordinary courts, or through the administrative courts. There is no sharp line of demarcation between these three categories, but there is a marked tendency toward narrowing the field of insusceptibility, and toward widening the field of susceptibility to control by the ordinary courts. Below, I shall discuss the general principles concerning these three categories with special attention to the Lebanese practice.

1. Acts not susceptible to any control

These are usually called political acts or actes de gouvernment. According to Duguit,[97] these are acts made by an administrative authority and determined by some political motive. This is a concept about which there is a lot of controversy, ambiguity, and confusion. This may be due to the fact that in a parliamentary system, the government has a double character. Sometimes, it acts in the capacity of a political organ, and on other times in that of an administrative organ. When the government is functioning in the first capacity, its acts are not susceptible to judicial review. Duguit seems to be very much opposed to the concept of actes de gouvernements. He insists that there is no intrinsic difference between the two categories. The distinction is merely a formal one,

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97. Duguit, op.cit., Vol. 2, pp. 506-519.

and it relates to the capacity in which the administrative agency is functioning when it issues the act, that is, whether this agency is acting as a political organ or as a purely administrative organ.

On the other hand, several legal scholars believe that the concept of political acts is necessary for the good functioning of government. They believe that this concept has led to the growth of the powers of the administrative courts; because by admitting that some administrative acts are not susceptible to their control, these courts have caused the governmeht to submit willingly to their control all its other acts. For if the government was not confident that there is a field in which it is completely free from judicial control, it would have attempted consistently to compete with the administrative courts for the right of controlling administrative acts.[98]

The American concept of "a political question" is similar to the _acta de gouvernement_ concept. Under that concept, American courts admit that there are powers given to the legislative and executive branches to be used in their discretion; and the way they use these powers, be it right or wrong, may not be reviewed by the courts. Thus, Mr. Justice Frankfurter declared in a recent case before the Supreme Court (Colegrove V. Green, 1946) that "it is hostile to a democratic system to involve the judiciary in the politics of the people."[99] The issues that the American courts consider "political questions" correspond closely to the issues classified in France as _actes de gouvernement_.

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98. _Ibid_.

99. Robert Eugene Cushman, _Leading Constitutional Decisions_, 9th edition, (New York, Appleton-Century-Crafts, 1950), pp. 256-262.

The Lebanese Council of State tends to follow the French *jurisprudence* concerning the entertainability of suits against the administration. Acts of pardon, proclamation of a state of emergency, and the relations of the government with the legislature are considered political acts, and therefore not susceptible to judicial control. Thus, the convocation or dissolution of the parliament, calling for new elections, or the adjournment of parliamentary sessions, are all actions over which the Lebanese law gives the government a wide discretionary power, limited only by the formalities prescribed in the constitution (articles 25, 33, 41, 42). The administrative acts on these issues are not susceptible to any judicial review even if they are made in violation to the prescribed formalities. This may be due to the fact that the legislature is supposed to be powerful enough to be able to defend itself against the infractions of the executive. This may also explain why administrative acts dissolving local elected councils are not considered political acts and are thus susceptible to control through the *recours pour excès de pouvoir*; because, being under the tutelage of the executive, these councils are not capable of defending themselves against it.

Diplomatic relations are generally regarded as political acts not susceptible to judicial review; also acts of military nature are so classified. Thus, the Lebanese Council of State, regarded the pillage of the plantations of the plaintiff by the Palestinian refugees during the Arab-Israel hostilities an *acte de gouvernement*, and thus refused to uphold the plaintiff's claim for indemnity from the government.[100] In

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100. *Arrêt* No. 154 of September 27, 1950, *La Revue*, VII (1951), p. 53.

two recent cases in 1947 and in 1948, the French Council considered pillage a *fait de guerre* and hence an *acte de gouvernement*.[101]

Arrest during time of war was also regarded by the Lebanese Council an *acte de gouvernement*.[102] The government measures concerning foreigners during the time of war are also considered political acts. Thus, the Lebanese Council refused to hear the case of a Palestinian who sued the government for revoking his hotel license.[103] The Council based its decision on the French case law citing a similar case that was decided similarly by the French Council (*Arrêt* Du Graty, of January 4, 1918).

Throughout the period of the French mandate, and for several years after the independence,[104] the administrative suspension of a newspaper was considered a political act not susceptible to review before the Council of State. The head of the State in Lebanon was empowered to suspend any newspaper through a "*mésure de gouvernement*" in the form of a decree taken in the Council of Ministers.[105] The Council of State interpreted the phrase *mésure de gouvernement* to mean an *acte de gouvernement*, and thus refused to hear the case brought by the editor of *Zahlé el-Fatat*.[106] In justifying its decision, the Council referred to the French legal writings and case law for the explanation of the concept of the *acte de*

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101. Waline, *op.cit.*, p. 100.

102. *Arrêt* No. 130 of December 27, 1950.

103. *Arrêt* No. 53 of April 28, 1949.

104. Until September 2, 1948, when a new Press Law was promulgated, preventing the administrative suspension of newspapers, and abrogating *arrêté* 3080, mentioned below.

105. *Arrêté* No. 3080, of April 21, 1925, *The Lebanese Official Gazette*, (1925), No. 1862.

106. *Arrêt* No. 45 of August 11, 1951, *Rec.*, II, p. 91.

gouvernement. Appleton's definition of this act was cited:- "A fundamental act performed by the government in such special circumstances that the subjection of that act to judicial control would expose the government to serious risks." The Lebanese Council upheld this concept in its decision stating that though the doctrine of political acts was attacked by many legal scholars due to its extension to a wide field of administrative acts, yet the concept has its merits and its justifications. For the same reason the Council rejected the petition of the editor of ed-Diar newspaper by its arrêt of December 28, 1945.[107] In this decision, however, the Council felt that the law restricting the liberty of the press to such an extent was not fair. And so, although it rejected the case, because it was bound by the explicit law on this subject, it added that the government acts were subject to the control of the Chamber of Deputies, and if the Chamber feels that arrêté 3080 of the French High Commissioner is incompatible with the requirements of liberty and independence, it may as well cancel it. About three years later this arrêté was cancelled.[107a]

The French Council of State, on the other hand, has always accepted cases contesting administrative decisions suspending newspapers, because such decisions are not basically political acts, and there was no law in France similar to arrêté No. 3080 that classified the administrative suspension of a newspaper in the category of political acts.

In a recent decision, the Lebanese Council of State gave the following definition to an acte de gouvernement: "Actes de gouvernement are acts of a political nature, to which the administration resorts when it needs to be completely free. Serious harm may result from subjecting

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107. La Revue, II (1946), p. 145.

107a. Supra, footnote 104.

such acts to legal control; Actes de gouvernement include acts concerning the relation of the government with the legislature, acts relating to the safety of the State, to external and internal public security, acts of pardon, and all acts pertaining to warfare."[108]

These are in general, the types of administrative acts that are not susceptible to any judicial control. The modern tendency, however, is toward limiting the administrative acts that are considered political acts. This limitation seems to be taking place in two ways.[109]

1. By reducing the number of acts classified as political acts.

2. By lessening the harm that may result from not subjecting government acts to judicial control.

The second method, supported by several eminent legal scholars including Gaston Jèze, is an attempt to distinguish between the legality of the government act and the responsibility of the public authority.[110] These persons admit that an acte de gouvernement cannot be questioned as to legality, but they hold that an injured person may claim damages from the administration for losses caused by such an act. The French Council tends to adopt this point of view in many of its decisions.

2. Acts susceptible to judicial control

Up to 1873, the French jurisprudence was dominated by an important theory regarding the judicial control of the administration. This theory,

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108. Arrêt No. 47, of June 30, 1947; La Revue, IV (1948), p. 61.

109. Jean Baz, "The Government Acts", La Revue, VII (1951), pp. 1-8.
جان باز، العمل الحكومي ، النشرة القضائية ، المجلد السابع ، ١٩٥١ ، ص١ ـ٨ .

110. Ibid.

supported by many eminent legal writers including Barthelèmy, Ducrock, and Laferrière,[111] divided administrative acts into two categories, _actes d'autorité_ and _actes de gestion_. _Actes d'autorité_ are unilateral administrative acts in which the state functions in the capacity of a public authority commanding the ordinary citizens or intervening in their activities. _Actes de gestion_ are acts of the administration that are similar to the acts of ordinary citizens and that can be performed by private persons. This distinction bears some similarity to the distinction made in the Anglo-American world between the governmental and the proprietory functions of the administration.

Jurisdiction over _actes d'autorité_ was supposed to belong wholly to the administrative courts, while the _actes de gestion_ unless specifically provided otherwise by law, belonged to the ordinary courts.[112] The laws that exempted _actes de gestion_ from judicial control and transferred them to the category of _actes d'autorité_ were accumulating and increasing to such an extent that the separation of administrative acts into these two categories became impracticable. Thus, the theory has been abandoned almost completely by French jurisprudence, as the similar distinction in the Anglo-American world has also been abandoned. Many legal writers seem to be strongly opposed to this theory, which, according to Duguit, is vague, valueless, and without scientific foundation.[113] The new criterion of public service as a basis for determining the jurisdiction of the

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111. Waline, _op.cit._, p. 54.

112. Duguit, _op.cit._, v. 2, p. 345

113. _Ibid._, p. 346.

administrative courts displaced this theory.[114] Thus, an administrative act that related to the organization or functioning of a public service fell within the jurisdiction of the administrative courts, unless specifically mentioned otherwise by law. There has been, however, a growing tendency in the last thirty years in France to limit the jurisdiction of the Council of State over such acts, and to extend that of the ordinary courts. Public service is still the criterion for determining jurisdiction, but the Conseil d'Etat tends to distinguish between two types of public service: a public service that is performed by procedures pertaining to private law, and a public service that makes use of public law (gestion privée et gestion publique des services publics). The first of these falls within the jurisdiction of ordinary courts. This seems to be a return to the old theory of separating administrative acts into actes d'autorité and actes de gestion; this tendency is perhaps an attempt to relieve the Conseil d'Etat from part of its increasingly accumulating load of cases, which has resulted from the evergrowing governmental activities and public services.[115] The Lebanese Council seemed to accept this point of view when it declared its incompetence to hear a case concerning an injured worker, in spite of the fact that the injury was caused during the execution of a public service, because there is an implied employment contract between the worker and the administration, which puts the case within the jurisdiction of the ordinary courts.[116] In a more

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114. De Laubadère, Traité, op.cit., p. 297.

115. Ibid., pp. 299-300.

116. Arrêt No. 50 of March 3, 1938 in Ministry of Justice, Repertoire de jurisprudence Libanaise, (juridictions mixtes, 1924-1946), (Beirut, Imprimerie Dabbour, 1947), p. 5.

recent decision the Council declared that public service is not a sufficient criterion for determining whether or not a contract is an administrative one; that the form in which the contract is made is a decisive factor in this matter because the administration may make an ordinary contract with a private person for the execution of a public service.[117]

In France, the administrative acts that fall within this category are not enumerated by law. The case law of the Conseil d'Etat and of the Tribunal des Conflits is the main basis for making the distinction. In the Lebanese law concerning the Council of State, on the other hand, there is a detailed enumeration of the cases falling within the jurisdiction of the Council, and at the same time, the law states that the Council hears all administrative cases not assigned to a special administrative court.[118]

In distinguishing between these two categories, the Lebanese Council applies Lebanese laws and previous judicial decisions, and refers to the French jurisprudence and doctrine in the absence of such Lebanese provisions. Below some selected cases are given to illustrate what administrative acts have been regarded by the Lebanese Council as falling within the jurisdiction of the ordinary courts.

Cases relating to the private property of the State or to its commercial activities usually fall within the jurisdiction of the ordinary courts. The state owns its property in the capacity of a legal person; this ownership imposes on the state the same duties and obligations that it does on private persons. So, the rent, sale, purchase, and administration

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117. Arrêt No. 68 of June 18, 1953, La Revue, IX (1953), p. 778.

118. Article 9 of decree-law No. 14 of December 9, 1953; Collection of Legislative decrees, 1952-1953, op.cit., p. 8.

of state property is not considered a public function. In accordance with this principle, the Lebanese Council of State declared itself incompetent to hear a case brought by a citizen concerning a contract he made with the municipality for cutting wood from a municipal forest.[119] In this arrêt, the court decided that the only contracts that may fall within the jurisdiction of the Council are those related to the establishment or the organization of a public service. The municipality did not raise this point in its briefs, but it tried to prove that the plaintiff's claim was not valid.

Contracts made by the administration fall within the jurisdiction of the ordinary courts if these contracts are of a private nature, the Lebanese Council declared in a recent case concerning the rent of a truck for the transportation of instruments for public works.[120] The Council stated that "because the administration is exercising functions in this contract that are usually exercised by private individuals, it must be liable to the same laws and courts as the private individuals."

That the ordinary courts are the guardians of the right of property and of personal liberty is one of the established principles in Lebanese administration. Expropriation for the public interest must be made by means of a reasoned presidential decree. All disputes regarding compensation for expropriated property are to be settled by the ordinary courts.[121] The decree of expropriation, the Council decided, may be

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119. Arrêt No. 2 of January 12, 1938.

120. Arrêt of January 22, 1946, La Revue, II (1946), p. 339.

121. Decree law No. 45 L of October 13, 1932 in The Lebanese Official Gazette, (1932), No. 2728; also decree-law No. 4 of November 30, 1954.

contested for excès de pouvoir.[122] Thus, an expropriation act is liable to be contested before the administrative courts for excès de pouvoir, and before the ordinary courts for unsatisfactory compensation. The responsibility of the administration to pay compensation for expropriation is, the Council decided, to be determined by the administrative courts, while disputes on the amount of the indemnity is to be decided by the ordinary courts.[123]

A new development in the case law of the French Conseil d'Etat is the theory of the voie de fait. French legal theory has assumed that administrative acts are susceptible of varying degrees of illegality; illegality can attain such flagrant proportions that it destroys the very administrative quality of the act. This becomes not only illegality, but also tyranny or usurpation of power by the official concerned, who is acting no more as a public official but as a private person committing a wrongful act.[124] In such instances, when the administration departs from its proper duties by committing some gross irregularity doing violence to the right of property or to public liberty, the ordinary courts have jurisdiction over cases brought by persons who are adversely affected by these acts. The Lebanese Council seems to have accepted this jurisprudence when it decided that the indirect expropriation of a piece of land without adherence to the prescribed procedures constituted a voie de fait and such cases fall under the jurisdiction of the ordinary courts.[125]

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122. Arrêt No. 23 of April 13, 1934, Rec., III, p. 40.

123. Arrêt No. 2 of January 29, 1932, Rec., II, p. 107.

124. Bernard Schwartz, The French Administration and the Common Law World, (New York, New York University Press, 1954), p. 72.

125. Arrêt No. 18 of July 5, 1940, Répertoire, I, p. 6, and arrêt No. 43 of March 30, 1949, La Revue, V (1949), p. 715.

To sum up, we may say that the ordinary courts are competent to hear administrative cases relating to contracts of a private nature, compensation for expropriation, the private property of the state and its commercial and industrial enterprises, and to the flagrant violation of the law by the voie de fait.

In addition to these the French judicial courts hear administrative cases dealing with indirect taxes and with the electoral lists,[126] while in Lebanon these cases now fall within the jurisdiction of the Council of State.

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126. Puget et Maléville, op.cit., p. 38.

CHAPTER VIII

The Court of Conflicts

Lebanon has three systems of courts, each with jurisdiction over certain types of cases. These three systems are the ordinary courts, the administrative courts, and the religious courts. Disputes over jurisdiction in such an arrangement is almost inevitable. The existence of many borderline cases, not to mention the possible desire of each system to extend its jurisdiction as far as possible, make the existence of a body to settle disputes over jurisdiction indispensable.

Here, as in other instances, Lebanon has drawn on the French experience. Thus, on December 5, 1924, the French High Commissioner, General Weygand, issued an arrêté establishing at the Haut Commissariat a court of conflicts.[127] This was a mixed court with the Secretary General of the High Commissariat as president.

The disputes concerning religious courts are outside the scope of this paper. The conflicts between the ordinary and the administrative courts, which were to be settled by the Court of Conflicts, are of two kinds: positive and negative.

A positive conflict occurs when a case that comes under the exclusive jurisdiction of one of the two court systems is heard by the other court system. The Minister of Justice can ask the administrative court to stop hearing a case that he deems falling outside the jurisdiction of that court; if the administrative court refuses his demand, he may bring the case before the Court of Conflicts, which must decide it within

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127. Arrêté No. 2978, Recueil des actes administratifs, op.cit., V (1924), p. 386.

two months.[128] Similarly, the chief executive may follow the same procedure in a case that he deems falling within the jurisdiction of the administrative courts, when it is being heard by the ordinary courts. When the case is brought to the Court of Conflicts, the court that was hearing the case must suspend the deliberation until the Court of Conflicts gives its decision.

