

THE POWERS AND DUTIES OF THE FRENCH ADMINISTRATIVE JUDGE

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Introduction

To explain the specificity of the “office of the administrative judge” in a country like France, it is necessary to look both to history and to geography. History allows us to understand how this Napoleonic creation, whose original aim was in no way the protection of the citizen against the administration (rather, it was the protection of the latter against interference by citizens and ordinary judicial courts),¹ progressively became both an extremely powerful judge and an institution at least as independent as its judicial counterparts. Geography helps to explain how specialized administrative courts have long since ceased to be a specifically French or even continental European institution (they exist, in some form, in Austria, Belgium, Germany, Italy, Luxembourg, and the Netherlands). One also finds similar judges in countries as various as the majority of francophone African states, Egypt, Lebanon, Turkey, Thailand, and Colombia, just to name a few.²

There must be a reason that an independent administrative judiciary on the French model exists in numerous democratic countries or in countries transitioning to democracy. In this chapter, I will try to show that it is precisely in the way the powers and duties of the administrative judge have developed that one finds a good deal of the justification for the institution’s existence. On the level of mission (Part I below), I will show that the French system of administrative justice has all powers needed to fulfill its role but that its judicial duties are not quite like those of other courts. And on a more functional level (Part II below), I will show that the French administrative judiciary has never lost sight of its responsibilities even as it has also understood how to develop its powers in new ways.

I. The Mission of the Administrative Judge: Independence in Service of the General Interest

A. Independence: the First Duty and the Basis of the Administrative Judge’s Powers

A court will never merit the confidence of litigants, so necessary in the administration of justice, unless the parties understand that the court issues its rulings in complete independence. In the case of the French system of administrative justice, this

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¹ The paralysis of the royal administration of the *ancien régime*, caused by the *Parlements* (which were, in fact, judicial bodies), is often considered one of the causes of the French Revolution and was a prime impetus for the French conception of separation of powers, in which the judicial courts lack jurisdiction over administrative acts of the State.

² At the ceremonies in 1999 celebrating the bicentennial of the founding of the French *Conseil d’Etat*, nearly fifty countries were represented.

requirement has given rise to a number of developments over time, some deeply historical, others more recent. As a consequence of these developments, it is less and less common to see challenges to the independence of the French administrative judge.

1. *Development of the Duty and Its Legal Guarantees*

The oldest guarantees of the duty of independence concern the status and career of the French administrative judge. The system of administrative justice in France benefits from several guarantees that have insulated it from political pressure except perhaps during the most severe historical crises (like the Nazi occupation, the upheaval following the Liberation, or in the atmosphere of near civil war at the end of the Algerian War in 1962). One can cite in this regard rules governing competitive recruitment (the *concours*),³ which precludes political authorities from influencing the power of selection of judges; rules mandating promotion by seniority as well as control by the administrative judges themselves of the nominations to the most important positions within the *Conseil d'Etat*; and, for the inferior administrative courts, promotion overseen by an independent body, the *Conseil supérieur des tribunaux administratifs et des cours administratives d'appel* (the High Council of Administrative Tribunals and Administrative Courts of Appeal).⁴ The law also prohibits the reassignment of lower administrative judges and magistrates without their consent,⁵ and their discipline is under the jurisdiction of the same High Council.

Among the traditional rules intended to protect independence in the French administrative justice system are those relating to collegial decision-making and the strict respect for the secrecy of deliberations. Admittedly, as to collegiality, there has been a recent trend toward allowing single judges to issue decisions in certain contexts, generally in the simplest cases. But the so-called *juge unique* can also act in more sensitive contexts where emergency procedures are invoked (a topic to which I return below), and the overall effect is to interfere somewhat with the normal requirement of collective decision-making. Fortunately, only the most experienced judges may serve as a *juge unique*.⁶

Independence and impartiality have long been a quality of French administrative justice. But recently there have been efforts to reinforce not merely the *reality* of this quality, but also its *perception*. This effort has been in response to a concern often expressed by the European Court of Human Rights (ECtHR), drawing from English law: “Justice must not

³ This is subject to the exception that, for certain superior ranks, the government has at its disposal a right of nomination (known as the *tour extérieur*), whose proportions are progressively limited and under conditions that are increasingly precise.

