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12 Judicial Review of Administrative Action: Impact of the Choice between One Peak and Multiple Peak Models on Legal Certainty

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12.1 Introduction

The organization of court systems and division of jurisdiction regarding judicial review of administrative action is by no means uniform. In some countries, administrative courts and tribunals coexist with ordinary courts. In other countries, general courts resolve administrative law disputes, while specialized administrative chambers could be established within these general courts. Moreover, a division of jurisdiction between ordinary and administrative courts could entail complementary and overlapping jurisdiction. The structure of court systems and the division of jurisdiction undeniably have an impact on judicial efficiency and legal certainty. A patchwork of courts and tribunals with a complex division of jurisdiction could require multiple lawsuits to obtain full legal redress, significantly delay the processing of cases, lead to conflicts of jurisdiction and jeopardize the uniformity of case law.

In this contribution, the notions ‘one peak model’ and ‘multiple peak model’ will be introduced as explanatory concepts to conduct a comparative analysis of court systems and their impact on legal certainty.1 In a one peak model, administrative and civil law disputes are exclusively allocated within an integrated court system with a higher court supervising the uniform application of the law by lower courts. A multiple peak model is characterized by the coexistence of administrative and ordinary courts, without a common higher court supervising the uniform application of the law between the distinct jurisdictional orders.

The French separate administrative court system can be considered as one of the most successful legal transplants ever. Currently, 16 of the 28 EU Member States have a multiple peak model with an autonomous highest administrative court, distinct from other highest courts. Common law systems, such as the United Kingdom, Ireland and the United States, however, are traditionally characterized by ordinary judges and a one peak model.

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1 See Bart Jan van Ettekoven, ‘One peak or twin peaks?’ Het regeerakkoord en de toekomst van de bestuursrechtspraak, Nederlands Juristenblad [NJB] 596-603 (2013).
This chapter provides a brief comparative overview of the administrative justice systems in Belgium, France and the Netherlands. The administrative justice systems of these countries have similar origin and have influenced each other. They also have undergone various evolutions over time. Therefore, it is interesting to analyze how they have evolved and gradually have become judicial systems with distinct characteristics. It should be pointed out that a comparative analysis enables countries to learn from the successes and failures of each other’s policy decisions. These case studies will unveil fundamental questions regarding the design of administrative justice systems and will demonstrate, in particular, the importance for countries with a multiple peak model of a transparent division of jurisdiction, mechanisms to resolve conflicts of jurisdiction and guarantees for uniform case law.

Finally, this contribution analyzes the case law of the European Court of Human Rights (ECtHR) with respect to violations of the right to a fair trial and in particular the principle of legal certainty enshrined in Article 6 § 1 of the European Convention on Human Rights (ECHR) due to the existence of divergent judgments in dualistic court systems.

12.2 One Peak and Multiple Peak Models

12.2.1 Conceptualization

It is a challenging task to classify distinct systems of judicial review of administrative action. Although judicial systems are always adapted to a particular society, historical evolutions and institutional structure, one could make a basic distinction between one peak and multiple peak models. In a one peak model, administrative and civil law disputes are exclusively allocated to an integrated court system with a higher court supervising the uniform application of the law. Consequently, the judiciary holds monopoly on adjudication of disputes, irrespective of the status of the litigants (i.e. public or private actors) or the matter of the dispute. The establishment of such a system could be regarded as an application of the principle of checks and balances. It demonstrates trust in the judiciary and the choice to resolve disputes in which the government is involved on the same footing as purely private law disputes between private actors.2

A multiple peak model has a court system with a distinction between administrative and ordinary courts without a common higher court supervising the uniform application of the law by the lower courts. Certain disputes, mainly those in which administrative authorities are involved, are allocated to judicial bodies established outside the ordinary court system and a highest administrative court supervises the uniform application of the

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law. There is usually a body or procedure to resolve conflicts of jurisdiction between the administrative and ordinary courts.

Traditionally, the French model of a separate administrative justice system originated from a distrust towards the ordinary courts of the judiciary.\(^3\) It was prompted by a rigid conception of the separation of powers,\(^4\) according to which ordinary courts cannot be granted jurisdictional control over the action of the executive branch. Many countries adopted this widespread French legal transplant for various reasons. Such reasons could be a rigid concept of the separation of power or, for instance, efficiency or expertise within administrative justice systems.

In legal doctrine, a twin or multiple peak model corresponds to the notion of ‘(jurisdictional) dualism’ or of ‘(jurisdictional) pluralism’, while a one peak model is referred to as ‘(jurisdictional) monism’. Instead of jurisdictional monism and dualism, I suggest to use the one peak model and twin or multiple peak model in order to avoid confusion with the concept of monism and dualism which explains the relationship between national and international law.\(^5\)

Distinct systems of administrative justice can be situated on the following continuum:

\[ \text{Multiple peak model with a strict division of jurisdiction} \]

\[ \text{Multiple peak model with complementary and/or overlapping jurisdiction} \]

\[ \text{One peak model} \]

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A twin or multiple peak model with a rather strict division of jurisdiction corresponds to the traditional French dogmatic dualistic order stemming from the principle of séparation des autorités, while a one peak model on the other side of the continuum can for instance be found in the United States and the United Kingdom. In between these two sides of the continuum, one can, for example, situate Belgium and the Netherlands with complementary and/or overlapping jurisdiction of ordinary and administrative courts regarding judicial review of administrative action. It should be noted that the theoretical conceptualization of one and multiple peak models does not provide information on the possible existence of a constitutional court, namely a sui generis court which performs specific tasks regarding constitutional review. It does not provide information on the existence and positioning of other (lower) administrative courts either.