A negative conflict occurs when both the ordinary and the administrative courts decline jurisdiction, each on the ground that only the other is competent. Such cases may be brought to the Court of Conflicts by the parties concerned. This court decides which of the two systems is competent to hear the disputed case.

There is a third possible kind of conflict that is similar to the negative conflict in that its object is the protection of the individual's interest. This is the conflict over decisions; it occurs when each of the two courts hears a certain case but reaches opposite conclusions amounting to denial of justice. In such cases the French Court of Conflicts decides on the merits of the case in accordance to the law of April 20, 1932.[129] Nothing is mentioned in the Lebanese law about such a conflict.

By _arrêté_ No. 324 LR of November 22, 1939[130] the conflicts over jurisdiction between Lebanese courts were to be decided by the Court of Appeals. This provision implicitly abrogated the 1924 _arrêté_ concerning the establishment of a Special Court of Conflicts. According to the 1950

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128. Article 6 of _arrêté_ 2978; an illustrating case is _arrêt_ No. 23 of April 13, 1934, _Rec._, III, p. 40.

129. De Laubadère, _Traité_, _op.cit._, p. 292

130. _Supra_, p. 32.

law reorganizing the judiciary, as amended by legislative decree No. 15, of January 9, 1953, conflicts between the two court systems are to be settled by the General Assembly of the Court of Cassation. The courts of appeals and of Cassation belong to the hierarchy of the ordinary courts, and so, the ordinary courts, have been since 1939 in a sense judges in their own cause. Such an arrangement may have been justified by the fact that when it was made there was no council of state and the administrative cases were taken over by a chamber in the Court of Cassation. Now, with the existence of separate administrative courts, it is preferable, I believe, to have a court of conflicts independent of both court systems.

It must be noted here, however, that most of the conflicts that come before the Court of Cassation concern the jurisdiction of the religious courts. Administrative cases are nowadays brought to this court only in negative conflicts, that is, when both courts declare themselves incompetent to hear a case. Thus, in many cases the State pleads that the court hearing the case is incompetent, but if the court does not uphold this plea, the State does not take the issue to the Court of Conflicts. An eminent councillor told me that the Council is the final judge whether it is competent or not in positive conflicts, and that the State has never asked the Council to stop hearing a case until the Court of Conflicts decides whether or not the Council is competent. He believes that the legal provisions concerning positive conflicts have been implicitly abrogated.

CHAPTER IX

The Procedure of the Council

1. Formal requirements

a. The documents

No case is entertained unless it is presented in the form of a petition and unless it is concerning an act issued by the administrative authority. If the complaint is over a failure to act on the part of the administration, the person concerned must establish the dispute with the administration by filing a petition with the administrative agency concerned, explaining his demands, before bringing the case to the Council. All the documents concerning the case must be submitted to the Council along with the petition. The parties, including the State, must appoint a legal counsel;[131] but unlike in France, there is no special class of lawyers to appear before the Council and so any licensed lawyer may be appointed. The plaintiff must submit a number of certified copies of the original petition and documents, equal to the number of dependents. He must also submit a statement of the facts, the relief sought, the grounds on which such relief is claimed, and the names and addresses of the parties. If the validity of an administrative act is contested, a copy of the act must be adjoined. When some of the formal requirements are missing, the plaintiff is notified within forty-eight hours, and he must submit the missing items within fifteen days of notification; if he fails to do so, the Council, according to a new decree-law modifying its laws

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131. Arrêt No. 10, of January 31, 1952, La Revue, VIII (1952), p. 345.

of procedure,[132] will either hear the case or dismiss it. Before 1955, however, the Council had to dismiss the case if the formal deficiencies were not completed within fifteen days after notification. Thus, during the first year of its life (1925), the Council dismissed nineteen cases for such reasons. After 1930, however, there appeared to be some contradiction between the case law of the Council and the legal provisions concerning this subject. Thus, in its arrêt No. 20, of April 20, 1931,[133] the Council declared a case with some formal deficiencies as non avenue after having twice notified the plaintiff to complete the deficiencies; one notification was made six days after the receipt of the petition, and the other two years and four months later. When the plaintiff failed to complete the deficiencies after this long period, the Council dismissed the case. On another occasion the plaintiff was notified three times within a period of six years before the case was finally dismissed for formal deficiencies.[134] In a later decision, the Council reverted to the old practice of dismissing a case because the deficiencies were not completed in time.[135]

b. Time Limitations

Cases for the annulment of administrative acts (recours pour excès de pouvoir) have to be brought to the Council within two months

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132. Decree-law No. 23 of January 15, 1955, in Collection of 1954-1955 decree laws, op.cit., p. 451.

133. Recueil, II, p. 36.

134. Arrêt No. 22 of June 2, 1933; Rec., II, p. 292.

135. Arrêt No. 36 of May 30, 1948; La Revue, VIII (1948), p. 453.

of the official notification of the contested administrative act. This provision was taken from the French practice; the shortness of the period is justified by the confusion caused within the administration by the judicial decisions overturning a settled legal status. The smooth functioning of the administration and the need for stability demand that administrative decisions must become final after as short an interval as possible. This justification looks excellent in theory; but unfortunately it is not so in practice, because the Lebanese Council of State takes an average time of two years to decide a case. Thus, the shortness of the interval for bringing action does not insure fully the desired administrative stability. The 1954 change, which set up a special administrative court to hear all administrative cases besides those of the excès de pouvoir, may help in expediting the work of the Council.[136]

In cases of plaine jurisdiction, where the plaintiff is suing the public authority for damages in reparation of loss he has suffered as a result of some State activity, the plaintiff must first establish the dispute with the administration by filing an application with the public agency concerned in which he sets his claim. The silence of the administration for two months is considered an implicit rejection to his application. The time interval for bringing action begins to run from the date of receipt of the answer of the administration, or two months after he submits his application, whichever be the earlier.

The Council may hear a case according to the rules of summary procedure; in such instances the establishment of the dispute with the

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136. The French Council of State is much slower, taking an average of 3 to 5 years to decide a case. The 1953 reform, which extended the jurisdiction of the local administrative tribunals, was mainly an attempt to reduce the pressure on the Council of State; George
(Cont. on next page)

administration is not required.[137]

The case law of the Lebanese Council shows that the Council tends to entertain a case provisionally before the expiration of the two months interval after the application for the establishment of the dispute; but the Council does not finally decide the case until after the expiration of that period, unless the public authority concerned has explicitly rejected the plaintiff's claims.[138] In an earlier occasion, however, the Council declared that bringing the case before the expiration of the period for the establishment of the dispute is sufficient cause for not entertaining the case.[139] The present tendency seems to be in favour of hearing such cases.[140]

If, on the other hand, the authority concerned files a defense with the Council before the expiration of the interval for the establishment of the dispute, the Council declares the dispute established and the case entertainable.[141]

The intervals are not liable to extension due to distance within the Lebanese territory. (They were liable to such extension by the 1924 law). But if the party concerned resides outside Lebanon the intervals

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136. (Cont.)
Langrod, "The French Council of State," American Political Science Review, XLIX (1955), p. 683.

137. Summary Procedure is accepted in cases involving less than 500 Lebanese pounds (50 pounds according to the previous law). The appointment of legal counsel is not required in summary procedure.

138. Arrêt of July 6, 1944, La Revue, I (1945), p. 253; Arrêt No. 34 of March 8, 1949, La Revue, V (1949), p. 646; Arrêt No. 38 of September 5, 1951, La Revue, VIII (1952), p. 65.

139. Arrêt No. 25 of June 14, 1932; Recueil, II, p. 177.

140. Footnote 138 above. The French Council also entertains such cases; De Laubadère Traité, op.cit., p. 351.

141. Arrêt No. 73 of December 29, 1948, La Revue, IV (1948), p. 451.

are extended from one to four months depending on distance in accordance to Article 20 of the Lebanese Law of Civil Procedure.

Some confusion may arise between the application for establishing the dispute, (liaison du conentieux), and the mémoire préalable. The latter is the notice that must be sent to the Ministry of Justice two months before suing the State or any public authority in accordance to Article 42 of arrêté 1304 bis of March 8, 1922. (Nothing is still in force of this arrêté except the above mentioned Article 42). The Council of State decided in its arrêt No. 34 of December 7, 1933, that this notice is required only for cases brought against the State before the ordinary courts and not before the Council of State.[142] (That is, for the actes de gestion). The plaintiff in this case had filed with the Ministry of Justice a mémoire préalable in order that he might sue the State before the Council. He waited for two months and then brought his case, a recours en excès de pouvoir. By that time, three months had elapsed after his notification of the contested administrative act; the Council refused to entertain the case on the grounds that the statute of limitations had run to bar action. Thus, the plaintiff lost the case because of a misunderstanding of the law; he was not really to blame for such misunderstanding. The law was vague on this point and it took the Council two pages of justification based on French jurisprudence and legal reasoning to reach that conclusion.

The interval is interrupted whenever the person concerned seeks remedy through a recours hiérarchique or when he applies for a judicial assistance. The interval starts running again as soon as the answer to

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142. Recueil, II, p. 313.

such a petition is given. The Lebanese case law also tended to include the recours gracieux as a cause for interrupting the interval. The Council decided this point in many instances.[143] The present law concerning the Council of State mentions recours gracieux as a cause for interrupting the interval (Article 17). This article adds, however, that the interval may be interrupted only once through an administrative appeal; which means that the party concerned can have recourse either to the recours gracieux or to the recours hiérarchique and have the interval interrupted, but not to both.[144]

The interval is also interrupted throughout the period in which negotiations are made between the administration and the parties concerned in the hope of arriving at a peaceful settlement; the interval is resumed when these negotiations are severed.[145] In declaring this principle, the Lebanese Council based its decision on the French jurisprudence, which maintains that the statute of limitations does not run to bar action if the plaintiff is not responsible for the delay; the Council considered that when the administration was negotiating with the plaintiff, it was responsible for the delay.[146]

Bringing a case before an incompetent court also interrupts the interval that starts again after the court declares its incompetence.[147]

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143. See for example, arrêts No. 342 of February 20, 1926, Rec. I; No. 2 of January 29, 1932; No. 16 of May 17, 1932, Rec. II; No. 68 of December 22, 1947, La Revue, IV (1948).

144. This is similar to the French practice; Waline, op.cit., p. 118.

145. Arrêt of June 23, 1946, in La Revue, II (1946).

146. Ibid.; also arrêt No. 261 of May 23, 1951, cited in Jean Baz, "The statutes of limitations in administrative cases", La Revue, IX (1953), pp. 1-19.
جان باز ،مهل المراجعة في الشؤون الادارية ،النشرة القضائية ،(١٩٥٣)، ص ١ـ١٩ .

147. Arrêt No. 91 of May 28, 1952, La Revue, VIII (1952), p. 767.

In all these instances (that is, the recours administratifs, the application for judicial assistance, and the appeal to an incompetent court) the interval is not interrupted unless the plaintiff starts these actions before the expiration of the interval.

Article 17 of the present law concerning the Council states that the silence of the administration for two months after the application for the liaison du contentieux will not be considered an implicit rejection if the decision concerning the application is subject to legal intervals exceeding two months.

Up to 1953, the Lebanese Council tended to consider the acceptance of the administration to reconsider a case after the expiration of the interval for review as sufficient cause to revive the expired interval and to open the way again for bringing action; the 1953 law, however, specifies that such reconsideration does not revive an expired interval if the new decision of the administration upholds its previous decision. Here also the Lebanese Law has followed the French jurisprudence.[148]

The Council of State has recently entertained several cases inspite of the fact that some formal requirements were missing.[149] In justification of such decisions the Council stated that if the public agency did not plead for the rejection of the case for formal deficiencies, such as the liason du contentieux and time limitations, the Council entertains the case inspite of the presence of such deficiencies. These decisions seem to contradict the legal provisions concerning the formal

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148. De Laubadère, Traité, op.cit., p. 373.

149. Arrêt of October 19, 1946, La Revue, II (1946), p. 143; arrêt of February 12, 1946; ibid., p. 341.

requirements for bringing action to the Council, and they reflect the growing tendency of the Council to be tolerant in questions of formal requirements.

2. The procedure during trial

The procedure of the Lebanese Council, like that of the French Council, is "contradictory", inquisitorial, and written. By contradictory is meant that the petitions and briefs of each party are always open to the inspection and the reply of the other party. By inquisitorial is meant that the court plays an active role in the development of the case. The Council is not simply a referee between the parties. It has a duty to inquire into the law and the facts by all the means of investigation deemed helpful or necessary. The procedure is mainly a written one in that the Council bases its decisions on the written briefs submitted by the parties, and only the decision is given in an oral session.

The *rapporteur* of the Council is responsible for making the necessary investigations; in this he is not bound by any specified rules but he usually relies on the Lebanese Law of Civil Procedure. The decision of the *rapporteur* regarding the results of the investigation are issued in the form of orders to be notified to the parties without being reasoned; these orders may be appealed before the General Assembly of the Council within a period of five days of notification. The Assembly must give its decision regarding this appeal within eight days. It is worth mentioning here that the *rapporteur* participates in this decision. When all the investigations and the notifications are completed, the *rapporteur* writes his report on the case and then the Government Commissioner studies

the case and the report and writes his own report. The parties may submit their written observations regarding the reports of the *Rapporteur* and the Government Commissioner within five days of notification; however, no new claims or points of law that are not mentioned in the original petition are entertained by the Council (Article 22).

CHAPTER X

The Types of Cases Heard By The Council

The cases heard by the Council may be classified into two main categories; the recours en annulation and the recours en pleine juridiction. The first type is that in which the plaintiff attacks an administrative act requesting the Council to annul it on the grounds that it is improper. In the second type, the plaintiff sues the administration for damages in reparation of loss caused by some administrative action.

Unlike the French Council, where the plaintiff must chose just one of these actions, the Lebanese Council of State decided that both could be taken simultaneously by the plaintiff.[150] The Council justified its decision by stating that the French case law tends not to accept the two cases simultaneously because the procedure for each differs from the procedure for the other, while in Lebanon both types are heard according to the same procedure; the Council's decision added that though the damage suits require some special conditions not required in the annulment cases, such as the liaison du contentieux, if these conditions are fulfilled there is no reason why the two claims are not entertained simultaneously. It must be noted here, however, that the French Council tends to extend the legal consequences of a recours en pleine juridiction to result in the annulment of the administrative act that has caused the injury for which damages are claimed by that recours.[151]

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150. Arrêt of July 6, 1944, La Revue, I (1945), p. 255.

151. Waline, op.cit., p. 118.

In addition to these two main types, there are a few sub-types that may be classified under the *recours en annulation*, but are subject to special requirements and conditions. These are:-

1. *Recours en interprétation et appréciations de la légalité*

These two actions are based on the doctrine of the separation of powers. Whenever an ordinary court is met with a vague administrative text while hearing a case, it must suspend the judgement until it receives an interpretation of the text from the Council of State. Similarly, if the cases involve an evaluation of the validity of an administrative act as to legal and formal requirements and to the competence of the administrative authority issuing it, the ordinary court has to suspend judgement and wait for the decision of the administrative court. It is up to the ordinary court to decide whether an administrative act is vague or whether its validity is questionable. Any of the parties, however, may claim that the administrative text is vague or that the act is not valid; the court may uphold the claim and suspend judgement, or may dismiss it and proceed with the case.[152] The decision of the court on this point is subject to appeal. If the court suspends judgement for either one of these two reasons, the more interested party brings the case before the Council of State. This means that the court that suspended judgement cannot bring the action of interpretation to the Council, it simply invites the parties to take such action, and the more diligent party does so. This is similar to the French practice, and it may be due to the doctrine of the reciprocal independence of the administrative and ordinary court

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152. *Arrêt* of the Court of Appeal No. 152, of February 24, 1953, *La Revue*, IX (1953), p. 216.

systems.[153]

A recours en interprétation, the Council decided, cannot be brought except when the issue is raised in an ordinary court that agrees to suspend judgement until the Council gives its decision.[154] The Council based this decision on Article 12 of decree law No. 14 of January 9, 1953, which states that when a court of justice is faced by a vague administrative act it must suspend judgement until the Council of State, on the application of one of the parties, gives the interpretation. The Council added that this is a wise and logical provision because it saves the Council of State from becoming "a consultative tribunal" for private persons and civil servants. For these reasons the Council dismissed the case brought by the Court of Accounts for the interpretation of an article in the law defining the functions of that Court.[155]

The opinion of the Lebanese Council in this case is in agreement with the French practice. It also bears some interesting resemblance to the Anglo-American concept of declaratory judgement and to the procedure of the newly established constitutional court in Italy.