⁴ This body is chaired by the Vice-President of the *Conseil d'Etat* (the de facto head of the CE) but the inferior judges themselves are well represented on it, with five out of the thirteen members. Moreover, together with these five, a majority of this body is drawn from the ranks of administrative judges themselves (in addition to the Vice-President of the CE, two additional councilors of state).

⁵ Article L231-3 of the French Administrative Court Code (the *Code de justice administrative*, or CJA).

⁶ For example, in the case of the *Conseil d'Etat*, the vast majority of single-judge rulings are rendered by presidents of judicial sub-sections; that is, among the highest-ranking members of the CE (councilors of state) with at least twenty years of experience as administrative judges.

only be done, it must be seen to be done.”⁷ There has been a longstanding tension between the ECtHR and various councils of state throughout Europe (for example, in Luxembourg, the Netherlands, and France) that has flowed from the dual role these bodies generally play as both policy advisors to their governments and judges of the legality of their governments’ administrative acts. Insofar as France is concerned, a decree of March 6, 2008 largely resolved this tension by explicitly codifying existing custom as well as prior case law. Henceforth, members of the *Conseil d’Etat* may not participate in judging claims that challenge the legality of a text upon which they, as participants in one of the *Conseil d’Etat*’s administrative sections, previously “took part in the deliberation of the advisory opinion (*avis*)” to the government on the same text. This decree has consequently led to the recomposition of certain judicial formations within the *Conseil d’Etat*. Fortunately, in a unanimous decision of June 30, 2009, the ECtHR ruled that if no member of the relevant judicial section of the *Conseil d’Etat* had previously participated in the deliberations on an *avis* on the legal text at issue in the case, “the concerns [of the challenging party] as to the independence and impartiality of the judicial section . . . cannot be considered objectively justified.”⁸ It goes without saying that, even without this ruling, the French *Conseil d’Etat* has always tried to ensure the respect of independence and impartiality by those bodies which are subject to its oversight, either by “appeal” or “cassation.”⁹

In this vein, the administrative courts adopted an ethics charter in 2011, enforced by an oversight body of three members drawn respectively from the *Conseil d’Etat*, the lower administrative tribunals, and one external member. The importance of the role of this body is reflected in the number and length of the opinions it issues: in excess of ten per year regarding alleged problems of conflicts of interest that might emerge from the fact that members of a judicial formation exercise, or have exercised, functions in the active administration. This soft law approach was recently converted into a hard law mechanism through a bill adopted on April 20, 2016. The law includes provisions that go beyond the rules governing declaration of interests that are now in force in the civil service.

⁷ This adage is usually traced to Lord Chief Justice Hewart in the *McCarthy* decision of 1924.

⁸ *Union fédérale des Consommateurs Que Choisir de Côte d’Or v. France*, no. 39699/03, ECtHR (Fifth Section), June 30, 2009, available online (in French only) from <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (accessed January 14, 2010). It is interesting to note that the decision of the CE under challenge here had been issued long before the decree of March 6, 2008 came into effect, thus confirming that the CE respected the now-codified rule as a matter of custom and practice.

⁹ The CE’s jurisdiction on “appeal” is roughly equivalent to what Americans would call “de novo” review on all questions of fact and law, though in France this power is also limited to review of the determinations of a very limited number of specialized jurisdictions. More typical is the CE’s “cassation” jurisdiction, which applies more broadly and extends only to “quashing” decisions below for errors of law. Hence, “cassation” is more analogous to what Americans call “appeal” (for example, in the sense described by Tom Merrill in his contribution to this volume). Regardless of the scope of review, the CE’s oversight of impartiality and independence has given rise to a very significant jurisprudence, less with regard to ordinary administrative tribunals (where challenges on this point are rare), than with specialized jurisdictions, particularly those responsible for discipline cases within the civil service and professional orders. See, for example, the *Didier* decision of December 3, 1999, reprinted in *Les Grands arrêts de la jurisprudence administrative* (ed. 2015) (hereafter “GAJA 2015”), no.98 p.705.

2. *The Consequence of Independence: the Extensive Powers of the French Administrative Judge*

This independence, long established in practice and more recently embodied in texts, has allowed the French administrative judge, over time, to develop its powers in more and more extensive terms. Indeed, as compared to its counterparts elsewhere in Europe, the French administrative judge has perhaps some of the broadest range of powers. The administrative judge in France not only has authority to hear actions for damages (so-called *plein contentieux*) but also actions seeking annulment of administrative acts as ultra vires (the *recours pour excès de pouvoir*), something that in other European countries is often limited to certain categories of acts, whether to those of an exclusively individual or an exclusively regulatory character depending on the system. Moreover, in ruling on these various types of claims, the French administrative judge has at its disposal a broad range of remedial powers often not available to other European judges.

