ANALYSIS OF FRENCH ADMINISTRATIVE TRIBUNAL

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CHAPTER-I : FRENCH ADMINISTRATIVE TRIBUNAL

If problem-solving justice has only a limited approach in French administrative justice and was probably not intended to replace the traditional approach to the trial based on judicial review in respect of the administrative law by citizens and public administrations, certain elements may be nevertheless observed as characteristics of problem-solving justice: the French administrative judge may be a member of a committee set up to deal with problems that involve an administration and citizens, she/he can proceed to conciliation within the court, she/he has tools for solving problems and users can ask her/him to solve a problem. These elements are becoming increasingly important: although the presence of administrative judges in administrative committees is old, it has developed particularly in recent years. The procedural tools are more recent and reflect the willingness of both the legislator and the Council of State to resolve the problem beyond the settlement of the administrative dispute.

2.1 Administrative Judge as problem solving tool:

Although the problem-solving tools are not all recent, they have been particularly developed in recent years because the case law of the Council of State has recently adopted positions aimed at a settlement of the problem (mostly legal problems) and not simply settle a dispute. These initiatives of the administrative courts in their case law have not always been well appreciated by the public law doctrine which has seen it in pragmatic methods with little respect for the rules of form and procedure and possible questioning of the rule of law. In the United States, such fears have also been expressed about the creation of problem solving courts. It was also feared that problem-solving courts were too intrusive, evoking the idea of a 'Big Brother style'. The first tool initiated by the Council of State in the case law is called 'substitution of legal basis' (substitution de base légale). The administrative judge can substitute the legal basis when she/he considers that the contested administrative decision is based on an incorrect legal basis but could have been taken by the public administration according to the same appraisal and on the basis of another text. There are nevertheless

certain conditions: the person concerned must have had the guarantees attached to the application of the text on the basis of which the decision should have been delivered. Such a substitution falling within the scope of its 'own motion' (office du juge), she/he may proceed on her/his own initiative on the basis of the documents in the case file, provided that the parties have been given the opportunity to present their observations. The purpose of such a judicial position is to save the administration time (and also that of the citizen affected by the decision) by avoiding the quashing of its decision, and thus a new administrative decision process. Through another tool, the 'substitution of grounds/reasoning' (substitution de motifs), the public administration can, in the first instance or in appeal, ask the judge to substitute a ground of law or fact that the administration has not originally mentioned in order to 'save' the decision. It is then up to the judge, after having given the appellant the opportunity to submit her/his observations on the substitution sought, to check whether such a ground is sufficient to legally justify the decision and then to assess whether the administration would have taken the same decision if it had initially relied on that ground. If so, she/he can proceed with the requested substitution provided that it does not deprive the applicant of a procedural safeguard linked to the substituted ground. As a third tool, the 'neutralisation of grounds' allows a judge to decide thata defect affecting the process of a prior administrative procedure makes it illegal only if the defect has an influence on the content of the decision or deprives the persons concerned of legal guarantees. The principle applies in the event of the omission of a compulsory procedure,provided that such an omission does not affect the competence of the author of the act. In addition, the administrative court can decide to dismiss the ground alleging procedural irregularity without having to communicate this to the parties if it considers that the conditions laid down by the 'Danthony' judgment are fulfilled. The administrative judge can also arrange for the regularisation of urban planning authorisations. Urban planning disputes have undergone numerous modifications, which are based on the awareness of a recurring problem of legal uncertainty. Indeed, the quashing of a planning permission, such as a building permit, does not prevent the administration from taking up the same project by re-filing an application for authorisation after having corrected the irregularities. But the passage of time and the necessity of restarting an investigation, by adapting eventually the project to the new provisions in force, led in fact to many abandonments of projects. This is why Law gave the administrative court a power to grant partial quashing in cases where the illegality affecting only part of the project can be corrected by an amending permit and within a time limit that the judge can lay down in

her/his decision.

2.2 Administrative Judges as Arbitrator:

Developing conciliation and mediation was the will of the former Vice-President of the French Council of State, and a recent law has facilitated the use of it. However, the phenomenon is considered in terms of ADR, with the main aim of getting out a number of cases more quickly,rather than in the aim of solving problems, all the more so as the term is unused, as mentioned above. Regardless, administrative justice favours an extension of ADR tools and an alternative approach to judgments. And in these alternatives, which for some were carried out in a completely informal way, there is also a desire to solve problems. Some judges interviewed as part of the QUALIJUS project (see above) considered themselves in favour of the development of ADR, if only because they make possible the problems of understanding of litigants with regard to decisions of public administrations. Some interesting initiatives by administrative tribunals, and sometimes initiatives by public administrations concerned about potential prosecution by citizens, have emerged, aiming to organise arrangements for finding solutions to certain problems. For instance, an ethics charter and an agreement have been concluded to organise ADR relating to civil servants, administrative contracts and town planning by the Administrative Tribunal of Grenoble, the City of Grenoble, the Isère department and the local bar. In the context of the realisation of works of a tramway line, the Departmental Council of Seine-Saint-Denis – the public contracting authority – took the initiative to create the Saint-Denis amicable settlement committee, in close cooperation with the administrative tribunal of Cergy. Indeed, the Departmental Council and the RATP addressed the President of the Tribunal in 2008 to propose the establishment of a committee to prevent disputes relating to damages suffered by traders bordering the future tramway. On the basis of the power of conciliation recognised by the code of administrative justice since 1986, the president of the tribunal accepted this request and appointed a judge of the court as conciliatory judge and future chairman of the committee, in order to participate in the operations preceding the establishment of the committee. These examples are interesting because they show the interest of administrative judges in conciliation mechanisms to solve problems. The existing, but limited, possibilities of mediation by administrative judges in the Code of Administrative Justice (in French, CJA) have been extended to all administrative disputes by the Act of 18 November 2016. Article L. 213-1 of the CJA specifies that mediation allows two or more parties to reach an agreement with a view to the amicable resolution of their