In the United States under the Federal Declaratory Judgement Statute, cases are not admitted except where there is an "actual controversy."[156] The British system appears to give more freedom in this respect; however, merely hypothetical cases cannot be raised by declaratory judgement, and this remedy is available only before the High Court.[157] The

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153. De Laubadère, Traité, op.cit., p. 379.

154. Arrêt No. 112 of March 31, 1954; La Revue Juridique, XXXV (1955), p. 379.

155. Ibid.

156. Hart, op.cit., p. 65.

157. J.A. Griffith & H. Street, Principles of administrative law, (London, Pitman, 1952), p. 235.

newly established constitutional court in Italy follows a similar procedure: no question of constitutionality may be brought by a private person to this court unless the issue is raised in the course of a civil or criminal proceeding before the ordinary courts.[158]

2. Electoral Cases

The Council of State is competent to hear cases concerning disputes over local elections. Disputes concerning the parliamentary elections are not heard by the Council, because according to the Lebanese constitution, the members of the parliament themselves decide the validity of the election of members (Article 30). The 1922 electoral law gave the Council of Administrative Cases at the Haut Commissariat jurisdiction over disputes concerning general elections.[159] This provision was implicitly abrogated by the 1926 constitution and thus the Council of State refuses to entertain cases regarding these elections on the ground of incompetence. The Council, however, decided that the behavior of the employees supervising and managing the elections is subject to the control of the ordinary courts according to the law of criminal procedure.[160]

Electoral cases constituted a large proportion of the cases heard by the Council during the first years of its formation. This may be explainable by the reluctance of the people then to sue the State, which

158. Le tré piu interessanti questioni che la Corte Costituzionali decidèra; in corriere della sera, Milan, April 3, 1956, p. 5.

159. Arrêté 1307 of March 10, 1922, Recueil des actes administratifs, op.cit., III (1922), p. 195

160. Arrêt 33 of May 3, 1948; La Revue, IV (1948), p. 451.

they regarded as omnipotent and invincible. This reluctance had its roots in the Ottoman period when suing the State, personified in the Sultan, was considered a dangerous procedure and perhaps mere folly. In electoral cases people might have felt that they were suing their opponents and not the State, and on the other hand, the strong rivalry, or professional jealousy, tended to overcome any feelings of fear that might restrain the person concerned from bringing action.

There are two main types of electoral cases that come before the Council. The first type is composed of cases that may be raised by a candidate whose nomination is not officially recognized by the administrative agency concerned. According to the electoral laws for both the municipal councils and the general elections, the candidate must officially notify the central government representative (the Kaimakam or the Mohafiz) of his desire to nominate himself at least ten days prior to the election day.[161] If the governor deems that the candidate is qualified, he must acknowledge his nomination officially within a period of five days. If the governor fails to give this acknowledgement within the prescribed period, the candidate may appeal to the Council of State, which must give its decision within three days. This is the only type of cases dealing with general elections that can be heard by the Council. This may be justified by the fact that such cases are not really electoral cases, but rather cases of annulment of an administrative act for excès de pouvoir. They differ from the ordinary excès de pouvoir cases in the special time requirements involved.

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161. No such formality is required in the elections for the Moukhtars and their councils; Moukhtars Law, 1947, the Lebanese Official Gazette, (1947), appendix to No. 49, p. 739.

The formalities of nomination may be useful in that they would help in guaranteeing that no unqualified person is elected, and so they serve to prevent the harm before its occurrence. The time limits are however too short, and I wonder what the Council of State would do if faced with a large number of such cases at the same time especially since elections are usually held on the same day in all the country.

The second type is composed of the election cases contesting the results of the local elections. These elections are either for the municipal councils or for the councils of villages or of city sections (the moukhtars). Any voter or candidate in the constituency may file a petition with the Council contesting the results of the elections within a period of eight days after their announcement. (This interval was ten days in the laws of the previous councils.) The Minister of the Interior may contest the results of the elections within a period of one month.

The important point to note in these electoral cases is the long time that used to be taken by the Council for giving its decisions, an average of two years. The local councils are elected for a period of four years, and so the decisions of the Council lose their real value when an election is annulled after the illegally successful candidate has enjoyed membership for the greater part of the period for which he is elected. Thus, out of the twenty-four electoral cases heard in 1954 and 1955, one case was six years old, three cases were three years old, fifteen cases were between ten and fifteen months old, four cases were six months old, and one case was three months old.[162] One cannot but wonder why the intervals for bringing action should be so short (ten days) when cases remained

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162. Recueil, III.

undecided for such long periods.

This condition was improved by the 1941 and 1953 laws concerning the Council, which provide for hearing electoral cases according to the rules of summary procedure. Greater improvement could be achieved by adopting something similar to the French system, where the administrative courts of first instance must give priority to electoral cases and decide them within a period of one month. The failure of the court to give its decision within this period is considered an implicit rejection of the claim. The decisions of the lower courts may be appealed to the Council of State, where the case is declared urgent, but with no time for giving the decision.[163]

The 1922 electoral law[164] provided that the administrative court had to decide electoral cases within a period of one month. This provision, however, was not adopted by the subsequent laws and regulations organizing the Council of State and its functions. An attempt to solve this problem was made in 1947 when special electoral commissions were formed in each constituency to decide electoral cases in the first instance.[165] The decisions of these commissions could be appealed to the Council of State. This provision was cancelled by the 1952 municipality law.[166] The electoral commissions, however, still exist and retain the

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163. Waline, op.cit., p. 191.

164. Supra, p. 16.

165. The 1947 municipality law, Articles 19 and 40.

166. Decree-law No. 5 of October 31, 1952, Collection of 1952-1953 decree laws, op.cit., V. I, p. 35.

function of preparing the electoral lists and of hearing in the first instance cases regarding either the omission of qualified persons from the lists, or the inclusion of unqualified persons therein. In rejecting a case that was brought directly to it, the Council of State decided that all cases dealing with the electoral lists must first be brought to these commissions.[167]

Prior to 1950, appeal from these commissions was made directly to the Council of State; the 1950 electoral law established a High Commission to hear these appeals. This commission is composed of a president of a section in the Court of Appeals as president, and of a judge and an administrative inspector from the Ministry of Interior as members; the chief of the "civil status" agency acts as rapporteur for this commission. Its decisions may be appealed to the Council of State.

The local elections in Lebanon did not take place regularly. There were frequent laws or arrêtés postponing the elections or appointing the members of the local councils. This may have been a cause for reducing the number of electoral cases coming to the Council, because the intervals between the elections have been almost always more than four years.

In a recent decision[168] the Council declared itself incompetent to hear cases contesting the election of the president of a municipal council. This president is elected by the members of the elected municipal council. The Council justified its decision by stating that Article

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167. Arrêt No. 80 of October 25, 1950; La Revue, VII (1951), p. 13.

168. Arrêt No. 650 of December 12, 1955; La Revue Juridique, XXXVI (1956), p. 36.

10 of decree law No. 14[169] gives it jurisdiction over disputes concerning the further election of officials by the elected members. The editor of the Revue Juridique, in which this decision is cited, does not agree with the Council's opinion; he insists that the Council is competent over such a case in accordance with Article 7 of the above mentioned decree law; this Article states that the Council is competent to hear all administrative cases not assigned to a special administrative court. The enumeration of the types of cases that are heard by the Council in the articles following Article 7 does not exclude from the jurisdiction of the Council cases that are not enumerated; the election of the president of the municipal council is an administrative act that must be subject to control by the Council, because the law does not assign such an act to any other administrative court.

This issue raises the question whether the Lebanese Council follows the principle of implied powers or of enumerated powers. It seems clear from Article 7 stated above, and from all the corresponding legal provisions of the previous Councils, that the Council has implied powers. It is true that there has always been some detailed enumeration of cases that may be heard by the Council; but such enumeration is made only for emphasis, and the enumerated cases by no means exclude other cases from the jurisdiction of the Council, which remains "the competent court for all administrative cases not assigned to another court."[170] It follows that in the case mentioned above the Council must have asked two questions:

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169. This is the decree law establishing the present Council and defining its functions; supra, p. 57.

170. Article 3 of the 1924 Council; Article 30 of the 1941 Council; Article 7 of the 1955 Council.

Is the election of the president by the members of the Council an administrative act? Is review of such an act assigned to another court? If the answer to the first question is positive and to the second negative, then the Council is competent.

The second question is an objective one and the answer for it is negative, the law does not assign this act to any other court. The first question, whether or not the election of the president of the municipal council is an administrative act, is subject to controversy. The French practice concerning this issue is that municipal decisions cannot be challenged directly to the Conseil d'Etat,[171] but have to be brought first to the prefect whose decision may be contested to the Council for excès de pouvoir. Thus, the election of the Maire by the municipal council in France may be contested to the prefect; the latter's decision is an administrative act that can be annulled by the Council.

3. Cases relating to taxes

The competence of the Council of State in cases dealing with taxes has been subject to many changes. Up to 1953, the Council was not competent to hear cases dealing with indirect taxes. This incompetence was not specified by any law, but it developed from the case law of the Council. In one of its earliest decisions,[172] the Council declared itself competent over cases of indirect taxes. The Council justified its decision by stating that even though cases relating to indirect taxes were not explicitly enumerated among the cases to be heard by the Council, yet

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171. Waline, op.cit., p. 204.

172. Arrêt No. 12 of May 8, 1926; Recueil, I, p. 126.

the article that gave the Council jurisdiction over all administrative cases implicitly includes disputes over indirect taxes. The Council has, however, shifted away from this opinion in later cases, until its incompetence in matters of indirect taxes became an established principle.[173] In a decision rejecting a case relating to indirect taxes,[174] the Council declared that jurisdiction over such cases belonged to the ordinary courts.

The 1953 decree law establishing the Council of State includes explicitly in the jurisdiction of the Council cases dealing with indirect taxes (Article 8). To make sure that all cases of indirect taxes fall within the jurisdiction of the Council, the Article giving the Council jurisdiction over these cases was amended two years later by adding to it the phrase "inspite of all contrary provisions".[175] This phrase was added, because many of the laws concerning the different kinds of indirect taxes specified that decisions concerning these taxes could not be contested, or that they could be contested only through some special administrative appeal. Thus, the Council finally became fully competent over all cases relating to taxes, direct or indirect.

Cases relating to direct taxes have been the source of more troubles. When the Council of State was first established in 1924 it was given competence over these cases. This Council, however, could not cope with the huge number of cases contesting the assessments of direct taxes; by 1928 there was a backlog of about 1,700 such cases.[176] This issue was raised

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173. Arrêts No. 7 of March 1, 1934; No. 27 of April 24, 1935; No. 50 of July 31, 1947, to mention a few.

174. Arrêt No. 10 of January 31, 1953; La Revue, VIII (1952), p. 345.

175. Decree Law No. 23 of January 15, 1955, Collection of 1954-1955 decree laws, op.cit.

176. The Proceedings of the Chamber of Deputies, (1928); session of March 9, 1928.

during the parliamentary debate over the 1928 government bill proposing the abolition of the Council. Deputy Khalid Shehab proposed going back to the practice that existed before the establishment of the Council of State, when these cases were heard by special commissions whose decisions were appealable to the local administrative councils.[177] Deputy Emile Thabet pointed out that all cases went directly to the Council, and he proposed that a special commission be formed in the Ministry of Finance to hear these cases initially so as to relieve the Council from the minor disputes that could be settled by administrative action. The Prime Minister at that time, Sheikh Bishara el-Khoury, declared that the government was going to discuss this problem and to treat it effectively in the near future.

Thus, on March 11, 1929, a law was promulgated giving final jurisdiction over claims for the reduction or annulment of direct tax assessments to special administrative commissions. In the short message introducing this bill to parliament, the government stated that the bill was drafted in response to the wishes previously expressed by the deputies, and in order to relieve the administrative court from part of its heavy load.

According to that law, petitions contesting tax assessments were to be filed with the Mohassib of the district (the highest financial officer in the district) where the contested tax was imposed, within a period of one month from announcement of the tax. The mohassib had to submit the petition together with his own observations to the District

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177. These administrative councils were partly elected and partly appointed local advisory bodies, one in each district (Mohafaza).

Commission, which was headed by the Mohafiz (District Administrator), and had as members an official of the local bureau of accounts appointed by the Minister of Finance, and an elected member from the local administrative council. These members were to be appointed for a period of one year. The decisions of these district commissions could be appealed within a period of ten days by either the tax payer or the Mohassib to a higher commission whose decision was final. This higher commission was headed by a magistrate of a rank at least equal to that of a councillor at the Court of Appeal, to be appointed for one year by the Minister of Justice; its members, also appointed for one year, were a high official from the Ministry of Interior[178] and an elected member from the Beirut Administrative Council. The Inspector of Finance acted as rapporteur. In order to make sure that only justifiable claims came before the Higher Commission, a deposit equal to ten percent of the imposed tax, to be forfeited if the case was lost, had to be made by the plaintiff prior to appeal to this commission.

This law was made retroactive, so that all cases that were not already decided by the Administrative Section of the Court of Cassation were to be transferred to the commissions concerned. The purpose of this provision was to relieve that Section of a backload of 3,000 cases.[179]

Cases contesting the assessment of direct taxes continued to

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178. In the original draft this official was to come from the Ministry of Finance; the Parliament amended that provision in order not to have in the commission a person who would be in a sense judge in his own cause, supra, footnote 176.

179. Ibid.

come before the Council in spite of this law;[130] of course, the Council rejected these cases for incompetence and so many people lost time and money through ignorance of the law. This state of affairs was perhaps expedited by the fact that up to 1941 the plaintiff before the Council of State did not have to appoint a legal counsel, and so people brought such cases to the Council without first seeking legal advice.

When the Council of State was reorganized in 1941, it was again given jurisdiction over disputes concerning direct taxes. In some instances, however, such cases were to be taken first to special commissions whose decision could be appealed to the Council. The present practice is based on the 1950 budget law that provided for the formation of a "tax claims commission" in each district (*Mohafaza*) to hear claims contesting taxes assessments in the first instance. Each commission is composed of a judge, a financial official, a delegate from the Chamber of Commerce (in cases of income taxes) or a delegate from the district council (in other cases). Another finance official acts as a *rapporteur*.

Petitions contesting taxes assessments must be filed with the Department of Revenues in Beirut or with the Chief of Finance in the districts; these petitions have to be submitted within a period of one month in Beirut or two months in the other districts. If the finance agency does not uphold the claim, it has to inform the plaintiff by registered mail and at the same time turn over the case together with its own observations to the claims commission concerned. This commission must give its decision within a period of fifteen days. Both the finance

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130. *Arrêts* No. 17 of March 1, 1934; No. 2 of January 30, 1934; No. 24 of July 1, 1932; and No. 2 of January 24, 1933; *Rec.*, II & III.

agency and the plaintiff may appeal the decisions of the commission to the Council of State. The plaintiff's appeal must be made through the finance agency concerned, which must turn over the case together with its own observations to the Council. A deposit of five percent of the tax is forfeited if the case is lost before the Council.

The claims commissions hear cases contesting the value of the tax, but other disputes arising from the administration of the tax, such as disputes concerning the legality of the manner in which a tax is collected, are subject to the direct control of the Council.[181]

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181. Arrêt of January 27, 1947; La Revue, III (1947), p. 308.

CHAPTER XI

The Types of Cases (Continued)

The RPJ Cases

The *recours en pleine juridiction* are either cases in which the plaintiff is suing the State or another public agency for damages in reparation of harm that he has suffered as the result of the wrong doing or breach of contract by the State or public agency, or damage suits brought by the State against any civil servant or contractor.

The most important cases in this category are disputes concerning such governmental activities as public works, administrative contracts, and salaries and pensions of civil servants.

Between May 10, 1950 and January 9, 1953, jurisdiction over these cases was given to the ordinary courts, which were to hear them according to the ordinary judicial procedures.[182] Only the pre-requisite formalities for introducing these cases continued to be made in accordance to the rules of administrative adjudication. In this respect the Lebanese legislator followed the present Italian practice that gives the ordinary courts jurisdiction over all cases involving damages, reserving to the *Consiglio di Stato* cases of annulment of administrative acts.[183] This state of affairs was changed on January 9, 1953 when the Lebanese Council of State was reestablished. This Council is now the Court of Appeal for these cases, the newly established special administrative court being the court of first instance.

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182. A similar arrangement existed for a few months in 1939, *Supra*, p. 32.
183. *Livre jubilaire*, op.cit., p. 500.