This authority is subject to three broad limits flowing from the hierarchy of norms. First, the French administrative judge is subject to the supremacy of legislation and therefore must yield to a so-called “validation law” (*une loi de validation*) by which the Parliament renders retroactively legal what the administrative judge had previously held to be illegal. Second, in explicit cases of conflict, the *Conseil d’Etat* recognizes that the constitution necessarily prevails over treaties and acts of the European Union.¹⁰ Finally, the *Conseil d’Etat* does not have authority to control the conformity of legislation with the constitution. But even this last limit, as a consequence of judicial innovation,¹¹ has lost a good deal of its force in the European integration context. Since 1989, the French administrative judge has followed the approach established a few years previously by the judicial courts, which permit the non-application of otherwise valid domestic legislation on the basis of its nonconformity with international agreements, most importantly the European Convention on Human Rights (ECHR) and the EU treaties, whose provisions often include demands of a constitutional nature.¹² A constitutional amendment of July 23, 2008, authorized a further curtailing of these limits. This legislation permits lower judicial and administrative courts to make, in effect, preliminary determinations regarding the possible nonconformity of legislation with the constitution. If a litigant raises such a question, the lower court may disregard the challenge if the court finds that it is not of a sufficiently serious character. If the court concludes, however, that the question is indeed serious, the legislation will require the lower court to refer the matter to one of France’s two supreme courts (the *Conseil d’Etat* for the administrative courts, and the *Cour de cassation* for the judicial courts). If one of these supreme courts, once again exercising a filtering function, also finds that the question is serious, then it will refer the matter to the *Conseil constitutionnel*. Since the entry into force of this new procedure in March 2009, the *Conseil d’Etat* has referred between 40 and 60 *questions*

¹⁰ See the decision of the highest judicial formation in the CE, the *Assemblée du contentieux* (Ass.), Octobre 30, 1998, *Sarran, Levacher et autres* (GAJA 2015), no. 96, p.686. The scope of this jurisprudence was recently limited in the context of European integration in CE Ass., February 8, 2007, *Sté Arcelor atlantique* (GAJA 2015), no. 109, p.831.

¹¹ CE Ass., October 20, 1989, *Nicolo* (GAJA 2015), no. 87 p. 605.

¹² This permits, for example, the disregard of validation laws that the CE judges are insufficiently of a general interest character.

prioritaires de constitutionnalité (QPC) to the *Conseil constitutionnel*, which has declared the legislation under challenge to be unconstitutional, in whole or in part, in approximately one-quarter of those referrals.

B. Safeguarding the General Interest: the Specific Duty of the French Administrative Judge

To understand the responsibility of the administrative judge with regard to the general interest, it is good to recall here a celebrated passage from one of the seminal rulings in French administrative jurisprudence: the *Blanco* decision of *Tribunal des conflits*, issued February 8, 1873.¹³ “The State’s responsibility is neither general nor absolute; it has its special rules that vary according to the service [that the State is providing to the public] and the need to reconcile the State’s rights with the rights of individuals.”

It would take a complete course in French administrative law to describe how the administrative judge, by way of judicial decision and in the absence of precise texts limiting its creative powers, has constructed a body of rules that seeks to strike a proper balance between the rights of the administration and individual rights. I will only mention a few doctrines that have emerged out of this jurisprudential construct. In the first place, of course, is the doctrine of *service public* (“public service”). This seeks to protect the rights of *puissance publique* (“public authority”) by affirming the principle of “continuity” while also protecting private rights through the principles of “equality” and “neutrality” of public services. From this doctrine others have developed that reflect a similar concern for reconciliation and balance. One example is the doctrine of “public markets,” which holds that the administration may unilaterally modify public contracts, subject to protections for private contractors on the basis unforeseeability, competition law,¹⁴ and above all legal certainty (a topic to which I will return below). We could also illustrate the point by referring to the doctrine of public property or that of civil service (*la fonction publique*), the latter with the now famous distinction between the wrongs of the public service generally (*une faute de service*) and wrongs of an individual member of the service committed under color of law (*une faute personnelle*). This distinction found a particularly vivid illustration in the *Papon* decision of the *Assemblée du contentieux* (the highest judicial formation in the French *Conseil d’Etat*) issued on April 12, 2002.¹⁵ One could also point to the notion of administrative liability flowing from the *Blanco* decision of 1873, which has recently seen a spectacular development as a consequence of the

¹³ TC, February 8, 1873, *Blanco* (GAJA 2015), no.1, p.1. The *Tribunal des conflits* is composed of an equal number of members from the CE and the *Cour de cassation* and is charged with protecting the particular character and jurisdiction of the administrative judge.