12.2.2 EU Member States: Diffusion of the French Model

In the EU, a majority of the Member States (16 of 28) are characterized by a multiple peak model with an autonomous highest administrative court, distinct from other highest courts. Although 12 of the 28 Member States are characterized by a one peak model, six of these countries with a unified highest court have a specialized administrative chamber within their supreme court. Consequently, only six of the 28 Member States have a highest court that rules on civil, penal, social and administrative law cases. Hence, one cannot deny that the French model of a distinct administrative justice system has substantial influence on the EU Member States.

The distinction between an administrative and ordinary court system originates from the distinction between public and private law and at the same time reinvigorates the latter distinction. According to Truchet, jurisdictional dualism has indeed been a source of legal dualism and thus a separate body of administrative law. The separate system of

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7 Estonia, Hungary, Latvia, Romania, Slovakia, and Spain.
8 Denmark, Cyprus, UK, Ireland, Malta and Slovenia.
administrative courts and administrative law in France has been a leading example for many continental countries. The Greek administrative justice system, for instance, is a prominent example of the French influence. The division between public and private law as well as the establishment of a separate administrative justice system in France have spread around the globe and have influenced even common law jurisdictions. Lord Diplock notoriously introduced the distinction between ‘public law’ and ‘private law’ rights in the O’Reilly v. Mackman case of the House of Lords. Moreover, even the United Kingdom has independent administrative tribunals and an Administrative Court has been established within the High Court of Justice of England and Wales. 

In conclusion, one could call the French dualist system one of the most successful legal transplants ever. S. Cassese stated that “[l]e droit administrative est l’œuvre de la France. Mieux encore, c’est un des apports le plus originaux que la France aura donnés à la civilisation juridique.” Dozens of countries, often inspired by the French model, including common law countries such as the United Kingdom and Ireland, have established special courts with jurisdiction to resolve cases involving administrative authorities. According to D. Labetoulle, approximately 80 states, in one way or another, currently have an administrative jurisdictional order. As a result, it would be advisable to no longer talk about the so-called ‘French exception’.

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18 Translation: ‘administrative law is the work of France. Even better, it is one of the most original contributions that France has given to legal civilization.’ Sabino Cassese, Une des formes de l’État nouveau du monde. Réflexions sur le droit administratif français, AJDA June 1995, special issue Le droit administratif, 167.


The judicial system in Belgium has regularly been criticized for its judicial backlog, conflicts of jurisdiction and inefficiency. The Belgian judicial system is a patchwork of ordinary and administrative courts with a complex division of jurisdiction, which has regularly sparked intensive debate in legal doctrine. The Belgian Constitution rudimentally governs the division of jurisdiction between ordinary and administrative courts. Articles 144 and 145 of the Constitution grant the jurisdiction to rule on disputes regarding ‘civil and political rights’ to the judicial branch, that is, the ordinary courts. As a result, the judiciary principally has jurisdiction to rule on every dispute involving ‘subjective rights’, namely a civil or political right. Articles 144 and 145 of the Constitution express the trust of the initial Constituent Assembly in the judicial branch and its distrust towards the executive branch acting as an administrator-judge (administration-juge).

According to Article 144 of the Constitution, disputes concerning ‘civil rights’ (e.g. property and the status of persons) are exclusively allocated to the ordinary courts of the judicial branch. Article 145 of the Constitution allocates disputes about ‘political rights’ principally to the ordinary courts. Nonetheless, Article 145 also grants the power to the legislator to grant jurisdiction regarding disputes on political rights to ‘extra-judicial courts’, better known as administrative courts. Thus, it allows the legislator to withdraw this jurisdiction from the ordinary courts. Articles 146 and 161 of the Constitution grant the legislator the power to establish administrative courts, and Article 160 of the Constitution establishes a highest administrative court, the Council of State.

The notion ‘political rights’ has traditionally been interpreted in a strict way. Originally, they were limited to the right to vote, the right to be elected and the ‘right’ to pay...
taxes. In addition, the ordinary courts were traditionally very reticent to review administrative action. The transition from a night watchman state into a social welfare state, however, resulted in an increased number of legal relations and disputes between the regulatory state and its citizens.\(^\text{25}\) The increase of government action during the interbellum period led to an expansion of conflicts between government and citizens, which also raised the need for legal protection against the administrative authorities.\(^\text{26}\) Consequently, administrative courts, most importantly the Council of State in 1946, have been established and have been granted the jurisdiction to annul and suspend unlawful administrative acts in order to fill the historical gap in judicial protection against administrative action.

In addition to the establishment of the Council of State, the federal legislator and more recently also the legislators of the Regions and Communities through their implied powers have established specialized administrative courts.\(^\text{27}\) Traditionally, administrative courts have been regarded as part of the executive branch, but nowadays administrative judges are characterized by impartiality and independence similar to the judicial branch. Unlike France, Belgium does not have a distinction between administrative courts of first instance and administrative courts of appeal. Nevertheless, the Belgian Council of State rules on appeals in cassation against decisions of the specialized administrative courts. In such a case, it operates as an administrative supreme court. In other cases, the Council of State rules as first and last instance.