Formalities of bringing action

These damage suits are not entertained unless they are preceded by an administrative decision establishing the dispute.[184] Such a decision may be secured by filing a petition with the administrative agency concerned in which the plaintiff explains his claims. This petition is not valid unless filed with the authority concerned, and thus the Council recently rejected a case in which the petition was filed with the Director of the Telephones in a suit raised against the Ministry of Post, Telegrams, and Telephones.[185] The administration either upholds these claims in which case the plaintiff gets his demands and the dispute is settled, or it may reject the claims explicitly by a formal answer or implicitly by not answering the petition within two months of receipt. In the later instances, the plaintiff may take the case to the Council of State. In order to secure evidence that a petition was filed with the administration for establishing the dispute, the plaintiff gets an official receipt from the administration acknowledging the filing of the petition. Sometimes, the authorities concerned refuse to give the petitioner such a receipt, thinking that by so doing they defend the interests of the State; thus, many people are forced to send their applications by registered mail in order to hold an official evidence of their having applied to the administration.[186] It is interesting to note here that Professor Waline reports about the occurence of similar incidents in

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184. Arrêt No. 18 of March 31, 1948; La Revue, IV (1948), p. 518.

185. La Revue Juridique, XXXVI (1956), p. 14.

186. Baz, "Statutes of limitations", op.cit., pp. 11-12.

France, especially in some municipal administrations, and that people resort in these instances to registered mail.[187] The requirement of securing an administrative decision prior to suing the government for damages was taken from the French practice. This French requirement is, according to Waline, a survival of the old practice when, prior to 1889, the Conseil d'Etat was the Court of Appeal for the decisions of the minister, who was the administrative judge of first instance.[188] Many Lebanese legal scholars think that these formalities should not have been adopted by the Lebanese legislator, first because they are not compatible with modern legal thought, and second because they tend to retard the activities of the various departments and increase the slowness of the already slack judicial system. It seems that the Lebanese legislator has tended to support this point of view ever since 1941, and so disputes involving a sum of less than 500 Lebanese pounds (50 Lebanese pounds according to the 1941 Council) are not subject to this requirement.

The question is, does France stick to these formalities just by the force of inertia, or do they have their justifications? The French legislator has tended to extend the scope of the cases to be subjected to this requirement; thus, fiscal cases were included in 1927, local government disputes in 1931, and disputes on pensions in 1934.[189] Therefore, this practice must be more than just a historical survival. A likely justification may be the possibility of arriving at a peaceful settlement of the dispute before going to the courts. The administrative agency

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187. Waline, op.cit., p. 95.

188. Ibid., p. 94.

189. Ibid.

may find that the claim is justified, or it may concede to some of the claims in a way that would save time and money for both the administration and the plaintiff. Thus, if the administration gives due care to the petition and studies it conscientiously and tries to reach a peaceful and just settlement, that formality may be somewhat justifiable. Such action, however, must be left to the option of the plaintiff and not made a requirement.

The Lebanese Council decided in several cases that in his petition to the Council the plaintiff cannot claim more damages than what he has originally claimed in his preliminary administrative petition.[190] But if within the proper time limit, the plaintiff files a new petition with the administration expressing new claims, these claims are entertained even though they were not made in the original petition filed with the Council.[191] This decision seems to contradict the legal provisions that all new claims and points of law raised in the course of the hearing, (that is after the filing of the original petition), are not entertained.[192] The Council justified its decision by stating that the "principles of equity that characterise the administrative adjudication" demand that such claims be entertained. This tendency towards toleration in matters of formalities appears in many of the recent decisions of the Council.

<u>Some illustrative cases</u>

1. <u>Public works</u>

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190. La Revue Juridique, XXV (1946), p. 81; XXVII (1948), p. 65; XXXIII (1955), p. 378.

191. <u>Arrêt</u> No. 46 of June 30, 1947; <u>La Revue</u>, VIII (1948), p. 65.

192. Article 22 of the 1953 decree law No. 14; article 45 of the 1941 <u>arrêté</u> No. 89 LR.

The most frequent damage suits that come before the Council nowadays are those concerning public works and administrative contracts. During the early period of the Council, in the nineteen twenties, cases dealing with the pensions and salaries of civil servants constituted a large proportion of cases coming to the Council. This was mainly due to the post war developments and the pensions and salaries claimed by many people who had served under the Ottoman Government. Cases concerning salaries and pensions are now less numerous than before, but they still constitute a good part of the total cases received.

The State has been recently losing many of the cases brought against the Ministry of Public Works. In fact, many people attribute the abolition of the Council in 1950 to this fact. Mr. Jamil Mekkawi, Minister of Public Works in Mr. Karami's cabinet, has recently held a meeting for discussing the causes and the administrative implications of this issue.[193] This meeting was attended by the President of the Court of Accounts, the Director General of the Ministry of Public Works, the Government Commissioner at the Council of State, and other officials from the Ministries of Public Works and of Justice.

As a result of this state of affairs, the government has thought of proposing the abolition of the Council in its bill reorganizing the judiciary. Fearing that such a proposal would meet much opposition, the government chose another alternative, that of placing restrictions on the powers of the Council by subjecting its decisions in many cases to the review of the Court of Cassation.[194]

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193. An-Nahar, Beirut daily, Tuesday March 6, 1956, No. 6206, p. 2.

194. Supra, pp. 64-66.

The Council entertains cases brought by third parties against both the State and the contractors of public works for damages in reparation of losses caused by public works. In such cases the Council holds the State and the contractors jointly responsible for the damages. The State and the contractor may in turn sue each other to determine the share of the damages to be borne by each.[195]

2. Faute de service and faute personnelle

The Lebanese Council had adopted the French distinction between faute de service and faute personnelle. The first is a fault made by the civil servant while on duty and for which the State assumes responsibility. The faute personnelle, on the other hand, is defined by Duguit as an act that is accomplished on the occasion of the public service and is in the mean time foreign to the Services.[196] The practical distinction between the two faults is often difficult to make; on the whole, civil servants are personally responsible for their acts constituting a voie de fait or faults resulting from unjustifiable negligence.[197] The Lebanese Council has also considered a faute personnelle the actions of a civil servant performed upon the command of his superior if such actions violate the law or regulations.[198] Personal faults are judged and decided before the ordinary courts, while service faults fall under the jurisdiction of

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195. Arrêt No. 202 of July 16, 1953, La Revue, XI (1955), p. 106.

196. Cited in Herman Finer, The theory and practice of modern government, revised edition, (New York, Henry Holt & Co., 1949), p. 926.

197. Waline, op.cit., p. 332.

198. Arrêt of July 6, 1950; La Revue juridique, XXXIV (1954), p. 81

administrative courts.

Because of the difficulty of distinguishihg between the faute personelle and the faute de service, the French Council tends to hold the State responsible for all the acts of civil servants that they perform while on duty. Only intentional faults and faults made when the civil servant is off duty are considered personal.[199] The Lebanese Council of State and courts seem to apply the same principle; thus the Lebanese Court of Cassation recently declared that if the faute personelle is committed while the civil servant is on duty or when it is caused by instruments put in his hands by the State, then the State is responsible for damages.[200]

The State may in such instances sue the civil servant before the Council of State, pleading that he pay back the damages that were assessed against the State. In these cases the Council may uphold the plea or reject it, or it may regard the fault of the civil servant as partly personal and partly a faute de service. Thus in a recent decision, the Lebanese Council decided that the accident caused by the driver of the President of the Chamber of Deputies constituted 75% faute de service and 25% faute personnelle and thus divided the damages to be paid to the victim according to this proportion.[201] In this case the State had sued the driver before the Council claiming that he should bear alone

199. De Laubadère, op.cit., p. 468.

200. Arrêt of the Court of Cassation No. 63 of July 29, 1953; La Revue, IX (1953), p. 615.

201. Arrêt No. 221 of May 9, 1951, ibid., XXXV (1955), p. 141.

the two thousand pounds damages which the criminal court had assessed jointly against the State and the driver. The Council held that placing the instrument causing the accident in the hands of the civil servant is enough to make the State responsible for the injury resulting from such instrument. The driver had to bear part of the indemnity because he was found guilty of contributory negligence. The attempt to evaluate how much of an act is personnelle and how much is de service seems too difficult to be practical. Nobody can define the responsibilities so sharply; however, the French Conseil d'Etat applied this same principle two months after the date of the similar Lebanese decision. The French Council based its decision on the concept of the cumul des responsabilités. Thus, it declared that in an act involving both a faute personnelle and a faute de service, the administrative judge should decide the respective responsibilities of the State and the civil servant, and divide the damages to be paid to the victim between them in proportion to their responsibility.[202]

3. Responsibility for risk

The decision of the Lebanese Council that "placing the instrument causing the accident in the hands of the civil servant is enough to render the State responsible" is related to the newly developing theory of responsibility for risk. This theory holds that in certain cases, the State must pay damages in reparation for losses resulting from its activities even when such losses are in no way due to a fault of the administration, provided that there is a cause-effect relationship between the activity

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202. Arrêt Delville of July 28, 1951, cited in De Laubadère, Traité, op.cit., p. 478.

and the loss incurred.[205]

The Lebanese Council seems to have adopted this theory in many of its recent decisions. This Council decided in a recent case that "the State is responsible for harm resulting from the public works activities even when this harm is due to no error of the State".[204] The decision was based on French jurisprudence; the case dealt with a claim by the owner of a house and an orchard in the vicinity of the Beirut International Air Port. This person claimed that the flight and arrival of planes caused a lot of disturbances to his family and a lot of damages to the orchard. The expertise appointed by the Council upheld the claims, and the Council decided that the State pay him the damages fixed by the expertise. This decision was based on the principle that damage resulting from public works from which all citizens benefit must not be borne wholly by the plaintiff; the remuneration to be paid, however, needs not be equal to the loss incurred, but it must be evaluated according to the discretion of the court.

The Council also applied the theory of responsibility for risk in an earlier decision.[205] In this case the Council declared that it must accept the theory of the responsibility for risk that is widely recognized by modern legal thought. According to this theory, the Council held the State responsible to the victim of an explosive missile that the Lebanese armies left over in the victim's land. The Council held the State responsible only for one third of the damages, because

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203. De Laubadère, Traité, op.cit., p. 490; Waline, op.cit., p. 557.

204. Arrêt No. 19 of March 31, 1954; La Revue, XII (1955), p. 105.

205. Arrêt No. 136 of September 13, 1950; La Revue, VII (1951), p. 51.

the experts testified that the missile would not have exploded if the victim had not handled it.

The cases in which the Council decides that the State must pay only part of the losses incurred are frequent. In a case of this type,[206] the Council decided that the State must bear fifty percent of the losses incurred. This was a case in which a person was killed accidentally by a stray bullet while some policemen were chasing a dangerous criminal. The Council decided that the person was guilty of contributory negligence when he stood on the roof of his house to watch the chase and so the responsibility of the State was evaluated at only fifty percent.

4. Lack of foresight

The Lebanese Council has also accepted the French theory of lack of foresight.[207] (Theorie de l'imprèvision). This theory was developed by the case law of the French Council of State, and it states that the public administration must share with the contractors of public services losses resulting from unforeseen causes such as a risė in prices due to war. This theory is applied only to administrative contracts.[208] Many public agencies, however, manage to evade such a possibility by providing a special clause in the contract precluding or limiting the possibility of revision. This is happening both in France[209] and in Lebanon.[210]

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206. Arrêt No. 353 of November 25, 1953.

207. Arrêt No. 11 of February 29, 1948; La Revue, IV (1948), p. 318.

208. De Laubadère, op.cit., p. 454.

209. Ibid., p. 455.

210. Arrêt No. 34 of March 8, 1949; La Revue, V (1949), p. 646.

The Superior Council of Common interests

A problem that faced the Council of State for a few years was over cases brought against the acts of the Conseil Superieur des Intérêts communs Libano-Syriens that was established by the Syrian-Lebanese Agreement of October 1, 1943.[211] This Council was to be composed of six members, three Lebanese and three Syrians; its function was the administration of, and the preparation of legislation for, certain public services whose scope of activities extended to both countries, such as the Customs Department, the Tobacco Monopoly and similar concessionary companies. This Council had the authority to appoint and discharge the employees in these services, and to issue all necessary rules and regulations concerning them.

Both the Lebanese and the Syrian Councils of State have declined jurisdiction over the administrative acts of this organ, on the grounds that it was not an exclusively Syrian or an exclusively Lebanese agency.[212]

In subsequent agreements between the two governments, most of the public services that lay under the direct control of the French High Commissioner and his Superior Council[213] were turned over to the Superior Council of Syrian-Lebanese Common Interests.[214] Its functions were thus

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211. Collection of Lebanese Laws, op.cit., Vol. IX.
مجموعة القوانين اللبنانية ، الجزء التاسع حرف م تحت كلمة مصالح مشتركة .

212. The Lebanese Council of State; arrêt of February 2, 1946; the Syrian Council of State; arrêt No. 89 of April 28, 1947; both cited in Adnan Ajlani, Les décisions du Conseil Superieur des Intérêts Communs Libano-Syriens, La Revue, V (1949), pp. 14-15 (the French section).

213. Supra, pp. 24-25.

214. Collection of Lebanese Laws, op.cit., Vol. IX.

extended to cover a large part of the Lebanese and Syrian public administration; yet its acts escaped judicial control. Apalled by this State of affairs, Dr. Ajlani, a leading Syrian judge, proposed the establishment of a Lebanese-Syrian Council of State to control the acts of this mixed organ.[215] This proposal would perhaps have been accepted if this mixed organ had not been dissolved at the outset of the Syrian-Lebanese boycott in 1950.

Although the acts of the Superior Council for the Common Interests could not be contested for excès de pouvoir, the case law of both the Syrian and the Lebanese Council of State tended to hold each state responsible for damages resulting from the acts of the Common Interests' civil servants within its territory.[216] The Lebanese Council declared this principle in an earlier decision when it declared that "acts concerning the appointment, transfer, or discharge of Customs employees are not susceptible to its control because they emanated from the Superior Council for Common Interests that is not a Lebanese authority; however, the Council entertains claims for damages for losses resulting from such acts."[217]

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215. Ajlani, op.cit.

216. Arrêt No. 91 of May 28, 1952; La Revue, VIII (1952), p. 767.

217. Arrêt No. 58 of October 31, 1947, La Revue, IV (1948), p. 161.

CHAPTER XII

Types Of Cases (Continued)

The REP Cases

The *recours pour excès de pouvoir* is the action in which the plaintiff attacks an administrative act for illegality. It is the common law remedy for the annulment of illegal administrative acts, meaning that it is resorted to in all such cases not assigned by law to another court.

The object of this action is to quash the administrative act that the plaintiff alleges to be improper. If the Council upholds the claim it annuls the act *ex tunc*. Among the legal consequences of such decision are the annulment of previous administrative acts based on the act brought to the attention of the court, and in some instances the payment of damages. According to the Lebanese Law, the Council of State entertains claims for the annulment of decrees, *arrêtés*, and administrative orders emanating from the administrative authorities, whether dealing with individual persons or with general regulations.

The cases of annulment are now the main type of cases heard in the first instance by the Council of State; the other types of cases that the Council still hears in the first instance are electoral cases and cases for the annulment of decisions of disciplinary committees. In all other administrative cases, the Council is either a court of appeal or a court of cassation.[218]

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218. *Supra*, p. 77

Cases for annulment may be brought by private citizens against the acts of public authorities, or by one agency of the State against the decision of another agency. An example of the second instance is a recent case in which the government contested an act of the Court of Accounts before the Council of State.[219] The Court of Accounts had annulled a decree of the Council of Ministers, because it was not submitted to the preaudit of the Court. The rapporteur of the Council proposed that the decision of the Court of Accounts be quashed for incompetence, because only the Council of State is entitled to annul administrative acts.

The Council may, in exceptional cases, and upon the formal request of the party or parties concerned, stay the execution of the contested act if it finds that serious or irreparable harm may result from the execution. It did so recently, when an action was brought contesting the decision of the Ministry of Economy for reducing the price of textbooks. Later the Council annulled this act for its violation of the law.[220]

The Council may annul an administrative act through the *recours pour excès de pouvoir*, that is, it can prevent the public authority from acting, but it can never force that authority to act. The Lebanese Council declared this principle in a recent decision.[221] In this case, the plaintiff claimed that the State must open a road to his property that was rendered inaccessible through an expropriation act. This plaintiff had previously filed a petition with the administration requesting

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219. *La Revue Juridique*, *op.cit.*, XXXV (1955), p. 241.
220. *Arrêt* No. 266 of June 30, 1954, *ibid.*, p. 138
221. *Arrêt* No. 176 of April 21, 1954; *ibid.*, p. 140.

that a road be opened. The administration appointed experts who decided that the plaintiff's claims were justified, and recommended that the administration make the road. The administration refused to act upon the experts' recommendation and thus, the plaintiff brought the case before the Council. The administration pleaded for the dismissal of the case for incompetence on the grounds that the independence of the state in exercising its authority must be protected, and hence that the Council cannot force the State to perform any act. The Council upheld the plea of the administration and dismissed the case. The plaintiff's claim in this case was perfectly justified but the principle of the independence of the administration prevented the Council from taking action.[222] The plaintiff in this case, however, has another remedy by claiming damages from the administration for the losses he incurred from isolating his property. If the administration rejects his claim explicitly by a formal answer, or implicitly by keeping silent for two months, the plaintiff can file a damage suit (RPJ) with the Council.