¹⁴ Regarding the role of competition law in public markets, see the decision of the second highest judicial formation of the CE, the *Section du contentieux* (Sect.), November 3, 1997, *Sté Million et Marais* (GAJA 2015), no. 95, p. 675; see also CE Ass., April 4, 2014, *Département de Tarn et Garonne* (GAJA 2015, no.116, p.910.

¹⁵ This decision held that, by participating in the deportation of Jews during the German occupation, the defendant, an eminent civil servant, committed a *faute personnelle* that built on a *faute de service* (GAJA 2015) no.104, p.776 .

recognition of State liability for simple negligence in cases involving certain kinds of judicial malfeasance.¹⁶

This creative power (or duty?) of the administrative judge does not consist solely in unilaterally protecting the administration, but also in reconciling the general interest with the interests of individuals. By way of evidence, one could usefully recall the administrative judge's development of so-called "general principles of law" as an additional basis for controlling the legality of administrative acts. These principles are a strong illustration of the ambition of the French administrative judge to protect private interests while also respecting the general interest. For example, the manner in which the administrative judge applies the principle of equality, or how the court permits derogations from that principle only for reasons of the general interest, would itself merit an extensive discussion.¹⁷ It is precisely here that one finds perhaps the best justification for the existence of a specialized administrative jurisdiction, though it is not possible, within the confines of this brief essay, to spell out the reasons in greater detail. Rather, let me now turn more specifically to the functioning of administrative justice in France, which will allow us to better understand the continuing, symbiotic relationship between the powers and duties of the French administrative judge.

II. The Operation of the Administrative Courts: Affirming New Duties through the Extension of Powers

A. Classical Duties and Powers

I will pass quickly over the most classical duty belonging to any judge, the French administrative judge included, namely the obligation to fully address the arguments of the parties before the court, with firmly supported reasoning, respecting the adversarial principle. Rather, allow me to address three further questions: How easy is it for claimants to gain access to administrative justice in France? Should the administrative judge confine him or herself only to the arguments raised by the parties? And must the court respond to all arguments when only one need be addressed in order to dispose of the case?

1. Access to Justice

Access to administrative justice in France manifests itself above all in the reasonably flexible conditions for admissibility ("justiciability" in American parlance) as well as in the relatively low costs to the parties to maintain an action. We need not dwell in detail on the conditions for admissibility. Beyond respecting certain relatively strict time periods and certain somewhat more flexible formal requirements whose evolution is not of great import, broad access to justice is generally reflected in the progressive

¹⁶ These cases generally involve claims of excessive delay, a question to which I will return below. See, e.g., CE, February 27, 2004, *Mme Popin* (GAJA 2015), no. 106, p. 796

¹⁷ Normally one traces the recognition of the general principles of law to the decision of the CE of March 9, 1951, *Sté des concerts du conservatoire* (GAJA 2015), no. 61, p. 387, which focuses primarily on the principle of equality.

liberalization of the law of standing (*intérêt à agir*). Once again, this entails a purely judicial construction. The majority of leading decisions date from the beginning of the twentieth century. They recognize, for example, taxpayer standing against local acts as well as the standing of users of public services and that of trade unions. They exclude, however, taxpayer standing against national acts as well as the standing of civil servants challenging organizational measures that do not injure one of their legal prerogatives. In effect, the administrative judge has sought to prevent the transformation of the *recours pour excès de pouvoir* into what the ancient Romans called the *actio popularis*.