Due to the traditionally strict interpretation of the notion of political rights and the respect for Article 144 of the Constitution which allocates the jurisdiction over civil disputes exclusively to the ordinary courts, a distinction has been created between so-called ‘objective and subjective appeals’. As a result, it is now commonly accepted that ordinary courts are exclusively competent to rule on disputes in which subjective rights are at stake, while administrative courts rule on objective appeals for annulment. An objective appeal solely focuses on the invoked unlawfulness of an administrative act and not on the subjective rights of the claimant. In another contribution, I have extensively argued that this distinction is artificial and problematic.\(^\text{28}\) It regularly leads to legal uncertainty.

The initial distrust of the Constituent Assembly towards the executive branch and its blind faith in the legislator are also reflected in Article 159 of the Constitution, which vests the courts with the power to disregard administrative acts and regulations if they are

\(^{26}\) Cyr Cambier, Principes du contentieux administratif 238-252 (1961).
\(^{27}\) Art. 161 of the Constitution requires a federal law to establish administrative courts. However, the Regions and Communities can establish courts through their implied powers based on Art. 10 of the Bijzondere Wet tot Hervorming der Instellingen [Special Act on Institutional Reform] of 8 August 1980 (BS 15 August 1980), if it is deemed necessary to execute their existing legislative powers.
\(^{28}\) Jurgen Goossens, De vervaagde grens tussen burgerlijke en administratieve rechter, TBP 275, 281-282 (2014).
in violation with the law, albeit only with respect to the parties to the pending proceedings.\textsuperscript{29} In contrast to the ordinary courts, the administrative courts can also annul administrative acts.

In addition, both administrative and civil courts rule in summary proceedings\textsuperscript{30} and award compensation. As part of the sixth state reform, Article 144 of the Constitution has been amended in 2014 so that the (federal) legislator can grant jurisdiction to administrative courts to rule on the so-called ‘private law consequences’. Pursuant to this amendment, the legislator adopted Article 11\textit{bis} of the Act on the Council of State,\textsuperscript{31} which grants the power to award indemnification to the Council of State.\textsuperscript{32}

The proceedings before the administrative courts in Belgium increasingly became more ‘subjective’.\textsuperscript{33} Meanwhile, the ordinary judges gradually left their traditionally restrained attitude towards judicial review of administrative action. They increasingly allowed subjective rights claims of litigants against administrative authorities. On the other hand, civil proceedings increasingly became more objective by expanding the legality review pursuant to Article 159 of the Constitution.\textsuperscript{34} Thus, as I have extensively argued elsewhere,\textsuperscript{35} the administrative and civil proceedings have grown towards each other and the distinction between them has become blurred. One can make a choice between two parallel systems of judicial review of administrative action. Such a parallel jurisdiction without a higher court supervising the uniform application of the law may undermine the consistency of the case law and give rise to legal uncertainty.

Administrative courts were established to offer citizens complementary protection against government action because of the traditional reticence of the civil judges. Civil and administrative judges are now, however, almost equally competent regarding judicial review. It could be beneficial to engage in forum shopping and for instance avoid proceedings before the Council of State if there is a higher chance that the ordinary judge will issue a judgment in favor of the plaintiff. Moreover, one can still submit a petition to the

\textsuperscript{29} Jan Theunis, De exceptie van onwettigheid. Onderzoek naar de rol en de grenzen van artikel 159 van de Grondwet in de Belgische rechtsstaat. Administratieve rechtsbibliotheek nr. 18 (2011).
\textsuperscript{31} Art. 6 Wet met betrekking tot de zesde staatshervorming inzake de aangelegenheden bedoeld in artikel 77 van de Grondwet [Act concerning the sixth state reform regarding matters referred to in Art. 77 of the Constitution], BS 31 January 2014, at 8719. See Art. 11\textit{bis} Gecoördineerde Wetten op de Raad van State [Act on the Council of State], 12 January 1973, BS 21 March 1973, at 3461.
\textsuperscript{32} See, e.g., Jurgen Goossens, Elargissement et diversification du contrôle juridictionnel belge des actes administratifs, 4 Revue internationale de droit comparé [RIDC], 949-971 (2012).
\textsuperscript{33} Jurgen Goossens, De vervaagde grens tussen burgerlijke en administratieve rechter, TBP 275, 285-292 (2014).
\textsuperscript{34} Jan Theunis, De exceptie van onwettigheid. Onderzoek naar de rol en de grenzen van artikel 159 van de Grondwet in de Belgische rechtsstaat. Administratieve rechtsbibliotheek nr. 18, 234 (2011).
\textsuperscript{35} Jurgen Goossens, De vervaagde grens tussen burgerlijke en administratieve rechter, TBP 275-294 (2014).
civil judge if the Council of State has not annulled an administrative act. It is clear that this may jeopardize uniformity of the case law. The specialized, uniform case law of the administrative courts risks to be replaced by contradictory judgments of ordinary judges. The above-mentioned observations show the need to urgently and profoundly redesign the Belgian judicial landscape and distribution of jurisdiction.