The only way in which the administration can be forced to act is an indirect one - by annulling a decision in which the administration decides not to act. In this respect, the French practice seems to fall short of the Anglo-American practice, where it is possible for the courts, through the extra-ordinary remedy of mandamus, to force the administration to perform a ministerial act that it has failed to perform.[223] It is

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222. The Council declared the same principle in arrêt No. 21 of May 19, 1954; ibid., p. 107

223. The last paragraph of Article 3 of the recent law establishing the Egyptian Council of State (1949), states that the refusal or failure of the administration to perform a duty prescribed by law or regulations is considered an administrative act annullable by the Council; the Egyptian Official Gazette No. 17 of Feb. 3, 1949.

interesting to note here that through a legal fiction, mandamus has been used also by the English courts, but not the American, for the annulment of administrative acts, in a manner that bears some resemblance to the _excès de pouvoir_ action. This point seems to have been missed by Hamson,[224] but is brought out clearly by two modern English authors,[225] who consider that this special use of the mandamus is what makes it a valuable remedy. They state further that "English courts have regarded as _excesses of jurisdiction_ acts carried out for improper purposes[226] or acts based on wrong considerations; the courts have granted mandamus in these circumstances, holding that where a discretion is abused, it is not exercised at all, and therefore that mandamus is required to enforce the carrying out of the duty of the body to exercise its discretion according to the law." Mandamus may control a discretion even more closely when the court excludes so many considerations as being wrong ones that the administration is left without a choice, and the court orders it to act in the only remaining possible way.[227]

Conditions for entertaining REP suits

So that a case for annulment may be entertained, the following conditions must be satisfied:

1. The contested administrative act must be an executory decision that is likely to cause harm.

2. The plaintiff must have a direct personal legitimate interest in the act.

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224. _Supra_, p. 8
225. Griffith and Street, _op.cit._, p. 229.
226. Note similarity here to the _détournement de pouvoir_, _infra_ p. 137.
227. Griffith and Street, _op.cit._, p. 230.

3. No other remedy should be available.

4. The required formalities that were discussed before must be complied with.

1. Executory acts

The requirement that an act be executory so that it may be contested by way of *excès de pouvoir* is strictly adhered to by the Lebanese Council. By an executory act is meant an administrative act that is complete and ready for enforcement. It is very difficult to make always a sharp distinction between an executory administrative act and a non executory one. This explains why the Lebanese Council has handed down some contradictory decisions regarding the municipal regulations that are subject to counter-signature of higher authorities. The question raised was whether or not these decisions become executory and hence subject to the Council's control from the moment they are issued by the municipal council or whether they do not become executory until they are finally approved and countersigned by the tutelary authority.

In two recent decisions,[228] the Council declared that municipal decisions requiring the countersignature of the Minister of Interior can - not be brought before the Council of State until they are finally approved by the said Minister, because they do not become executory unless they are countersigned.

In a later decision,[229] the Council was of another opinion. It declared that municipal acts subject to the countersignature of higher

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228. *Arrêt* No. 19 of April 1, 1948; *La Revue*, V (1949), p. 34, and *Arrêt* No. 61 of Nov. 26, 1947, *La Revue*, IV (1948), p. 482.
229. *Arrêt* No. 4 of January 15, 1949; *La Revue*, V (1949), p. 455.

authorities are considered executory from the date of their issue, even before the final approval of these authorities. The Council based its decision on the French practice quoting Hauriou in his Précis de droit administratif, (1919), p. 463.

This decision seems to be in violation of the laws of municipalities in Lebanon; Lebanon has had so far two laws of municipalities, and both specified clearly that the municipal acts requiring the approval of higher authorities do not become executory until they are explicitly approved by countersignature, or implicitly by silence for a certain interval.[230] The Italian practice seems to concur with the Lebanese in considering non-executory an act that needs the approval of some superior authority.[231] In France also the deliberations of municipal councils cannot be challenged directly to the Council of State. They have to be contested to the hierarchic superior, the prefect, whose decisions may be challenged for excès de pouvoir to the Conseil d'Etat. If the prefect countersigns the act, then his countersignature is considered an executory decision that may be contested to the Council of State.[232]

Thus both the Lebanese laws and the French and Italian practice agree that municipal decisions do not become executory until approved finally. Reason also leads to such a conclusion for an act that is not in

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230. Article 48 of arrêté No. 1208 of March 12, 1922 as amended by legislative decree No. 32 of September 15, 1932. The Lebanese Official Gazette, (1932), No. 2713; Articles 66-70 of legislative decree No. 5 of October 31, 1952. Collection of 1952-1953 legislative decrees, op.cit., p. 35.

231. G. Miele et al, "Italian administrative law," The International and comparative law quarterly, III (1954), p. 435; also Enrico Guiccardi, "La giustitia amministrativa", (Padova, Cedam, 1954),p. 125.

232. Waline, op.cit., p. 204

force is literally not executory.

Such contradicting decisions may seem confusing, and they may give the impression that one can never tell what the opinion of the Council on a certain issue will be. The picture is not so dark, however. It is true that the Council is not bound by its previous decisions, and that contradictions may and do exist. These contradictions, however, occur mainly in new issues; in the long run the Council does tend to form a body of consistent case law that is followed almost to the letter. Thus many decisions of the Council are based on, or at least cite as corraboratory evidence, the "constant case law of the Council".

That only executory decisions may be contested for excès de pouvoir was declared by the Council in another recent case[233] in which the Council dismissed a suit brought against a decision of the Council of Ministers, because such a decision is not executory. The Council based its decision on Articles 17 and 64 of the Lebanese constitution; Article 17 states that the executive power shall be entrusted to the President of the Republic, by whom it shall be exercised with the assistance of the ministers; Article 64 states that the ministers shall have the supreme direction of all the services of the State that come under their respective departments. From these provisions the Council of State deduced that the constitution does not give any executive power to the President of the Council of Ministers or to his Council, and hence that their decisions cannot be executory.

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233. Arrêt No. 125 of December 29, 1951; La Revue, XII (1956), p. 108

It is perhaps interesting to mention that in this case the government did not plead that the contested decision was not executory, and hence not subject to the control of the Council, but it tried to prove that the decision was legal and that the ground on which it was contested were not founded. The Council did not discuss the issues raised by both the plaintiff and the government, and it declared its incompetence, because the decision was not executory. The Council often raises points of law that were not brought by the parties, a fact that contrasts sharply with the Anglo-American legal principle, where the impartiality of the court is so much emphasized that the court is formally required to act as an arbiter and to decide the case in the light of the arguments raised by the parties. This principle, however, has also been disregarded by the American courts in some important cases.[234]

To be susceptible for attack by way of excès de pouvoir, an act must not be only executory, but also potentially productive of injury. (Décision faisant grief). In other words, the act must be capable of affecting the jural relations of the petitioner. Thus circulars,[235] projects of administrative acts, and acts simply providing for the execution of acts already rendered definitive[236] are not subject to a recours pour excès de pouvoir because they are not liable to produce harm.

In one instance, however, the Lebanese Council admitted a recours pour excès de pouvoir against a non-executory act on the grounds that if

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234. See for example Marbury V. Madison, in Cushman, op.cit., pp. 245-252.
235. Arrêt No. 23 of June 14, 1932; Recueil, II, p. 175.
236. Arrêt No. 21 of April 3, 1941, Répertoire, I, p. 6, No. 12.

put into execution, it would produce harm;[237] the Council decided that in such cases the party concerned must be permitted to bring a recours préventif pour excès de pouvoir. In this decision the Council also drew upon the case law of the French Council of State, citing a similar case decided in 1911.

2. Interest

It is very difficult to define the notion of "direct legitimate personal interest", which is the second requirement for admitting the excès de pouvoir action. This notion was adopted in the case law of the French Council as a result of the need for not making the excès de pouvoir remedy an actio popularis that will be open to any body.[238] A legitimate interest is distinguished from a right; if a person has a legitimate interest in an act, this act does not necessarily violate any of his rights. It simply means that the person concerned is adversely affected by that act. A legitimate interest may be defined as a personal interest that cannot be protected except through the protection of the public interest.[239] The main difference between an excès de pouvoir case and a case of pleine juridiction is that the first involves simply an interest while the second involves a violation of a right. The voter, for example, has a legitimate interest in the elections; similarly a teacher in a public school has a legitimate interest in an act imposing

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237. Arrêt No. 7 of May 21, 1942; ibid., p. 31, No. 87.
238. Waline, op. cit., p. 110.
239. Zanobini, op.cit., Vol. I, p. 177.

new requirements on public school teachers.[240] On the other hand, a person has right to his property or to his physical safety, and so if the government encroaches on his property rights, or if through some activity of a public agency he is injured physically, then his right is violated and he can sue the State for damages by way of the recours en pleine juridiction.

The French Council has become increasingly tolerant in determining the interest deemed qualifying for bringing action.[241] In Lebanon, few cases are rejected by the Lebanese Council of State because of lack of a legitimate interest on the part of the petitioner. This is due to the fact that nobody takes the trouble of bringing a case to the Council if he is not really involved, or if the benefit that he may get through the action does not exceed the expenses of litigation.

In one of its decisions,[242] the Council rejected the petition of a villager challenging an act of the Minister of Interior providing for the division of the village into two quarters, on the grounds that the petitioner does not have a direct personal legitimate interest in the challenged act, as distinct from the general interest that every inhabitant of that village has.

This notion bears some similarities to the restrictions put on

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240. Arrêt No. 230 of August 26, 1953; La Revue Juridique, XXXIV (1954), p. 104. In this case a newly appointed teacher contested an act of the Minister of Education subjecting teachers on probation to an examination at the end of their one-year probation. The Council admitted the case and annulled the act for violation of law.

241. De Laubadère, op.cit., p. 366.

242. Arrêt No. 81 of May 5, 1939, Répertoire, I, p. 31, No. 90.

the admission of tax payers' suits in the Anglo-American world. Both aim at limiting the right of litigation to the persons who really have some personal interest in the contested act.

3. The non-availability of another remedy

The requirement that a recours pour excès de pouvoir is not admitted when the party concerned has access to another judicial remedy was also taken from the French practice as developed by the Conseil d'Etat. Until the beginning of this century, the French Council was very strict in the application of this formula.[243] Since that time, however, the Conseil d'etat has tended to become increasingly tolerant in this respect, so that it now admits a lot of cases of excès de pouvoir in spite of the availability of other judical remedies. Thus it admits such cases when the recours pour excès de pouvoir gives greater satisfaction than the other available remedies or when these other remedies fall within the jurisdiction of the Council;[244] for example, the French Council admits the REP in many cases when the only other available remedy is an RPJ action that must be heard by the Council itself.

The Lebanese Council is much more strict, and it does not admit any case of excès de pouvoir unless there is no other available judicial remedy. Thus, it recently rejected a case when the only other available remedy was a recours en pleine juridiction.[245]

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243. Waline, op.cit., pp. 121-124.
244. De Laubadère, Manuel, op.cit., p. 107.
245. Arrêt No. 10 of January 31, 1952; La Revue, VIII (1952), p. 345.

The reason why the Lebanese Council cannot be as tolerant in this respect as the French Council is the fact that these requirements and all similar provisions in the rules of procedure of the Lebanese Council were taken from the French practice and incorporated into laws that bind the Council. In France, on the other hand, these provisions are developed by the case law of the Council of State so that this Council, rather than being bound by such provisions, is in a sense the maker of them.

Decree Laws

The Council of State is not legally bound by its previous decisions; no wonder the decisions of the Council may reveal some contradictions, sometimes on basic principles.

One of these contradictions concerns decree laws. The Lebanese legislature sometimes delegates to the government the function of legislation on certain specified topics for a certain limited period of time; upon this authorization the government issues decrees having the force of law. These are known as legislative decrees, and they are parallel to the French décrets lois. The Council was more than once faced with the question whether these decree laws are subject to its control or not; in other words, are they to be considered as administrative regulations or as laws?

One case of this kind was decided by the Council in 1947.[246] In this case the Council declared that legislative acts, whether in the form of a law or a legislative decree, are not subject to the control of the Council. The Decree law contested was issued by the President of the Republic and the

246. Arrêt No. 67 of December 22, 1947; La Revue, IV (1948), p. 511.

Council of Ministers upon delegation not from the Chamber of Deputies, but from the French High Commissioner. This point, however, was of no consequence to the decision, because the legislative authority was in the hands of both the Chamber and the High Commissioner. The Council had previously declared the same principle of not entertaining suits for the annulment of decree laws in the reasoning of an earlier decision.[247]

The Council decided otherwise recently.[248] This case is a little different from the above case, because the power of legislation was this time delegated to the government by the Chamber. In this case, after a long introduction in which reference was made to the French case law and legal theory, the Council decided that it is competent to entertain cases contesting the legality of legislative decrees because they emanate from the executive; the decision added that the Council may annul such decrees for _excès de pouvoir_ if they are not made in accordance with the specifications of the delegating statute. The government pleaded that since the Chamber must be informed of all decree laws, such decrees have a legislative character that puts them outside the control of the Council. In answer to thispoint the Council stated that parliamentary control differs basically from judicial control and that the two are by no means mutually exclusive. Parliamentary control checks the advisability or usefulness of the legislative decree, while judicial control checks its legality. The first annuls

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247. _Arrêt_ No. 18-19 of April 22, 1944; _Repertoire_, I, No. 110, p. 102.
248. _Arrêt_ No. 522 of November 9, 1955; _La Revue_, XI (1955), p. 939.

the act from the moment the legislature does not approve of it, while the second has a retroactive effect. Thus, the Council annulled the contested legislative decree _ex tunc_ as well as the regulations based upon it. Here the Lebanese Council seems to have followed the French practice, where the _Conseil d'etat_ controls legislative decrees as to their conformity with the delegating statute.[249] Legislative decrees are no longer permitted in France according to Article 13 of the constitution of the Fourth Republic, which prevents the National Assembly from delegating any of its legislative powers to the executive. This provision, however, has been side stepped by some legal fiction and the French legislature has actually delegated such powers to the executive ever since 1948.[250]

The grounds of annulment

The grounds for the annulment of administrative acts for _excès de pouvoir_ are exactly the same as those of the French Council, namely, violation of fundamental procedural regulations, incompetence, violation of law, and the use of authority for a purpose other than that for which authority was given (_détournement de pouvoir_).

The Council of State is not as strict as the Anglo-American Courts sometimes are in matters of violation of procedural regulations -

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249. Waline, _op.cit._, p. 26; the Italian legal thought seems to contradict the French and the Lebanese practice in this respect: Decree laws are not considered administrative acts and hence they are not subject to control by the REP. Zanobini, _op.cit._, Vol. I, p. 224.

250. Waline, _op.cit._, p. 34.

it annuls the act only when such formal errors may influence the administrative decision in a way that adversely affects the parties concerned. The Lebanese Council declared this principle in one of its early decisions basing its opinion on the French case law and legal theory.[251]

By incompetence as a ground for annulment is meant the issuing of an administrative act by an authority that is not competent to issue it. The Council annuls such acts whenever they are brought to its attention by a recours pour excès de pouvoir. Thus, the Council annulled a decision of the Minister of Public Works providing for the demolishment of a building in conformity to a municipal street plan; the Council declared that this was a function of the municipal council and not of the Minister of Public Works.[252]

The Council has always considered the violation of the principle of res judicata a violation of law and thus has annulled any act touched with this legal error.[253] The violation of res judicata as a separate cause for annulment for excès de pouvoir was later incorporated in the laws of procedure of the Lebanese Council.[253a]

Acts violating the acquired rights of private persons are annulled by the Lebanese Council for violation of law. The Council declared this principle in a decision in which it annulled an administrative act concerning a person who had been authorized two years before to exploit a small local

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251. Arrêt No. 17 & 18 of May 7, 1933, Recueil, II, p. 284
252. Arrêt No. 5 of February 14, 1933, Recueil, II, p. 241.
253. Arrêt No. 26 of February 20, 1937, Repertoire, I, p. 33, No. 97.
253a. Article 83, paragraph 3 of arrêté No. 89 LR of April 23, 1941, and Article 55, paragraph 3 of decree law No. 14 of January 9, 1953.

electric installation;[254] the contested act was an order to this person to demolish his installation, because a third person was granted a monopoly for supplying the district with electricity. The Council declared that the person with the small electric installation had an acquired right that could not be legally revoked by an administrative act.