Accessibility is further reinforced by the right of claimants to bring many actions without retaining a lawyer (at least in the jurisdiction of first instance) or, for meritorious claimants, for bringing actions without incurring any court costs. On the other hand, to avoid the risk of overwhelming the docket of the *Conseil d'Etat*, and in the interest of the “sound administration of justice,” the supreme administrative jurisdiction requires representation of counsel when it is serving in its capacity as the judge of errors of law (*juge de cassation*)—that is, only after two lower levels of review have been exhausted. It is a historical particularity of French justice that a limited, specialized bar of supreme court litigators (*avocats aux conseils*) has the exclusive right to represent clients before the *Conseil d'Etat* and the *Cour de cassation*.¹⁸ As for costs, the law requires that the judge always impose them on a losing administrative body but then gives the judge discretion not to impose them on a good faith plaintiff who nevertheless did not prevail in its claim.

2. Consideration of the Grounds Raised (or Not Raised) by the Parties

Of course, the adversarial principle requires that the grounds raised by a party be communicated to the opposing party and that a reasonable time be allowed for response. More delicate, however, is the question of whether the judge may raise issues of its own motion, in effect coming to the aid of the parties. In French law, these are called grounds raised *ex officio* (*moyens soulevés d'office*) or more often grounds of public policy (*moyens d'ordre public*). These grounds implicate issues of such great importance that the court, by failing to take them into account, would itself undermine the rule of law, which is of course the judge's primary mission to uphold.

The doctrine of *moyens d'ordre public* is old and well-settled. First, it requires that the judge consider all possible admissibility arguments even if the defendant administrative body has failed to raise the particular issue. Second, the doctrine requires the court to consider all possible arguments regarding the lack of legal authority (*l'incompétence*) of the administrative body. Finally, it requires the court to determine for itself the scope of any pertinent legislation, whose misinterpretation might lead the judge to apply a legal text that is in fact inapplicable.¹⁹ However, since a decree of January 22, 1992, the judge

¹⁸ In this regard, see the decisions, CE, December 21, 2001, *M. et Mme Hofmann*, and CE, December 17, 2003, *Meyet et autres*.

¹⁹ There is, however, disagreement between the CE and the *Cour de cassation* as to whether the judge must raise of its own motion the nonconformity of domestic law with EU law. The CE says no, the *Cour de cassation* says yes.

must, out of respect for the adversarial principle, communicate to the parties any argument that it raises of its own motion.

3. *Decisional Economy*

Traditionally, the French administrative judge has practiced what is called *l'économie de moyens*, or “decisional economy.” That is, if the court determines that one ground is sufficient to decide the case, even a ground raised of its own motion, then it need not reach the other grounds raised by the parties. In addition, the administrative judge combines this practice with a standard approach to considering the legal issues raised in the complaint: first any claims of *incompétence*, then any assertions of formal or procedural invalidity (*vice de forme*), and finally any substantive grounds warranting reversal. That said, the court remains free to choose the grounds it regards as dispositive of the case and can rule on the substance without pronouncing on the admissibility of the complaint, the legal authority of the administrative actor, or its respect for formal or procedural requirements. The only thing prohibited to the court is the misinterpretation of its own jurisdiction in the matter.

From all this often results such a brief decision that, although it meets the minimum requirements for reason-giving, often leaves the parties unsatisfied. The recent trend has in fact been toward more didactic decisions that rule in depth and explain in a very thorough fashion the appropriate conduct of the administration, thus breaking with the tradition of “*imperatoria brevis*.”²⁰

B. *New Duties and Powers*

1. *Rulings within Reasonable Time Periods*

French administrative justice has long been fairly accused of excessive delays in issuing its rulings. This practice is increasingly untenable, particularly given the increasingly severe demands imposed by the ECtHR in Strasbourg as to the interpretation of the requirements of Article 6(1) of the European Convention of Human Rights.²¹ France, like other European states, has found itself regularly condemned under Article 6(1) for excessive delays, not just in administrative justice but also in the ordinary judicial courts.²² In addition, in a decision of June 22, 2002, *Minister of Justice v. Magiera*, the *Conseil d'Etat* has itself taken the initiative to create a new cause of action for State liability based in simple negligence for excessive judicial delay, whereas the normal basis

²⁰ In this regard, compare the length of the major decisions reported in GAJA (2015) often cited in this chapter. The early ones at the beginning of the volume are generally only a half-page, those toward the end generally reach three pages.

²¹ Article 6(1) provides in pertinent part: “everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law” (emphasis added).