On several occasions a ‘war of judges’ (guerre des juges) occurred in Belgium between the three highest courts, for instance about the hierarchical relation between international law and the Constitution. Belgium has no formal instruments to pursue legal uniformity of the decisions of administrative and ordinary courts. Only the appeal in cassation before the Council of State or the Court of Cassation may enhance uniformity in the case law of the administrative and ordinary courts. Legal certainty will benefit from the introduction of instruments to guarantee legal uniformity within the multiple peak model or a transformation into a one peak model.

### 12.3.1.2 Conflicts of Jurisdiction

Pursuant to Article 158 of the Constitution, the Court of Cassation has jurisdiction to resolve conflicts of jurisdiction between ordinary and administrative courts. The Court of Cassation is at the same time an arbitrator of these conflicts as well as intervening party in its capacity as Supreme Court of Cassation for the ordinary courts. Given the distrust towards administrative justice, the Constituent Assembly of 1831 initially opted for the Supreme Court of Cassation as arbitrator. However, administrative courts have become fully independent so that the position of the Court of Cassation as both an arbitrator and a party is no longer legitimate.

If the current organization of the court system is maintained, one could reflect on establishing a ‘Tribunal of Conflicts’ to resolve conflicts of jurisdiction and avoid contradictory judgments regarding the same legal rules. This Tribunal could be composed of delegates of both the Council of State and the Court of Cassation, and potentially also the Constitutional Court. This would enhance uniformity of these courts case law. Alternatively, one could establish a Belgian unified highest court, a Supreme Court, in which the Council of State and the Court of Cassation (and potentially also the Constitutional Court) could each form a specialized chamber. In such a setting, conflicts of jurisdiction could be resolved by a joint assembly of judges from each chamber. Inspiration can be

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found in the legal systems of 12 of the 28 Member States, characterized by a one peak model with one highest court. Moreover, six of these unified highest courts have a specialized administrative chamber (Estonia, Hungary, Latvia, Romania, Slovakia, and Spain).40

12.3.2 The Netherlands

12.3.2.1 Division of Jurisdiction

Article 112, 1 of the Dutch Constitution stipulates that the settlement of disputes about ‘civil rights’ and ‘debt claims’ is entrusted to the judiciary. These two notions are considered to encompass all possible disputes with administrative authorities.41 According to Article 2 of the Act on the Judicial Organization,42 the judiciary is composed of 11 district courts, 4 courts of appeal and the Supreme Court (Hoge Raad). Pursuant to Article 112, 2 of the Constitution, the legislator is allowed to grant the resolution of disputes that do not stem from civil law relations, better known as administrative law disputes,43 to the judiciary or to ‘courts which do not belong to the judiciary’. Hence, based on Article 112, the legislator can choose to grant jurisdiction over administrative law disputes respectively to the judiciary (para. 1) or to courts outside the judicial branch (para. 2). Over time, the legislator has regularly used the latter option to grant jurisdiction to administrative courts outside the judiciary.

Besides the Supreme Court, which functions as a court of cassation for the ordinary courts, the Netherlands has three highest administrative courts (the Administrative Jur-

42 Wet op de rechterlijke organisatie [Act on the Judicial Organization], 18 April 1827, Stb. 1827, 20.
isdiction Section of the Council of State, the Administrative High Court for Trade and Industry, and the Higher Social Security Court). The rules regarding the division of jurisdiction in the Netherlands are included in Chapter 8 of the General Administrative Law Act (GALA) and Annex 2 of GALA. According to Article 8:6, 1 juncto Article 8:1 GALA, an act of an administrative authority can be appealed before the district courts, unless another administrative judge (within or outside the judiciary) has jurisdiction based on Chapter 2 of Annex 2. The general rule constitutes ‘general administrative jurisdiction’ and its exception has resulted in several ‘specific administrative jurisdictions’.

The Dutch system resulted in a fragmented division of jurisdiction and divergent case law, for instance regarding the functionality of higher appeal in administrative justice and the possibility to renounce appellate jurisdiction. This situation created the need to establish formal and informal instruments to pursue uniformity and harmonization between the Dutch highest courts.

12.3.2.2 Reform of the Administrative Justice System

Judicial review of administrative action in the Netherlands and France has the same roots but has undergone distinct evolutions. Since the beginning of the twentieth century, administrative courts have been established in the Netherlands with jurisdiction over disputes between legal subjects and administrative authorities. Nevertheless, the implementation of a substantial reform of the administrative justice system was initiated in 1994. Several administrative courts were abolished and their jurisdiction on the level of first instance was transferred to administrative law chambers within the district courts. Depending on the field of law, one can appeal the judgment of a district court before the Council of State, the Administrative High Court for Trade and Industry, the Higher Social Security Court or a court of appeal. An appeal in cassation can be lodged against the judgment of a court of appeal to the Supreme Court. Hitherto, the third and last phase of the administrative justice reform has not yet been accomplished. This phase relates to the design of the appellate level and the question whether an appeal in cassation before

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49 Joannes B.J.M. Ten Berge, Rechtsbescherming tegen de Overheid 17 (1993). The Dutch district courts can establish ‘combined chambers’ of administrative and civil judges working together on a case within the same court, for example if a case blends civil and administrative law issues.
the Supreme Court should be provided. The third phase actually concerns the choice between a one peak and multiple peak model.