Retroactive acts adversely affecting the interests of others are also annulled by the Council of State for violation of the law.[255] This is also similar to the French practice where the Conseil d'Etat annuls such retroactive measures.[256]

Détournement de pouvoir

Détournement de pouvoir is one of the most important grounds on which the Council of State may annul an administrative act for illegality. It is especially important, because it provides the court with the means of controlling the motives of the administrative agency concerned. The Lebanese Law concerning the Council of State and its procedure states that the fourth ground for the annulment of an act for excès de pouvoir is "the use by the administrator of his authority for a purpose other than that for which that authority was conferred by law." This statement is almost a literal translation of the definition of the notion of détournement de pouvoir as developed by the case law of the French Council and given by legal writers.[257]

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254. Arrêt No. 38 of June 19, 1935, Répertoire, I, p. 33, No. 95.
255. Arrêt No. 3 of April 28, 1925, Répertoire, I, p. 32, No. 94.
256. Langrod, op.cit.
257. Waline, op.cit., p. 131; Laubadère, Traité, op.cit., p. 389.

A competent administrator may act in accordance with the proper procedure and legal requirements, yet at the same time his act may be touched with détournement de pouvoir and hence illegal; thus a détournement de pouvoir is a violation not of the law, but of the spirit of the law. This notion of the abuse of power was originally based on the principle that however large may be the powers delegated to the administrator, they have never been given to him except for serving the public interest; and so there is abuse of power whenever the administrator uses his authority for a purpose other than that for which he was given power, that is, other than that serving the public interest.[258] There has recently been a tendency to extend this notion to maintain that "no public agent ever has authority except to further, not merely a purpose in the general interest, but also the particular purpose for which the power was conferred upon him by the enabling legislation."[259] This extension of the notion of the abuse of power is still an issue around which there is a deal of controversy among French legal writers.[260] Lebanon seems to have outrun France in the application of this concept and the new notion of the abuse of power has been formally incorporated in the Lebanese civil law.[261] (Article 124 of the Law of Obligations).

Some illustrative cases of abuse of power

Détournement de pouvoir presupposes a discretionary power; it is a control over the purpose of the act; that is, the subjective element in the act. The Council of State freely investigates the motives of the

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258. Waline, op.cit., p. 132.

259. Gaston Jèze, La jurisprudence du Conseil d'Etat et le détournement de pouvoir, Revue de Droit Public, LVIII (1944), p. 59, cited in Shwartz, op.cit., p. 218.

260. Shukri Kurdahi, "La juridiction administrative au Liban et son evolution" in Livre Jubilaire, op.cit., p. 593.

261. Ibid., p. 592.

administration whenever an abuse of power is claimed. Thus, the decree abolishing a post to which a civil servant was newly transferred from another department was cancelled by the Council for abuse of power.[262] The Council justified its decision by stating that the motive of the administration in transferring the civil servant and then supressing the new post was to discharge him from the service; and that the administration must not resort to such indirect methods for discharging a civil servant, but it must follow direct methods and make its decision in the interest of the public service. Similarly, the Council considered that the discharge of a civil servant through the abolition of the position was tainted with détournement de pouvoir when the suppressed post was reestablished in a reorganization of the service shortly after the discharge.[263] When an act is attacked for abuse of power, the Council investigates the facts to find out whether they justify the challenged act. Thus, an administrative act requisitioning food materials during the war to prevent monopoly and insure the distribution of the necessary rations was annulled by the Council for détournement de pouvoir when it was found out that the confiscated food was of a kind found in abundance in the market and that it was not good for consumption. The Council deduced that the real motive of the administration was to force the owner of the confiscated products to settle out of court a dispute that existed between him and the administration.[264]

Discrimination and inequality of treatment of the citizens by the administration constitute an abuse of power. This principle was declared

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262. Arrêt of January 27, 1947; La Revue, III (1947), p. 306.
263. Arrêt Nol 13 of May 27, 1935, Répertoire, I, p. 38, No. 107
264. Arrêt Nos. 18-19 of April 22, 1944, Répertoire, I, p. 38.

by the Lebanese Council when it decided that the administration cannot grant one person what it has refused another by allegating to the latter a motive which it did not allegate to the former. The Council added that the grant of a concession does not depend solely on the whims of the administration.[265] Similarly the Council annulled for abuse of power two consecutive decrees, the first revoking a license of occupation of a public property granted to three persons and the second authorizing one of the three to reoccupy that property. The Council stated that the administration was favouring one citizen over the others for no acceptable reasons.[266]

Comparison with Anglo-American practice

The illustrations given above show that under the concept of the abuse of power the Council of State asks not only what the administration has done, but also why it did it. It thus inquires into the motives that made the administration act in a certain way, and tries to determine whether these motives correspond to the purpose for which the administration was given its powers. This notion that the reviewing courts must probe into the mental processes of the administrator and discover the motives that induced the challenged act is an obligation that the Anglo-American courts have consistently declined.[267] Thus, Chief Justice Hughes declared in the second Morgan case[268] that "it is not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." What the Common Law courts

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265. Arrêt No. 54 of May 27, 1935, Répertoire, I, p. 38, No. 106.
266. Arrêt No. 24 of April 27, 1935, Répertoire, I, p. 37, No. 104.
267. Shwartz, op.cit., p. 219.
268. Morgan V. U. S., 304 U.S. 1 (1938), cited in Hart, op.cit., pp. 514-519, at 517.

seem to ask is merely what the administration has done and not why it did it. According to Shwartz, however, the Anglo-American courts seem to give a some what similar protection to the citizen in their control of the reasonableness of the act. "American courts", writes Mr. Shwartz,[269] "in exercising their authority to determine the reasonableness of regulations, look to see if there is a rational relationship between the particular regulation and the governing statute." This scrutiny, according to Mr. Shwartz, permits the American courts to exercise a control similar to that exerted by the French Council of State under its concept of abuse of power; because the required rational relationship does not exist when the contested regulation has been made for a purpose other than that which the legislature had in mind when it passed the enabling statute. Nevertheless, the Anglo-American courts are much more reluctant than the French or Lebanese courts to inquire into administrative motives so that there is in fact nothing like the French concept of _détournement de pouvoir_ in the Anglo-American courts.[270]

Incompetence of the Council over certain administrative acts

Besides the policy acts known as _actes de gouvernment_,[271] there are certain other administrative acts over which the Lebanese Council has no control. These acts may be divided into two categories: first, acts that normally fall under the jurisdiction of the Council and are excluded from this jurisdiction by special legal provisions; and second, acts that normally fall outside the jurisdiction of the courts in accordance with the

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269. Shwartz, _op.cit._, p. 220.
270. _Ibid._, 222
271. _Supra_, p. 71

French legal theory and case law and with the gradually accumulating Lebanese case law.

There are many Lebanese laws that exclude certain administrative acts from the jurisdiction of the Council either for a limited period of time or permanently.

Thus, the decisions of the French High Commissioner were not subject to control by the Council of State.[272] Such acts, the Lebanese Council decided,[273] were not within its competence, and they had to be taken before the Supreme Tribunal at the Haut Commissariat in accordance to arrêté 2865. Similarly, we have seen that the acts of the Departments of the Lebanese-Syrian Common Interests were not susceptible to control by the Council, because they did not emanate from a Lebanese authority.

Among the administrative acts that have been excluded more than once from the control of the Council are acts concerning the reorganization of the civil service. Thus by a special arrêté of the French High Commissioner, the government was empowered in 1939, and for a period of four months, to discharge, lay off, or pension any civil servant, and the decisions of the government in these matters were not subject to any kind of review. On the basis of this arrêté, the Lebanese Council refused to entertain a case brought by a discharged civil servant.[274] Recently, the Lebanese Government was twice given similar powers for periods of six months.[275]

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272. Arrêté 2865 of September 18, 1924; Recueil des acts administratifs, op.cit., Vol. 5, p. 340.
273. Arrêt of November 29, 1941; La Revue, I (1945), p. 123.
274. Arrêt of January 31, 1945; La Revue, II (1946), p. 37.
275. Decree Law No. 1, of October 15, 1952, as amended by decree law No. 20 of January 15, 1953; Article 36 of decree law No. 14 of January 7, 1955. (the new personnel law).

Among the administrative acts excluded permanently from the control of the Council of State by legal provision are ministerial decisions announcing the names of the applicants qualified to take an examination for recruitment to the civil service.[276] If the minister refuses to include the name of a qualified applicant in the list, this applicant cannot appeal to the Council of State even where there is manifest injustice. The official reason given in justification of this provision is that many candidates may be legally qualified and at the same time they may have physical or moral handicaps that render them unfit for the job. The real reason for this limitation is probably to enable the minister to exclude with impunity any qualified applicants who are undesirable for political reasons, such as members of the illegal political parties - the Communist Party and the Syrian National Socialist Party. In this respect we find the French Council of State much freer.[277] The Lebanese law contrasts sharply with the French practice as expressed in the famous case of l'Affaire de l'Ecole Nationale decided recently by the Conseil d'Etat. In this case, the Secretary of State had refused, apparently for political reasons, to include the names of four qualified applicants in the list for a competitive examination for admission to the National School of Administration. It seems that the rejected applicants were Communists. The Conseil d'Etat, however, annulled the challenged act for détournement de pouvoir.[278]

Another recent law placing certain administrative acts outside the juridiction of the Council of State is the law requiring specific qualifi-

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276. Decree law No. 14 of January 7, 1955, Article 16.
277. Waline, op.cit., pp. 321-329.
278. Hamson, op.cit., pp. 22-41.

cations of contractors seeking government contracts for public works.[279] The list of qualified persons is prepared by a commission in the Ministry of Public Works; the decisions of this commission are not susceptible to any way of judicial review.[280]

Besides the administrative acts that are excluded from the Council's jurisdiction by special legal provisions,[281] the Lebanese Council shows much reluctance to exercise control over the discretionary power of the administration, or to examine the merits of an act. Thus in a recent case brought by a property owner challenging an act of road planning on the grounds that there is no public interest in opening that road, and that the act was made for serving the private interests of an influential person in the district,[282] the Council rejected the petition declaring that "its function as an administrative court is the control of the legality of acts, but the evaluation of the public interest in the act is left to the discretionary power of the administration." The Council seems to have omitted an important point brought by the petitioner - that the act was made for serving the interests of a particular person. Evidently, he was accusing the administration of détournement de pouvoir; and though determining whether or not there is a public interest in the act falls outside the jurisdiction of the Council, the determination whether or not there is détournement de pouvoir falls within that jurisdiction. The Council recognized this principle in a later decision[283] when it declared that the choice by the administration of a locality for the erection of a

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279. Decree law No. 31 of February 16, 1953, Collection of 1952-1953 decree laws, op.cit., II, p. 524.
280. Ibid., Article 2, last paragraph
281. It may be safely assumed that non-executory decisions and administrative decisions not susceptible of producing harm are also excluded from the jurisdiction of the Lebanese Council by legal provisions.
282. Arrêt No. 518 of October 2, 1955, La Revue, XII (1956)
283. Arrêt No. 532 of December 7, 1955, ibid., p. 32.

building for government offices is a discretionary power not subject to the control of the Council; "however", the decision continued, "this act may be attacked on the grounds that the administration has attempted to serve the special interests of some persons to the disadvantage of others."

The Council declared the separation of an area from the territory of one municipality and its annexation to another a discretionary act not subject to its control;[284] similarly, it declared that the evaluation of the reasons for discharging an official are not subject to scrutiny by the Council.[285]

The Lebanese Council exhibits some reluctance in the evaluation of the facts on which an administrative act is based, especially when these facts are of a technical nature. Thus the Council has many decisions in which it declared that technical matters or material facts as decided by the administration are not susceptible to its control.[286]

The Council, however, does not adhere strictly to the doctrine of its incompetence over material facts. In several decisions it declared that an error of fact is considered a violation of law and hence cause for annulment of an administrative act whenever the facts are clearly and manifestly inexact, and whenever a détournement de pouvoir is claimed.[287]

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284. Arrêt No. 36 of October 31, 1932, Recueil, II, p. 200

285. Arrêt No. 37 of December 12, 1933, ibid., p. 315.

286. Arrêt No. 16 of May 17, 1932; No. 27 of June 21, 1932; No. 43 of November 28, 1932; all in Recueil, II; No. 61 of November 26, 1947; La Revue, IV (1948), p. 222; No. 44 of October 20, 1954, La Revue, XII (1956), p. 111, to mention a few.

287. Arrêt No. 69 of May 25, 1938, and No. 71 of December 12, 1938, both in Repertoire Nos. 71 & 86.

If an administrative act interferes with the personal rights and liberties of the citizens, the Council freely examines the facts on which the act was based to find out whether or not the decision is justified by these facts. This principle was declared in a case that was brought against an administrative act dissolving a sports society in a Lebanese village on the grounds that the society was working for the propagation of communistic ideas under the disguise of sports. The Council declared that the right of association cannot be interfered with except for clear reasons; a society cannot therefore be dissolved unless it is proved beyond reasonable doubt that it is endangering public security and morality or that it is performing functions prohibited by the law. The Council was not convinced by the administrative investigation that the dissolved society belonged to that type, and the act was thus annulled. The decision added that the annulment of the act did not prevent the administration from making more serious investigations on the basis of which it might redissolve the said society.

Some comparisons

These decisions of the Lebanese Council seem to correspond to the modern French tendency that began at the outset of this century, and in which the Conseil d'etat is becoming increasingly liberal in examining the facts in excès de pouvoir cases as to their exactitude and reasonableness as grounds for the administrative finding.[288] The Italian Council of State, on the other hand, has always been competent to test administrative acts

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288. Edmond Naim, "Le Control des faits par le juge de l'excès de pouvoir", La Revue, VII (1951), p. 5 of the doctrine, the French section.

both for legality and on the merits;[289] this may explain why the Italian Council has not made such an extensive use of the détournement de pouvoir as did its Lebanese and French counterparts.

The Anglo-American courts are more reluctant than the French or Lebanese Councils of State in their control of the facts. It is an established principle of these courts. This is one of the main reasons for the development of the many administrative tribunals in the United States. Appeal from these tribunals is usually made to the ordinary courts only on points of law. Questions of law are to be decided judicially, questions of fact administratively. This is based on the belief in the expertness of the administration. "The administrative, whose daily concern is the consideration of these matters, is recognized to possess greater competence than would characterize either a judge or a jury."[290] Thus, "the findings of an expert commission have a validity to which no judicial examination can pretend."[291]

It is true that the Anglo-American courts have exercised some control over administrative findings especially as related to jurisdictional facts, but still, they have gone too far in their insistance that a reviewing court should not set aside an administrative act simply because it is based on an error of fact.[292]

REP as an objective action

Basically, the recours pour excès de pouvoir is an objective action

289. Miele, op.cit., p. 439

290. James M. Landis, The Administrative Process, (New Haven, Yale University Press, 1938), p. 144.

291. Harold J. Laski, A Grammar of Politics, 5th ed., 8th impression, (London, George Allen & Unwin Ltd., 1948), p. 394

292. Bernard Shwartz, Le Droit Administratif Américain, (Paris, Recueil Sirey, 1952), pp. 185-199.

that does not constitute a litigation between parties. The administrative act, and not the government is attacked. Duguit supports strongly this point,[293] a position that fits so well in his general theory of law. Alibert, on the other hand, finds a tendency of the excès de pouvoir cases toward becoming a subjective action, and hence a litigation between parties.[294]

The Italian practice is more definite on this subject. The Public Administration is always considered a party to an excès de pouvoir suit.[295] This position is in conformity with the legal theory of a leading Italian Jurist, Francesco Carnelutti, who holds that in every juridical relationship there are two juridical subjects known as parties, and a juridical object which is an economically limited good of a material or immaterial nature. A conflict or a juridical relation does not arise unless two different persons have an interest to seek the same good each for himself.[296]

The decisions of the Lebanese Council reveal some contradictions on this issue. In one of its recent decisions,[297] the Council seems to have followed the Italian point of view. It declared that though the recours pour excès de pouvoir is an action against an administrative act and not against the State, yet the State is nevertheless a party in this action; the Council justified its decision by stating that the word party has a different conception in administrative law from the conception it has in civil law where it means a person claiming or denying a disputed right. In administrative law a party is any person qualified to submit to the court his

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293. Duguit, op.cit., Vol. II, pp. 495-520.
294. Ibid., p. 499.
295. Zanobini, op.cit., pp. 254-256
296. John Clarke Adams, "Some remarks on Carnelutti's system of jurisprudence", Ethics, L (1939-1940), pp. 85-95, at 90-91.
297. Arrêt No. 281 of April 13, 1955, La Revue Juridique, XXXV (1955), p. 380.

observations or briefs on the case in question, that is, any person with a legitimate interest; and whereas the laws of procedure of the Council require that the concerned minister or administrative authority be notified and that their observation be received, it follows that the minister or the administrative authority, having a legitimate interest in their acts, are considered parties in the excès de pouvoir action. On this basis, the Council declared that the minister is qualified to bring a recours en revision, which is a request for a rehearing that can not be made except by the parties to a suit.