²² For an example involving French administrative justice, see the judgment of the ECtHR (Third Section), November 9, 2006, *Sacilor Lormines*, no. 65411/01, available online (in English) at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (accessed January 15, 2010).

for liability in the context of judicial malfeasance is gross negligence.²³ Indeed, the second highest judicial formation of the *Conseil d'Etat*, the *Section du contentieux*, recently extended this jurisprudence to a case where the victim of excessive delay²⁴ was a local government and not a private government contractor.²⁵ However, to prevent this new cause of action from itself precipitating excessive delays, a decree of July 28, 2005 gave the *Conseil d'Etat* original jurisdiction to hear liability claims arising from the conduct of the inferior administrative courts.

Numerous reforms have been adopted to address the slow pace of administrative justice in France. The first and most important was the 1987 legislation establishing the intermediate Administrative Courts of Appeal (the *Cours administratives d'appel*, CAA) between the Administrative Tribunals (the *Tribunaux administratifs*, TA) and the *Conseil d'Etat*. The 1987 legislation also permitted the *Conseil d'Etat*, in its supreme court role, to avoid getting itself enmeshed in the merits of each and every petition for review by giving the high court the power to select only those matters that raise significant questions of law. This filtering function is important because it breaks from the traditional obligation of the *Conseil d'Etat* to fully examine all issues brought before it by the parties.²⁶ This new filtering function brings the French practice closer to that of other national supreme courts, which often allow even more rigorous triage of the petitions heard on the merits.²⁷ However, to the extent that remanding a case to the CAA might itself raise too great a risk of delay, the 1987 law also wisely allows the *Conseil d'Etat* to proceed directly to final judgment, disposing of all aspects of the matter “if the sound administration of justice justifies it.”

A second line of reform has involved creating more judicial formations composed of ever fewer judges, reserving only the most delicate matters for the traditionally larger formations within the various administrative courts. Within the *Conseil d'Etat* itself, for example, of the 10,000 cases before it in 2013 as in 2014, the high court disposed of half by an order of a *juge unique*, just over a third by smaller colleges of three judges, leaving only the remainder to be handled by the larger formations (primarily nine-judge panels taken from two of the ten judicial subsections, as well as the larger *Section du contentieux* and the *Assemblée du contentieux* for the most sensitive and important matters). When I joined the *Conseil d'Etat* fifty-two years ago, in fact, the nine-judge panels handled nearly all the cases, four-times less numerous than today.

Finally, from the perspective of speed, surely the most important change has been legislation adopted June 30, 2000, largely at the urging of the *Conseil d'Etat* itself, which created emergency procedures truly worthy of the name. On the one hand, this legislation permits the administrative judge to suspend the execution of a challenged administrative decision upon an emergency application where there is serious doubt

²³ Another exception is in the context of a violation of EU law. See CE, June 18, 2008, *Gestas*.

²⁴ More than eleven years, including all levels of jurisdiction, in a matter that was admittedly very complex.

²⁵ CE Sect., July 17, 2009, *Ville de Brest*.

²⁶ In practice, this new approach allows the CE to eliminate, as soon as they are filed, nearly half of the petitions for review because they do not raise serious questions of law.

²⁷ The prime example, of course, is the United States Supreme Court.

about the measure's legality. On the other hand, this law allows the court to prescribe emergency measures enjoining grave and manifestly illegal violations of a fundamental liberty. An example of the first category (the *référé suspension*) is the ruling of February 15, 2006 preventing the decommissioned aircraft carrier *Clemenceau* from leaving the French port for asbestos removal in India; this proceeding took less than three weeks. Examples of second category (the *référé liberté*) are particularly numerous in the context of immigration and asylum litigation.²⁸ Another recent example of the application of this new procedure is the *Lambert* case, which involved aggressive end-of-life measures that gave rise to two decisions in 2014, one of February 14 and the second of June 24.²⁹ The case involved a challenge to a decision by doctors and the wife of a irretrievably comatose patient to terminate artificial feeding and hydration. The parents of the patient sued (in a manner reminiscent of the Terri Schiavo case in the United States in the late-1990s and early-2000s). The matter eventually made its way to the European Court of Human Rights, which, consistent with the *Conseil d'Etat*, ruled that the medical care could in fact be terminated. The parents, however, instituted new proceedings to stay the decision and the case is in fact still pending.