12.3.2.3 Formal and Informal Instruments for Uniformity of Case Law

The division of jurisdiction with respect to administrative justice in the Netherlands is fragmented, which leads to divergent case law and contradictory judgments. As a result, formal and informal instruments have been established to ensure cooperation and harmonization, and to avoid substantial divergences in case law of the three highest administrative courts and the Supreme Court. Informal consultations take place within the ‘Commission Legal Uniformity of Administrative Law’ between members of the Administrative Jurisdiction Division of the Council of State, the Administrative High Court for Trade and Industry, the Higher Social Security Court and the Supreme Court. These meetings have a successful impact on the uniformity of the case law. According to Ortlep, recently a trend could be detected in the case law of the four highest courts pursuing a uniform application of administrative (procedural) law.

Since 1 January 2013, three formal instruments have been introduced in order to pursue uniformity of the case law between the highest administrative courts. Firstly, cases can be referred to ‘legal uniformity chambers’, named ‘grand chamber’, consisting of five judges from the three highest administrative courts with a view of ensuring legal uniformity or legal development. The chamber consists of members of the court before which a case is pending as well as members of the other high courts in their capacity as substitute members. Secondly, the President of the Administrative Jurisdiction Division of the Council of State, as well as the Presidents of the Administrative High Court for Trade and Industry and the Higher Social Security Court can ask one of their court members to write a (non-binding) conclusion as an advocate general in cases where legal uniformity or legal development are important. Finally, justices of the Supreme Court can be appointed as councilors of state ‘in extraordinary service’ at the Council of State, but councilors of state cannot be appointed in the Supreme Court. In conclusion,

52 Ibid.
55 Art. 8:10a, 4 GALA.
56 Art. 8:12a GALA.
although the Netherlands does not have a formal institution to resolve conflicts of jurisdiction, the need to establish such a body is relatively low due to the successful formal and informal cooperation between the highest courts.

12.3.3 France

12.3.3.1 Division of Jurisdiction: The Principle of the Separation of Authorities

In contrast to the Netherlands, France still has a judicial system with a strict separation between ordinary and administrative courts. France has a three-tier hierarchical administrative court system. The tribunaux administratifs are administrative courts of first instance with general jurisdiction; the cours administratives d’appel are appellate courts; and the Conseil d’Etat (Council of State) is the supreme administrative court. Moreover, there are several administrative courts of special jurisdiction. The Tribunal des Conflits (Tribunal of Conflicts) primarily resolves conflicts of jurisdiction between the ordinary and administrative courts.

The separate French administrative justice system is based on the principle of the separation of administrative and judicial authorities (séparation des autorités administratives et judiciaires), as embodied in Article 13 of the Act of 16-24 August 1790 and the decree of 16 Fructidor Year III. This principle governs the division of jurisdiction between the administrative and ordinary judge and mainly encompasses a prohibition for the ordinary judges to administer and hear administrative law disputes. The latter is prompted by the view that ‘juger l’administration, c’est encore administrer’ (judging the administration, is still administering). Therefore, administrative authorities traditionally resolved disputes with citizens themselves and were called administrateur-juge (administrator-judge).

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The French notion *séparation des autorités* is considered to stem from a strict conception of the separation of powers. However, it can also be regarded as a deviation from the separation of powers, because both executive and judicial powers can be allocated to the administrative authorities. Nevertheless, the idea of taking the review of administrative action away from the ordinary judge goes further back than Montesquieu. Notably, it has been expressed in the Edict of Saint-Germain of 21 February 1641 and repeated in the Edict of Fontainebleau of 8 July 1661, as a reaction against the interference of the *parlements* (i.e. courts adjudicating in the name of the King) of the Ancient Regime in state affairs.

Nevertheless, the separation between administrative and judicial authorities does not in itself prohibit a jurisdictional control of the administration and has over time resulted in the establishment of administrative courts and thus the principle of duality of jurisdiction. After a long and turbulent history, the landmark decisions of the Constitutional Council of 22 July 1980 and 23 January 1987 justified and constitutionally embedded the existence and independence of the administrative judge. As a result, now the French administrative judge holds a monopoly on disputes involving administrative authorities, including claims for damages.

The landmark decision of 23 January 1987 introduced the demarcation criterion ‘*l'exercice des prérogatives de puissance publique*’ (exercise of the prerogatives of public authority) that is used to determine the exclusive jurisdiction of the administrative courts. Even though its practical impact should not be overestimated, there is an important exception to the exclusive jurisdiction of the administrative courts. In case of a *voie de fait* (flagrant irregularity), the situation in which an administrative act is so flagrantly irregular that it cannot be regarded as an administrative act and has infringed a fundamental right of the individual, the administrative act can be treated as the act of a private body and may lose the privilege of being adjudicated by an administrative court.

Nevertheless, even in France, the coexistence of ordinary and administrative jurisdictions has increasingly been questioned. In the landmark case *Septfonds*, the Tribunal of Conflicts ruled that the ordinary judge has jurisdiction to interpret regulatory administrative acts. In principle, the ordinary judge is not competent to interpret individual administrative acts, nor to review the lawfulness of any administrative act. In these situa-

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64 Council of State 23 January 1987, no. 87-224 DC.
65 See, e.g., Council of State 18 November 1949, Carlier.
tions, as a matter of principle, the judge is duty bound to suspend the proceedings and to refer the preliminary question to the administrative judge.