In an earlier case,[298] the Council was of a contrary opinion when it declared that an excès de pouvoir suit is an action attacking an administrative act and not the public authority; thus, the latter is neither a party nor a defendant in such suits and so it cannot bring a recours en revision. The Council added that the State might, if it was adversely affected by the Council's decision against which it brought the recours en revision, resort to the tierce opposition remedy.

That the State be permitted to bring a case of tierce opposition is based on a legal fiction that is not really convincing. By definition, a tierce opposition is an appeal to the court that issued the decision by a party who did not know of the case until after it was decided and hence was not represented in court.[299] It may be true that the State is not a party in one sense of the word to a suit of excès de pouvoir, but certainly it is informed of the case and it usually sends its observations defending

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298. Arrêt No. 73 of June 19, 1953, La Revue, IX (1953), p. 635
299. Article 551 of the Lebanese Law of Civil Procedure; Article 474 of the French Law of Civil Procedure.

the legality of the contested act. Thus, I believe that the State, being represented in the first case, must not have access to the tierce opposition remedy whose only purpose is to protect the rights and interests of unrepresented and unnotified third parties. The opinion that the State has access to the recours en revision seems to me better founded, because though the act and not the State is attacked by an excès de pouvoir action, yet the act is an act of the State, and the State has a definite interest in defending its acts; so the State may well be considered a party in the excès de pouvoir suit even without the need to resort to any legal fiction.

CHAPTER XIII

The Decisions of the Council and Their Execution

The decisions of the Lebanese Council are made by three councillors one of whom is the rapporteur. Thus, the six members of the Council - the President, the Vice President, and the four councillors - divide into two sections, one presided over by the President and the other by the Vice President. The decisions are made privately, *en chambre du conseil*, and they are announced in public sessions to which the parties are invited. These decisions may provide for the rejection of the petition, for the annulment of an administrative act, or for the assessment of damages to be paid by the State to private persons, or by these to the State or to other private persons.

Petitions for the execution of decisions against the State are to be filed with the Council of State, which must refer them without delay to the public agency concerned, together with copies of the decisions to be executed.[300] There is no way of forcing the administration to comply to the Council's decision, except perhaps through the Chamber of Deputies. So, the execution of such decisions is related to the morality of the administration. On the whole, the Lebanese administration executes these decisions without intentional delay. Because of the inefficiency of the Lebanese administrative process, however, a long time may pass before

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300. Decree law No. 69 of April 10, 1953, *The Lebanese Official Gazette* (1953), p. 978 of the legislation section.

the decision is actually carried out. It is to be noted that this delay is not limited to the payment of debts by the State, but it is also manifested in the activities for collecting the money due to the State from private persons. This proves that the delay in the execution of the Council's decisions is mainly due not to ill intentions but to negligence and inefficiency. That is why many people, to get a timely execution, seek the help of an influential person such as a deputy or a minister.

When an act is annulled for *excès de pouvoir*, it is the duty of administration to conform to the Council's decision. If it does not, its actions would be in violation of the *chose jugée* and it may be held responsible to make good the damages. The Council of State, however, does not have a sufficient sanction for the enforcement of its decisions if the State exhibits a persistent intention not to conform. The only available remedy in such circumstances is the petition to the legislature. The French administration has exhibited such ill intentions on several occasions.[301] As far as I can judge from my interviews and investigations, the Lebanese administration on the other hand, has not exhibited such intentions.

The Egyptian Council is in this respect in a better position than its Lebanese or French counterparts. The unjustified failure of the administration to execute a court decision is considered a criminal offence for which the public servant concerned is held personally responsible. In

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301. Waline, *op.cit.*, p. 150.

addition, the public servant is held personally responsible to make good the damages resulting from the delay in the execution of the court decision.[301a]

Decisions providing for the payment of damages by private persons are enforced through the Beirut Execution Department in accordance to the rules prescribed by the Law of Civil Procedure.[302] The Execution Department of Beirut is attached to the Beirut Court of First Instance, and presided over by the Single Judge of that court, whose decisions concerning the execution are appealable to the Court of Appeals. The State must provide the Execution Department with all the help needed for the execution of decisions in cases arising between private persons. Thus, the Council held the State responsible for not providing the necessary force for executing a court decision providing for the ejection of a person from a property that he has illegally detained.[303]

301a. Sulayman M. Tammawi, <u>administrative adjudiction</u>,
الدكتور سليمان محمد الطماوى ، <u>القضاء الادارى ورقابته لاعمال الادارة</u> ، (القاهره ــ دار الفكر العربي ، ١٩٥٦)، ص. ٤٦٧ ــ ٤٦٨ .

302. Decree law No. 69 of April 10, 1953, <u>op.cit.</u>

303. <u>Arrêt</u> No. 2 of January 7, 1952, <u>La Revue</u>, IX (1953), p. 149.

PART III

CONCLUSION

CHAPTER XIV

Evaluation, Suggestions, and Conclusion

The eighteenth century, the age of reason and enlightenment, left its legacy to the centuries that followed. The world was passing into an age of rationalism in all the spheres of life in general and in the field of politics in particular. Codes and constitutions were regarded as the surest remedy for all political troubles. There was a strong faith that an organization or an institution could be designed according to blue prints at any time or place. It was a wave of optimism - optimism about the future of man in the state based on the belief that good laws and institutions were not only the basis of a good political life, but also the surest path to such a life. This view contrasts sharply with what Alexander Pope thought of a good government in his famous couplet:

"For forms of governments let fools contest,
Whate'er is best administered is best."

This belief in the rationalization of laws and institutions was clearly manifested in the Ottoman Empire during the second half of the nineteenth century when the Ottoman Government began to copy extensively many of the European laws and institutions in the hope of healing the Sick Man. We have seen that an Ottoman Council of State was established in this manner in 1866. The newly established institutions did not, however, prevent the inevitable collapse of the aging Empire because, as a leading American author has recently remarked,[304] "an imperfect law

304. Marshall E. Dimock, "Administrative efficiency within a democratic polity" in New horizons in public administration: a symposium, (University, Alabama, 1945), pp. 21-43, at 32.

can often be repaired by resourceful administration, but poor enforcement will render ineffectual the best of legislation."

This belief in codes and constitutions got a stronger hold on the minds of men in the aftermath of World War I, when a wave of writing democratic constitutions spread over most of continental Europe. This tendency was referred to by Mirkine-Guétzevitch as la tendance à la rationalisation de pouvoir.[305] The political experience of these European countries has already shown that apparently identical constitutional formulae applied by different peoples give essentially different results, and thus this belief in the rationalization of power is now questioned by most of its previous exponents.[306]

Lebanon, like all the other Arab countries that split from the Ottoman Empire, received its share of this tendency to the rationalization of power, and so it experienced a continuation of the tendency started by the Ottoman Empire for copying laws and institutions. This tendency persisted, though on a modified scale, after independence. One of the main reasons of the instability of our institutions, an example of which was given in the development of the Council of State, appears to be this copying without serious reference to the needs of the country and to the special circumstances that distinguish it from the country from which the institution was copied. It seems that the Lebanese administrators have not always acquired a deeper appreciation of "how serious it was to dig up a flourishing tree and transplant it in someone else's back yard.

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305. Boris Mirkine-Guétzévitch, Les constitutions européennes, (Paris, Presses Universitaires de France, 1951), p. 14.

306. Piero Calamandrei, Processo democrazia, (Padova, Cedam, 1954), pp. 21-42.

It takes time to reestablish the root structure and during that time the tree withers."[307]

We have seen that the Lebanese Council of State was made on the pattern of the French Conseil d'Etat. As such, its future was to be determined by three possibilities:-

1. Being strange to the country - a tree transplanted into a foreign climate - it could have withered before it had time to become firmly established. Such a fate would almost necessarily meet an institution established in this manner if its freedom of action was rigidly circumscribed by law, because doctrines do not suffice to guarantee the functioning of institutions if these institutions are not adapted to the social substructure on which they are based.

2. If the laws were made flexible, the new institution could gradually adjust to the new environment. This adaptation would partly take place consciously through explicitly inserted changes and modifications to meet the special needs and circumstances of the couhtry, and partly unconsciously through the different ways of interpretation and application of the different cultures. The same sentence may and usually does convey different meanings to different people. The greater the cultural differences, the wider the gap between the different meanings conveyed by the same expression. The concepts of justice, of right and wrong, of public interest, of morality, all are understood differently by different people, and particularly so by people from different cultures. Custom insinuates itself into the process of the copied institution to alter

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307. Dimock, op.cit., p. 35.

or modify it, so that the law becomes little more than a frame for the institution, while the relief is composed of the customs and usages.[308] All these factors act innoticeably, and almost with an invincible power, to mould the new institutions according to the social environment.

3. The people of the country where the new institution was established may gradually avail themselves of the culture and concepts of the country of its origin. It is true that this process is difficult and time consuming, and that there are beliefs, attitudes, and traditions that are too deeply imbedded to be uprooted. This belief in the difference between cultures, however, must not be carried to the extremes; it cannot in our present time with all the means of communications available in the hands of man. Diffusion of cultures, and understanding between peoples are bound to take place. They are taking place unconsciously, and at an ever increasing rate, in spite of all our ethnocentric feelings.

The last two possibilities mentioned above, namely, the adaptation of the newly established institution to the new environment, and the adaptation of the people to the foreign culture, both have been important factors in making the Lebanese Council of State what it is today. With pleasure and with confidence, I can assure that this Council has developed into a valuable institution, which despite its many weaknesses, is serving a good and useful purpose.

The adaptation of the Council to the environment took place in the two ways mentioned above, namely, by explicitly inserted changes, and by unconsciously inserted changes. Examples of the first are numerous

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308. Calamandrei, _op.cit_.

and obvious; the number of the councillors is smaller, because Lebanon is smaller than France; for the same reason local administrative courts were not established in Lebanon; the statute of limitations was made two months instead of four, because in a newly developing country there is need for stability; legislative functions were not given to the Council, because the bulk of legislation emanated from the French High Commissioner, who had his own advisors; recruitment of employees is not subjected to the control of the Council, because factors other than merit influence this recruitment; e.g., the seats have to be distributed equitably among the sects; this factor plays an important role in the choice of the Councillors themselves. Many other examples can be given. All of these show the changes that were inserted to meet special conditions or special interests.

The unconscious adaptation is more subtle and of greater importance. The difference in the interpretation of legal provisions and in their application, the different attitudes that the Councillors, the people, and the government have towards one another and towards the State, the different conceptions of what justice, right, and morality are, all these influence greatly the manner in which the Council performs its functions. These subtle results cannot be easily enumerated; they have to be observed in the decisions of the Council. Some of them could be noticed while reading the part of this paper dealing with the functions and procedure of the Council, and it is hoped that this point will be made clearer through reading the remaining part of this chapter.

The second factor that has influenced the shaping of the Lebanese Council of State, the adaptation of the Lebanese to the foreign culture, is also clearly discernible. Most of the Lebanese lawyers and almost all

the Lebanese judges have been indoctrinated into the French legal system, or into another European system following closely the French pattern; many of our schools, specially during the Mandate Period, followed pedagogic systems closely copied from the French ones; the French way of life has gradually impermeated the Lebanese social life. Some of the Lebanese have become more French than the French, and many of them know a lot about France and its institutions and way of life.

Thus the Council of State was gradually adapted to the Lebanese social environment. This process of adaptation was an important cause in the instability of the Council. There are, however, other causes for this instability; financial reasons, political reasons, personal interests, lack of a tradition in democracy and hence an extensive eagerness to change without recalling that so that an institution may function properly it must be given a chance to grow roots and adapt itself to the social environment. Among the official reasons given for the abolition of the Council in 1928 were "purposes of economy". Many people attribute the abolition of the Council in 1950 to the fact that it was annulling many decrees and sentencing the State in a deal of cases. Some people believe that on several occasions the Council was abolished or created in order to get rid of a councillor or in order to find a post for some particular person. All of these factors have interacted to influence the shaping of the Council. They may all be regarded as integral parts of the adaptation process in its two phases: the conscious and the unconscious. The Council of State has successfully passed the test of the adaptation process, and it is now affording the Lebanese citizen a good means of self protection, as indicated by the many cases being nowadays won by private individuals.

The State has been recently losing many cases in both the damage suits and the actions for annulment. This tendency appeared clearly ever since 1948 and it culminated with the establishment of the present Council in 1953.

It is difficult to give specifically the reasons for this state of affairs. An analysis of the situation shows that this is the result of many interacting factors. One of the most important factors is the fact that the number of cases coming before the Council has greatly increased. From an average of twenty cases per month before 1944, the number has increased steadily so that it is now about 150 cases per month.[309] This obviously increases the number of cases lost, but the increase in the percentage of such cases may be due to the other reasons to be mentioned below. More cases are coming to the Council for several reasons. First, the activities of the State extended significantly during the last ten years. Second, after independence the citizens felt more freedom and courage to sue the government, and more confidence in that it is possible to get one's rights from the government through the courts. This attitude, however, is not strongly established yet. Many people still do not know that a council of state exists or what for it does exist. Many others still look at the government with awe and feel extremely inadequate in the face of the omnipotent giant that is the government. I made it a point to ask several persons who were obviously maltreated by the government why they did not go to the courts. The answer in most cases was a sarcastic smile followed by the common proverb "an eye cannot

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309. From an interview with Councillor Jean Baz, May 15, 1956.

resist an awl", meaning that it is hopeless to fight for a lost cause. Many have this feeling of extreme inadequacy combined with the no less dangerous feeling that the only solution to their troubles is mass action - strikes and related methods. This attitude is gradually changing, and the people are becoming increasingly legal minded. This is encouraged by the publicity being presently made about the activities of the Council of State, and by the low costs of litigation. Besides the counsel's fee, which depends usually on the importance of the case and whether or not it is won, and on the relations between the plaintiff and his counsel, there are only small registration fees amounting to about fifty piasters per petition or copy, and 2½% of the claimed sum or five hundred piasters if the value of the case cannot be assessed in money. Cases involving less than one hundred pounds and those regarding pensions and salaries of civil servants are exempted of all these charges.[310]

A second factor contributing to the loss of many cases by the State is the fear of responsibility on the part of the civil servants. This is one of the most troublesome diseases of bureaucracy. The civil servant feels that the safest way not to make mistakes is inaction. This feeling is strengthened in the Lebanese civil servant by the strict control exerted by the Court of Accounts. Several people who had to resort at last to the Council of State told me that the civil servants concerned encouraged them to go to the Council; they told them that they would help them at the Council by willingly presenting all the documents establishing their rights. These civil servants feared the responsibility involved in taking action of their own accord; what if the private person has no

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310. Law of Judicial Costs of October 10, 1950, and the law of the 1953 Council, op.cit.

right to this amount? What if the Court of Accounts does not agree to this decision? These seem to be the questions that haunt the civil servant whenever he is faced by such a problem.

Another problem that vitiates the civil service and is closely related to the fear of responsibility is the belief in one's incompetence, pushing the problem up the hierarchy and waiting for the instructions from above. This feeling of incompetence on the part of the civil servant is strengthened among Lebanese civil servants by the extensively centralized system that gives little chance to the civil servant to use his discretion or to take a responsible decision.

A third factor behind the loss of many cases by the State is inefficient administration. This is in part due to the above mentioned feelings of incompetence and fear of responsibility and their consequences of red tape and inaction, and in part due to other factors inherent in the Lebanese administration. The analysis of these factors is outside the scope of this paper. Unqualified civil servants, lack of public morality and sincerity, negligence, and inadequate organization and coordination, all contribute to the inefficiency of Lebanese administration.

This inefficiency reveals itself in two ways. First, neglect of the demands of the people and failure to render the necessary services, and second, after a case comes to the Council, failure of the department concerned to file a defense with the Council. A member of the Council told me that public agencies in many cases either fail to file their briefs with the Council or do so very late. The Council tolerates this laziness and often waits for the answer of the administration for a period much longer than the prescribed interval for filing the briefs. This causes a deal of delay in the work of the Council.