By 2015, with delays in France generally reduced to one year for each level of review, the administrative justice system could be said to have broadly satisfied the requirement of issuing its rulings within a reasonable time period. The situation is slightly less satisfactory if one focuses exclusively on so-called “ordinary” administrative cases, that is, those not handled by an order of a *juge unique*. In those contexts, delays can still reach as much as twelve months in the *Conseil d'Etat*, fourteen months in the CAAs, and twenty months in the TAs.

2. Moderating the Effects of Rulings in the Interest of Legal Certainty

Increasing attention to concerns over legal certainty have prompted the French administrative judge to change two traditional principles: first, the retroactive effect of an annulment of administrative acts under the *recours pour excès de pouvoir*; and second, the immediate application, in other pending disputes, of newly announced judicial rules that constitute a change in the law.

As to retroactivity, the key development was the decision of the *Assemblée du contentieux* of May 11, 2004, in *Association AC! et autres*.³⁰ The principle of retroactive effect in an annulment action is itself rooted in judicial decision. The challenged act, once nullified, is understood never to have existed, with the consequence being that any actions taken pursuant to the invalidated act also become illegal. It has long been recognized, however, that this retroactivity could have devastating effects. For example, it might render illegal, sometimes three to five years later, a cascade of regulatory measures including those relating to the collection of taxes. Or it might nullify an individual decision that had long previously taken force, like the selection of a civil

²⁸ See the commentary following the decisions CE. Sect., January 18, 2001, *Commune de Venelles*, and CE, March 5, 2001, *Saez* (GAJA 2015), no. 100, p. 725.

²⁹ (GAJA 2015), n° 117, p. 921

³⁰ CE Ass., May 11, 2004, *Association AC! et autres* (GAJA 2015), no. 107, p. 804.

servant for a new position. It is retroactive effect, incidentally, that has given rise to the practice of so-called “validation laws.” To address these concerns, the *Conseil d’Etat* drew inspiration from the approach of the European Court of Justice in its application of provisions of the Treaty of Rome,³¹ which allow the ECJ to limit the retroactive effects of its declarations of annulment, as well as from similar approaches in Germany, Austria, and Italy. Consequently, since the decision of 2004, the *Conseil d’Etat* has recognized that it has the power, even without a textual basis, to moderate the effects of an annulment through a balancing of interests, whether of the administration or of private parties.³²

As to the application of new judicial rules in pending litigation, the key development was the recent decision of the *Assemblée du contentieux* of July 16, 2007, in *Sté Tropic travaux signalization*. Prior to this decision, where there was a change in the case law, the new rule announced by the judge would apply immediately. This meant that it would also apply in any pending litigation, thus potentially taking by surprise the parties who had never contemplated the possibility of this modification in the state of the law. Henceforth, “having due regard for the imperative of legal certainty,” the administrative judge,³³ notably to avoid excessive interference with existing contractual relations, will be able to decide that a newly announced rule will only apply to past contracts only prospectively.

Conclusion

Old age does not always make innovation impossible. This is what I hoped to show with this brief overview, not with regard to my own advanced age, but rather with regard to that of the institution which I have had the honor of serving for over forty years and which is itself over two hundred years old. Guided by an often slight legislative and regulatory framework, judges on the *Conseil d’Etat*, and later those on the other French administrative jurisdictions, have been continuously attentive to the emergence of new duties and the need to develop new powers in response. The ever increasing number of filed cases—in 2014, 195,000 in the 30 metropolitan TAs,³⁴ 30,000 for the 8 CAAs, and 10,000 for the *Conseil d’Etat*—show that the confidence of litigants persists unabated, something which the increasing and often successful use of emergency procedures also confirms.

References

³¹ Ex Article 174, which became Article 231 of the EC Treaty (and is now Article 264 TFEU).

³² For example, a decision of March 3, 2009 delayed until September 1 the effects of an annulment for *vice de forme* of a regulatory text requiring that public transportation vehicles be made accessible to the handicapped. The purpose was to not render illegal the measures that had already been taken in the course of implementing this text.

³³ The *Cour de cassation* had similarly ruled a year earlier. See Ass. Plén., December 21, 2006.

³⁴ There are also ten TAs in French overseas territories, but they receive only 7000 cases.

GAJA. 2015. *Les grands arrêts de la jurisprudence administrative*, edited by Marceau Long, Prosper Weil, Guy Braibant, Pierre Delvolvé, and Bruno Genevois. 20th edition. Paris: Dalloz.