However, the landmark decision of the Tribunal of Conflicts SCEA du Chéneau substantially attenuated the strict division of jurisdiction between the administrative and ordinary judge. The Tribunal introduced two important exceptions to the principle of séparation des autorités and to the case Septfonds. It ruled that the civil judge is allowed – without being obliged to refer a preliminary question to the administrative judge – to 1) review the lawfulness of the administrative acts in the light of the EU law or to refer a preliminary question to the Court of Justice of the EU (CJEU) and 2) review the lawfulness of the administrative act if there is serious doubt about its lawfulness and it is apparent that the civil judge can resolve the dispute following the settled case law. Consequently, civil judges have become competent to rule on cases which traditionally belong to the exclusive jurisdiction of the administrative judge.

In France, similar to Belgium, there are no formal instruments to prevent or deal with diverging judgments. The same or comparable legal rules in the field of urban law and environmental law, fundamental rights law, health law, contract law and liability regularly play a role in both administrative and civil law cases. Nevertheless, the dualistic order usually does not prevent the administrative and civil law courts to adopt the same interpretation of comparable legal issues, such as the hierarchy of norms. Even though Mazars stresses the need for better communication between the two French judicial orders, which would enhance harmonization, she points out that the ordinary judge cannot ignore the decisions of the administrative judge on the same questions.

12.3.3.2 Conflicts of Jurisdiction

Due to the increase of legal relations, contracts, and specific regulations, the legal framework has become more complex which inevitably leads to jurisdictional problems. The Tribunal of Conflicts has jurisdiction to resolve conflicts of jurisdiction between administrative and ordinary courts. Moreover, it is the task of the Tribunal to prevent a denial

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of justice in a situation of conflicting final judgments by courts of the judicial and administrative orders regarding the same dispute. Finally, the Tribunal can rule on an action for damages stemming from an excessive length of proceedings within the two orders relating to the same dispute and the same parties. Nonetheless, the demarcation line of the separation of authorities in France is actually well known and applied and for that reason the Tribunal of Conflicts randomly hears cases. These cases amount to approximately 50 cases per year.\textsuperscript{75}

The composition of the Tribunal of Conflicts is characterized by parity. It is equally composed of members of the Council of State and the Court of Cassation.\textsuperscript{76} The presidency is granted alternately for three years to a member of the Council of State or the Court of Cassation.\textsuperscript{77}

\section*{12.4 Case Law of the European Court of Human Rights}

Even in France, the multiple peak model has been criticized on a regular basis.\textsuperscript{78} The main disadvantages are well known: a complex division of jurisdiction leads to conflicts of jurisdiction and uncertainty regarding the jurisdiction of courts; proceedings before both the ordinary and the administrative judge could be necessary in order to obtain full legal redress, which is costly and time-consuming; diverging or conflicting judgments between both jurisdictions regarding the same legal issue may arise.\textsuperscript{79}

The ECtHR already criticized the negative impact of a dualistic judicial system on legal certainty.\textsuperscript{80} For instance, in the case of \textit{Guillemin v. France}, the Court decided that the length of the entirety of the expropriation proceedings was unreasonable and in violation of Article 6 § 1 ECHR, thereby referring to the shortcomings of a dualistic order.\textsuperscript{81}

The resolution of the dispute before the domestic courts entailed two sets of proceedings. On the one hand, the administrative courts had jurisdiction to assess whether the public interest of an expropriation was lawful. On the other hand, the administrative courts had jurisdiction to award compensation for the unlawful expropriation of property by the public authorities. Due to doubts stemming from the complex division of jurisdiction, however, the applicant simultaneously lodged proceedings for compensation before both

\begin{itemize}
\item \textsuperscript{76} Art. 1-2 Act on the Tribunal of Conflicts.
\item \textsuperscript{77} Art. 3 Act on the Tribunal of Conflicts.
\item \textsuperscript{78} Roland Drago and Jean-Marie Auby have compiled a list of criticisms about the dualistic system, which even dates back before the French Revolution. See Roland Drago & Jean-Marie Auby, \textit{Traité de contentieux administratif}, Tome 1, 183-190 (1984).
\item \textsuperscript{79} \textit{See, e.g.}, a classic example in France: Court of Cassation, criminal chamber 6 June 1924, Gazette du Palais [Gaz. Pal.] II, 231 and Council of State 4 July 1924, \textit{Beaugé}, Recueil Lebon 641.
\item \textsuperscript{80} Stéphane Braconnier, \textit{La prise en compte du droit européen par les juridictions: quelle influence sur le dualisme juridictionnel?}, in \textit{Le dualisme juridictionnel: limites et mérites} 26 (Agathe Van Lang ed., 2007).
\end{itemize}
the administrative and the ordinary courts. At the time of the ECtHR judgment, the latter proceedings were still pending and had already exceeded fourteen years (from 1982 until 1997). The Court pointed out that expropriation proceedings are relatively complex, particularly because they fall under the jurisdiction of both sets of courts. As a result, this could lead to uncertainty due to the complex division of jurisdiction, conflicting decisions and delays due to organizational difficulties.