One of the important factors contributing to this failure of the public departments to file their briefs with the Council in time is the deficiency of engineers and competent lawyers in the public service. Many responsible administrators in the Ministry of Public Works attribute the loss of many cases by this Ministry to the inability of the limited number of engnineers employed by the Ministry to cope with the huge accumulating amount of work. Most cases involve some technical points that must be studied and answered by an engineer, and there are not enough engineers. The Ministry does not have the necessary appropriations for recruiting the needed number of engineers. The problem of lawyers is similar. Civil servants with professional training such as engineers and physicians are paid a 30% increment over the salaries fixed for civil servants of equal rank. Lawyers are not included in the group of professionals, and so they do not get any increments in salary. This is due to the fact that most civil servants of the fourth category or above are licensed in law, and hence it is absurd to raise the salaries of all these people. The relatively low salaries of civil servants, however, discourage the good lawyers from coming to the service, and so many cases are lost by the public agencies because of the lack of competent lawyers. A wise arrangement would be to distinguish between licensed in law persons who are employed as ordinary civil servants and those who are employed as lawyers. The latter must be included in the group of professionals and thus be entitled to the increment in pay. By so doing the public administration may be able to attract more competent lawyers, and this would lead to a decrease in the ratio of lost cases.

Three factors were mentioned as contributing to the loss of many cases by the State; they are: 1. the increasing number of cases coming

to the Council, 2. fear of responsibility and feelings of incompetence, and 3. inefficient administration. The last two are specially responsible for loss of the damage suits. Another factor that contributes mainly to the loss of annulment suits (excès de pouvoir), is the fact that the government issues many decrees and arrêtés without paying enough attention to questions of legality, inspite of the existence ever since 1948 of a special consultative body at the Ministry of Justice to advise the government on legislation.

The above mentioned factors that contribute to the loss of many cases by the State are related to the administration. There are factors that are related to the Council itself. The Councillors have tended to become increasingly bold in sentencing the State. This tendency has been noticeable ever since 1948. In combination with this boldness, the Councillors are on the whole unconsciously partial in favour of the citizen. An eminent member of the Council of State has told me, "We are here to protect the citizen against the tyranny of the State." The Council decides cases on the basis of this point of view. Instead of being an impartial arbiter, the Council in a sense becomes party to the dispute. A citizen may well regard the Council as the protector of his rights from the arbitrary actions of the government, but the Councillor must not have such an attitude. A Councillor is a judge, unbiased and impartial, whose job is to establish justice and to prevent injustice. It is suggested that this partiality in as far as it influences the Councillor's decisions, does so unconsciously, and that the sense of justice of the Councillors is beyond criticism.

This alleged partiality has resulted in a mutual distrust between the Council of State and some public departments. Some civil

servants believe that this impartiality is conscious and deliberate, at least on the part of some councillors. They insist that the Council of State has developed in many instances into a charity institution for distributing the public funds to private persons. Some councillors seem to be always eager to embarass the public agencies. This mutual distrust appears to be strongest between the Council and the Ministry of Public Works.

As a result of this unconscious partiality, the recent case law of the Lebanese Council shows a definite tendency towards the humanization of the law. Thus the decisions of the Council reflect a high degree of tolerance concerning the prescribed formalities; in several recent decisions the Council declared that a case is accepted in spite of formal deficiencies if the State does not plead for the rejection of the claim on that basis. The French Council has recently shown the opposite tendency of strictness as to formal requirements, perhaps in an attempt to reduce the number of casés that are increasingly accumulating in its dockets. Another manifestation of this tolerance with formalities is seen in several recent decisions in which the Council declared that if the plaintiff does not point out correctly the grounds on which he was claiming relief, the Council might correct these points if they were evident in the petition; similarly, the Council entertained a case that was brought against the "government" instead of against the State or the Ministry concerned, because the petition implied that the plaintiff was suing the State.[311]

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311. See for example _arrêt_ No. 91 of May 28, 1952, _La Revue_, VIII (1952), p. 767; also _arrêt_ of December 21, 1944, _La Revue_, I (1945), p. 129.

This tendency towards humanizing the law is seen also in the many decisions of the Lebanese Council referring to the general principles of equity and justice that characterize administrative adjudication; also references to "spiritual injury, suffering, and tears" and that the Lebanese Council must take them into consideration in evaluating the compensation to be paid by the State.[312] This contrasts sharply with the practice of the French Council, which holds the State responsible only for material injuries.[313]

The tendency towards humanization of the law is also seen clearly in the wide application that the Council is now making in damage suits of such concepts as the responsibility for risk and lack of foresight; also in the extensive use of the concept of détournement de pouvoir in excès de pouvoir suits.

In many recent cases the Council is faced with a law that it believes unjust, or with a decree that is illegal, but that was rendered definitive because the statute of limitations has run to bar action. In such instances the Council explains in the reasoning that it can do nothing about that matter and wishes that the parliament abrogate such a law or that the government be good enough to annul such a decree.[314]

This tendency of the Council towards strictness with the State and tolerance with the private persons appeared vaguely in the decisions of the Council after 1947, and it became clearly manifest after 1950. It is to be remembered that between 1950 and 1953 damage suits went to the single judge ordinary courts; most of these cases, however, were

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312. Arrêt No. 227 of August 27, 1952.

313. De Laubadère, Traité, op.cit., pp. 502-503; Waline, op.cit., p. 546.

314. Arrêt of December 28, 1945, La Revue, II (1946), p. 145.

brought to the Beirut Single Judge, who was not only a councillor before 1950, but also one of the Councillors most responsible for this tendency. He continued this tendency as a single judge for administrative cases. In 1953, he was reappointed a councillor. So this development of the Council in a sense continued without a break in spite of its abolition between August 10, 1950, and January 9, 1953.

Thus the reasons behind the loss of many cases by the State may be classified into three categories:-

1. The increase of the number of cases coming to the Council, for the different reasons suggested above.

2. Factors inherent in the administration itself. These include the fear of responsibility, feelings of incompetence, and inefficiency.

3. Factors inherent in the Council of State - unconscious partiality, strictness with the State and tolerance with private persons.

What was the impact of this state of affairs on the government? What reactions did such a state produce?

Recent Lebanese governments had attempted to solve this problem both by negative approaches and by positive approaches. The negative approaches are partly due to a lack of adequate appreciation of the causes of this state of affairs, and partly due to a conviction that the attitude of the Councillors is a main factor in this unhappy situation from the point of view of the government. This negative approach is manifested in attempts to abolish the Council of State or to limit its powers, or to remove temporarily the security of tenure enjoyed by judges and councillors so as to enable the government to transfer, discharge, pension, or promote any of them. Often these attempts do not reach the execution stage, and they are used as threats to make the judges "behave themselves".

In the chapter on the development of the Council, mention was made of the rumours to the effect that the government was about to propose the abolition of the Council; mention was also made of the recent government bill proposing the subjection of the decisions of the Council to the review of the Court of Cassation, and the suspension of the tenure of judges and councillors for a period of one month.[314a]

The positive approaches made by the government for solving this problem are more promising. These approaches take two different courses. First, an attempt of the government at improving the services of the civil servants and at increasing their efficiency, and second, an attempt at withdrawing or correcting the decrees and administrative regulations that are causing the trouble.

An example of the first of these two positive approaches is a circular sent recently to all the ministries and municipalities by the President of the Council of Ministers at that time, Mr. Rasheed Karami. In that circular, No. 1 of January 10, 1956,[315] Mr. Karami wrote to the different departments that he was informed by the Court of Accounts of the many losses incurred by the State in cases raised before the Council of State and that the public agencies should not have negative attitudes towards the private persons whose claims are founded; because such an attitude would compel those persons to resort to the Council of State and then the State would have to pay the sums due to them together with the interest and the costs of litigation. The circular also drew the attention of the public departments to the fact that the loss of many

314a. Supra, p. 65.

315. Copy of this circular is in possession of the writer.

cases was due to the delay of these departments to file the necessary briefs with the Council and the other courts; finally the circular threatened to punish severely those who did not conform to the instructions in the circular thus subjecting the public funds to bad and serious consequences.

This circular is an official admission on the part of the administration of its inefficiency. The diseases of the Lebanese administration, however, are too complicated to be cured by means of a circular. This step must be followed by a sincere attempt to enforce those instructions, and by further investigations to discover the causes of these ills and the means for curing them.

An example of the second positive approach named above, withdrawing or correcting the administrative acts causing the trouble, is a recent government bill transmitted to the Chamber on May 23, 1956, proposing the amendment of the articles concerning the age of retirement in the new personnel law.[316] These articles were vague, and due to this vagueness the State lost many cases brought by civil servants who were pensioned on the basis of those articles. The proposed amendment is an interpretation and clarification of the vague articles, and it is to have a retroactive effect "except in cases that were finally decided by the Council of State." This last statement implies that the amendment will also be applied to cases that were brought to the Council and are not decided yet. This is a third method by which the government can escape the control of the Council - by seeking the help of the Chamber of Deputies, because the laws passed by the Chamber are not subject to the control of the Council.

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316. *Supra*, p. 142, footnote 275.

Remedies and suggestions

The present situation of the Council exhibits three main characteristics - instability, a continuous rise in the number of claims, and a high incidence of decisions unfavourable to the administration. Instability and its causes have already been discussed. It is enough to remember that from 1950 until the present year (1956) the Council has undergone four basic changes and a fifth change is now under consideration.[317] It is high time that this period of experimenting come to an end. What is now needed most in the Council of State, as in all other Lebanese institutions, is stability and a chance for these institutions to grow roots and adapt themselves to the people.

We have seen that one of the main reasons of this instability is the fact that the Lebanese Council and its laws and procedures were copied from the French Council and its rules of procedure and body of case law. The Council had to adapt itself to the environment; but it must be remembered that many of the changes were imposed not by the needs of adaptation but by personal and political interests. The change due to these last causes must come to an end. Many of the countries that have adopted the French system of administrative adjudication had the Council of State incorporated in their constitutions.[318] Such incorporation gives the Council of State a higher prestige and makes its abolition more difficult as it would require a constitutional amendment. Many constitutions provide

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317. In 1950 the Council was abolished; in 1953 it was reestablished; in 1954 its functions were modified by the creation of the Special Court for Administrative Cases; and in 1955 its procedure was modified by Decree-Law No. 23 of January 7, 1955. The government bill proposing further changes is now at the Chamber of Deputies.

318. Italy, Greece, the Netherlands, and Turkey; Livre Jubilaire, op.cit.

for the security of tenure of judges. The Belgian constitution, for example, contains an article stating that judges are appointed for life, and no judge may be deprived of his post or discharged except if sentenced by a court.[319] The Lebanese constitution states that the limits of the judges' powers, the conditions governing the exercise of those powers, and the irremovability of judges shall be fixed by law.[320] The Lebanese laws concerning the judiciary do give such guarantees; but these laws are not enough, especially in a country like Lebanon where multitudinous interests constantly endanger the security of tenure granted to the judges by these laws. A law can easily be abrogated or suspended temporarily by another law. Such an action has been resorted to more than once by different Lebanese governments. Stronger guarantees will be useful. It is acknowledged by most politically interested Lebanese that the constitution is badly in need of reorganization and amendment. It will be of help if the Council of State and the security of tenure of judges are incorporated in the constitution in the process of its revision.

To perform their functions properly, Councillors must not be subject to political influence, and they cannot be so unless they enjoy a security of tenure strongly protected against all political or personal interests.

The second characteristic exhibited by the present situation of the Council, the continuous rise in the number of cases, may be due to two reasons: a continued inefficiency in administration, and a more enlightened citizen. So far as it is due to the first cause this increasing number of

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319. Article 100 of the Belgian Constitution.

320. Article 20.

cases is a problem that the administration must make serious efforts to solve; so far as it is due to the second cause, it is a good sign that must be encouraged by a wider publicity to be given to the achievements of the Council and to the protection that it provides for the citizen.

This increase in the number of cases, however, may effect seriously the efficiency of the Council if it is not counteracted before it is too late. It is true that despite the increased amount of work, the efficiency of the present Council is much higher than some of its predecessors, which were often nicknamed the "tomb of cases", meaning that a case that entered their files might never see light again. The Council is now taking a period of six months to two years to decide a case. It is receiving an average of one hundred and fifty cases per month. It is to be feared that the two present sections of the Council will not be able to cope with all this work. Increasing the number of councillors by six to form two more sections is advisable.

Another measure that may prove helpful in both decreasing the number of claims and improving the Council's performance is giving the Council the function of advising the government on bills and administrative contracts and regulations. The need for this function of the Council is sharply felt. The many decrees and administrative regulations that are being annulled by the Council for illegality reveal clearly this need. It is revealed also in the conspicuous confusion accompanying governmental legislation making it possible for a decree to be issued one day, modified the next, and finally replaced by a new decree a short time later. The 1952-1953 and the 1954-1955 decree laws illustrate this confusion. Some of them were issued on the same date and were at the same time

mutually incompatible;[321] many were modified and remodified or abrogated shortly after they were issued,[322] and some were annulled by the Council of State or caused many losses to the State through cases lost by the State before the Council as the result of their application.

It is true that the Council has sometimes been informally consulted on the legality of administrative acts, and that there is a legislative committee at the Ministry of Justice to advise the government on bills and regulations; but it is clear that more definite methods are required. Giving the Council of State advisory legislative functions seems to be an impelling need. The usefulness of this function is in that it is a preventive rather than a curative remedy. It prevents the harm before its occurrence by checking the legality of the administrative act before its enforcement. It thus saves losses both to the State and to private persons, and would result ultimately in a drop in the number of cases. This function will also make the Councillors constantly aware of the current developments in legislation and regulations, and thus acquaint them with the problems that these laws and regulations are attempting to meet, and hence they will acquire a greater capacity for apprehending the litigious points that may arise concerning them. The increase of the number of the

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321. See for example decree-laws No. 14 and No. 15 of January 9, 1953, in Collection of 1952-1953 decree-laws, op.cit., Vol. 2, pp. 821-844 and pp. 851-865.

322. Out of the 90 decree laws issued between October 15, 1952 and April 15, 1953, there were 33 decree laws modifying or abrogating the remaining 57 ones. Out of the 40 decree-laws issued between October 15, 1954 and January 19, 1955, there were 9 decree-laws modifying the remainders, and all of these decree-laws were modifications of the 1952-1953 decree-laws.

members of the Council from six to twelve can be made without burdening the budget with additional expenses if the Legislative Committee at the Ministry of Justice is abolished, because the Council would take over its functions of advising the government on projects of laws and regulations.

Another reform that may help in increasing the efficiency of the Council and in guaranteeing more the validity of its decisions is a practice that may well be adopted from the French Council, recruiting administrators into the Council and Councillors into the administration. In France, there is constant penetration of active administrators into the ranks of the Council, and of Councillors into the bureaucracy, which make for a permanent and intimate contact between the Council and the administration.[323] Cognizance of disputes between the administration and private persons presupposes in the judge an administrative competence and a sensitiveness to administrative needs and to the public interest. This is one of the important justifications for separate administrative courts, and it may be well achieved by this interpenetration between the Council and the administration. Such interpenetration also would undoubtedly lead to the elimination of the mutual feeling of distrust now existing between the administration and the Council.

The Lebanese Council is performing valuable services. With the improvements suggested above, and some ten years of stability, the Council's services may be rendered even more valuable. The government's proposal to subject the Council's decisions to the review of the Court of Cassation does not seem justifiable. It is a palliative rather than a curative remedy. The Council of State must have the final word in all

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323. Langrod, _op.cit._, pp. 676-678.

administrative cases. Instead of bringing a recours en révision to the to the Court of Cassation, it would be more advisable to bring such action to a section of the Council other than that which gave the first decision, or, if necessary, to the General Assembly of the Council. This is not to be justified by the theory of the separation of powers and the consequent necessity of preventing the ordinary courts from encroaching upon the administration. These classical theories do not seem to hold any more. In fact the administrative judge has become even more strict with the administration than was the ordinary judge. Thus the justification of administrative adjudication is to be found no more in the theory of separation of powers. This was the origin of separate administrative justice, but the continuation of this system is justifiable by the concept of specialization. Administrative adjudication has become a technical function, basically different from ordinary adjudication. It has developed its own theories, concepts, and rules of procedure in a manner that was empirically proved valid. The administrative function is becoming increasingly technical; the more technical it becomes, the greater the need for specialized administrative courts, and by administrative courts is no more meant courts that are part of the administration, but rather courts specialized for hearing administrative cases. This function requires the ability to make the optimum compromise between the private interests and the public interest, which itself includes also the private interests of the plaintiffs. The Lebanese Council has performed this function well, and if it is given the chance to grow roots and to slowly adapt itself to the environment, it is hoped that it will be even more successful.

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