Moreover, in the case of Bellet v. France, the ECtHR ruled that the applicant could reasonably believe that he would retain standing despite his application to the Compensation Fund, even after accepting the Fund’s offer. Therefore, the Court held that there was a violation of Article 6 § 1 ECHR, arguing that for the right of access to a court to be effective an individual must have a clear, practical opportunity to challenge an act that interferes with his or her rights.82 According to the Court, the functioning of the French compensation system was not sufficiently clear. In particular, it could lead to confusion about the available procedures for remedies and about the restrictions stemming from the simultaneous use of the distinct procedures.83 In another expropriation case, Paolini v. San Marin, the refusal of both administrative and ordinary courts to substantively examine whether the applicant was entitled to restitution of land led to a violation of the right to a court as embodied in Article 6 § 1 ECHR.84 However, the ECtHR never ruled that the complex dualistic court system affects the very existence and the privileged status of the administrative courts or requires a modification of the division of jurisdiction.85 It is not the task of the ECtHR to standardize the variety of legal systems of the Member States, which reflect each State’s history, traditions and legal culture.86 The choice of a particular judicial system in principle falls outside the scope of supervision by the ECtHR, as long as the domestic system does not violate the ECHR in the particular circumstances of the case.87

According to the ECtHR, the possibility of conflicting court decisions is an inherent feature of any judicial system, which, in itself, cannot be considered contrary to the Convention.88 Nevertheless, in its case law concerning conflicting court judgments,89 the Court has established criteria for its assessment whether ‘profound and long-standing

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84 ECtHR 13 July 2004, Beneficio Cappella Paolini v. San Marin, no. 40786/98.
86 ECtHR, Grand Chamber, 16 November 2010, Taxquet v. Belgium, no. 926/05, § 83.
87 ECtHR, Grand Chamber, 29 March 2006, Achour v. France, no. 67335/01, § 51.
88 ECtHR 20 May 2008, Santos Pinto v. Portugal, no. 39005/04, § 41.
differences’ exist in the case law and whether the domestic law provides effective mechanisms to resolve inconsistencies. The Court also delivered judgments, finding that conflicting judgments of domestic supreme courts violate the fair trial requirement of Article 6, §1 ECHR. In addition to the profound and long-standing nature of the divergences, other criteria to determine a violation of the right to a fair trial are legal uncertainty caused by the divergences and the lack of mechanisms to resolve conflicting judgments. The Court has regularly emphasized the importance of domestic mechanisms to safeguard consistency and uniformity of case law. On several occasions, the ECtHR stated that it is the responsibility of the State to organize their system in such a manner as to avoid conflicting judgments.

The ECtHR’s assessment of the specific circumstances of a case is based on the principle of legal certainty, which is an inherent part of all the Articles of the ECHR as well as a cornerstone of the rule of law. When the Court examines the conduct of States, it takes uncertainty into account, whether it be legal, administrative or that arising from practices applied by the authorities. The right to a fair trial must be interpreted in the light of the Preamble to the ECHR, which states that the rule of law is part of the common heritage of the Contracting States. The principle of legal certainty constitutes a fundamental aspect of the rule of law. The persistence of conflicting court rulings could give rise to legal uncertainty and reduce public confidence in the judiciary. Nevertheless, in the case of Unédic v. France, the Court also emphasized that the principle of legal certainty and the protection of legitimate confidence of the public do not establish a right to consistency of the case law. In itself, the development of (divergent and/or contradictory) case law does not undermine the proper administration of justice, because reform or improvement cannot be accomplished without a dynamic and evolutionary approach.

93 See ECTHR, 2 December 2008, Schwarzkopf and Taussik v. The Czech Republic, no. 42162/02.
96 See ECTHR 1 December 2005, Păduraru v. Romania, no. 63252/00, § 92; 6 December 2007, Beian v. Romania (no. 1), no. 30658/05, § 33; 2 November 2010, Ştefănică and Others v. Romania, no. 38155/02, § 32.
100 ECTHR 14 January 2010, Atanasovski v. 'the Former Yugoslav Republic of Macedonia', no. 36815/03, § 38.
Another landmark case of the ECtHR Grand Chamber is Şahin and Şahin v. Turkey.¹⁰¹ Turkey’s judicial system encompasses three sets of courts: ordinary courts, which include civil and criminal courts, administrative courts with general jurisdiction and military administrative courts with special jurisdiction. All three branches are headed by their own Supreme Court: the Court of Cassation for the ordinary courts, the Supreme Administrative Court for the administrative courts and the Military Court of Cassation and the Supreme Military Administrative Court for military matters. Moreover, pursuant to Article 158 of the Turkish Constitution, a special court, the Jurisdiction Disputes Court, is competent to settle conflicts between the ordinary, administrative and military courts concerning their jurisdiction and decisions.¹⁰² In its judgment, the ECtHR offers an interesting overview of its relevant case law and also conducts the following comparative overview:¹⁰³

33. In some European countries there is only one Supreme Court. This approach is found in ‘common law’ countries like Cyprus, Ireland and the United Kingdom, but also in Albania, Azerbaijan, Croatia, Denmark, Estonia, Georgia, Hungary, Iceland, Latvia, Moldova, Norway, Romania, San Marino, Serbia, Slovakia and Switzerland. Other countries, like Germany, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Finland, France, Italy, Lithuania, Luxembourg, ‘the Former Yugoslav Republic of Macedonia’, Monaco, the Netherlands, Poland, Portugal, the Czech Republic, Sweden and Ukraine, have two or more supreme courts.

34. In many of these countries the law does not provide for any means of settling possible conflicts of case law between the supreme courts, but only for means of resolving possible conflicts of jurisdiction. The authority responsible for settling such conflicts may be a court or a division of a court specially vested with this power (France, Luxembourg, Bulgaria, Lithuania, and the Czech Republic). In Italy the law confers this power on the Court of Cassation; in Austria and Andorra, on the Constitutional Court, and in Monaco, on the Supreme Court. In Poland there is no judicial authority responsible for settling conflicts of jurisdiction. Lastly, only a small number of countries have courts tasked with resolving conflicts of case law between supreme courts (Germany, Ukraine and Greece). In Bulgaria the legislation provides for an a posteriori means of resolving conflicts.

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¹⁰¹ ECTHR 20 October 2011, Nejdet Şahin and Perihan Şahin v. Turkey, no. 13279/05.
¹⁰² Ibid., § 20-22.
¹⁰³ ECTHR 20 October 2011, Nejdet Şahin and Perihan Şahin v. Turkey, no. 13279/05, § 33-34 (emphasis added).
In contrast to most of the above-mentioned case law, the case of Şahin and Şahin v. Turkey does not involve conflicting decisions of courts of final jurisdiction within the same branch of the judicial system where a domestic Supreme Court could exercise its unifying powers.\textsuperscript{104} It involves alleged discrepancies between the judgments of two hierarchically unrelated types of courts belonging to separate jurisdictional branches. According to the ECtHR, the criteria and principles developed in the above-mentioned cases cannot automatically be transposed to the present case. The ECtHR acknowledged that in the Şahin and Şahin case, diametrically opposite conclusions were reached by the ordinary administrative courts (the Ankara Administrative Court and Supreme Administrative Court) and the Supreme Military Administrative Court. Different interpretations by these two distinct types of courts in similar cases resulted in a different legal treatment of similar situations. However, conflicting case law does not necessarily amount to a violation of Article 6 ECHR. It does not fall within the ECtHR's jurisdiction to review \textit{in abstracto} the compatibility of the Turkish court system and its two branches of administrative courts with the ECHR, but only to rule whether the conflicting judgments in the particular case led to a situation where the right to a fair trial and in particular the principle of legal certainty enshrined in Article 6 § 1 ECHR have been violated.\textsuperscript{105}

Similar to the legal system in Turkey, numerous Member States have several Supreme Courts whereas they do not have a mechanism to guarantee a uniform interpretation of comparable issues between these distinct highest courts. This lack of a uniformity mechanism does not in itself lead to a violation of the ECHR. According to the ECtHR, in judicial systems with distinct branches of courts and multiple Supreme Courts, it takes time to achieve consistency of the case law and periods of conflicting case law can be tolerated without undermining legal certainty. Case law is inherently evolutive and the principle of good administration of justice does not impose a strict requirement of case law consistency.\textsuperscript{106} Based on the principle of subsidiarity and due respect for the decision-making autonomy and independence of domestic courts, the role of the ECtHR is limited to cases where the impugned decision is manifestly arbitrary. According to the ECtHR, the interpretation given by the Supreme Military Administrative Court to the applicants' case has not been arbitrary and thus has not violated Article 6 § 1 ECHR.

\textsuperscript{104} See, among others, ECTHR 6 December 2007, Beian v. Romania (no. 1), no. 30658/05, § 37; 2 December 2008, Schwarzkopf and Taussik v. The Czech Republic, no. 42162/02.
This chapter demonstrated that the structure of court systems and the division of jurisdiction regarding judicial review of administrative action have an impact on judicial efficiency and legal certainty. A maze of courts and tribunals with a complex division of jurisdiction may require multiple lawsuits to obtain full legal redress, significantly delay the proceedings and undermine the consistency of the case law. The notions of one peak model and multiple peak model have been introduced as explanatory concepts in the comparative analysis of court systems and their impact on legal certainty.

A multiple peak model with a rather strict division of jurisdiction corresponds mostly to the traditional French dogmatic dualistic order, while a one peak model exists, for instance, in the United States, the United Kingdom and Ireland. Between these two sides of the continuum one can situate Belgium and the Netherlands with complementary and/or overlapping jurisdiction of ordinary and administrative courts regarding judicial review of administrative action.

The French model of a separate administrative court system is a widespread legal transplant. Sixteen of the 28 EU Member States countries currently have a multiple peak model with an autonomous highest administrative court, distinct from other highest courts. An overview of the comparable judicial systems of Belgium, France and the Netherlands unveiled fundamental questions regarding the design of administrative justice systems and particularly demonstrated the importance for countries with a multiple peak model of a transparent division of jurisdiction, as well as mechanisms to resolve conflicts of jurisdiction and to guarantee uniformity of case law. Countries with multiple peak models usually have a procedure to resolve conflicts of jurisdiction. Nevertheless, they remarkably often lack a formal mechanism to pursue uniformity of case law between the distinct highest courts.

Even though the ECtHR already criticized the negative impact of a dualistic judicial system on the principle of legal certainty, the Court has acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system and it cannot be considered contrary to the Convention per se. The choice of a particular judicial system in principle falls outside the scope of supervision by the ECtHR. It remains possible, however, that in the particular circumstances of the case, features of the domestic system lead to a violation of the ECHR.