disputes, with the help of a third party, the mediator, chosen by them or appointed, with their agreement, by the court. The parties can request the organisation of mediation from the administrative judge outside any judicial procedure (L. 213-5), just as the administrative judge can take the initiative of mediation in the context of judicial proceedings (L. 213-7). Some retired administrative judges have become mediators within this framework of the mediation and have expressed the usefulness of mediation. In the example of social disputes, the mediator can succeed in convincing the social administration for the benefit of the users in three cases: the error made by the social security fund, the presentation of new elements and, sometimes, the waiver or at least a spread of the reimbursement because of the individual's precariousness.

CHAPTER-II: THE DOCTRINE- 'ACTES DE GOVERNMENT'

There still remain, however, two categories of presidential acts against which the council of state refuses to admit recourse for excess of power. The first of these are the decrees or decree- laws, as they are sometimes called, issued by the President in pursuance of authority conferred by the Senatus-Consultum of 1854 for the regulation of affairs in the colonies. Now the power of the council of state to annul is expressly restricted by the law of I872 to acts of the "administrative authorities" and it has been the view of the council of state all along that when the President issues a colonial decree he acts not as an "administrative" but as a "political" authority. Such decrees therefore are not attackable for excess of power. But it may now be said that whatever force this distinction may have formerly had, it has had little or none since 1907 when the council of state abandoned the distinction between simple ordinances and ordinances of public administration and extended the doctrine of recourse for excess of powerto the latter. Logic and consistency therefore would require the council of state to abandon the distinction between the President as an administrative agent and the President as a political authority and admit recourse for excess of power against the acts performed by him in both capacities without distinction.

The second category of presidential acts against which the council of state refuses to admit recourse for excess of power are the so-called "acts of government" (actes de gouvernement). The distinction between acts of this character and other acts of the President has long been an established principle of the jurisprudence of the council of state and it too rests, in the main, on the distinction which the French make between the President as an administrative agent and as apolitical authority-between the function of "administering" and

the function of "governing." The conception of "actes de gouvernement" has played an important role in French administrative law and it has been the subject of much controversy among French jurists and text writers. The difference of opinion has related not so much to the general principle as to where the line of demarcation between such acts and simple administrative acts should be drawn. Some of the older writers construed the category of government acts so broadly as to bring within its scope nearly every measure which in the judgment of the government was a public necessity or which even subserved an important public interest. Such acts might violate private rights but it was the theory that if they were necessary to the social or national defense the government might resort to them, in which case it was responsible only to Parliament and not to the council of state. There is still no agreement as to what acts fall legitimately within this category although the tendency of opinion and of the jurisprudence has been to reduce the number to very narrow limits. But after 1872 when the reorganized council of state acquired a larger degree of independence, it adopted a different attitude and did not hesitate to allow recourse against many so-called actes de government which were no different in principle from those with which the old council of state had declined to interfere. By a series of decisions it has steadily reduced the hitherto large domain of governmental acts which escaped the control of the council of state until today it includes little more than such acts of the President as the calling of elections; summoning, adjourning and closing of parliament; the conduct of foreign relations, measures in connection with the maintenance of a state of siege and certain extraordinary measures in time of war in the interest of the national defense. Of these the last three alone are of any importance. As the jurisprudence now stands the theory of acts of government presents little danger to the citizens for there are few administrative acts left the legality of which is not open to attack before the council of state. The acts of the President, once regarded as those of a representative of the national sovereignty, have gradually ceased to be such and are now treated, with a very few exceptions, as those simply of an administrative agent. This long-hoped for situation is due to the impartiality and indepen- dence of France's two great administrative courts, the council ofstate and the tribunal of conflicts.

3.1 Grounds for the annulments of administrative acts:

The council of state and the tribunal of conflicts have by their decisions not only extended the list of administrative agents whose acts may be annulled for excess of power and enlarged the category of such acts, but they have also greatly extended the grounds upon which they may beannulled. Originally these grounds were: incompetence, irregularity (vice

de forme) and violation of the letter of the law. For a long time both tribunals proceeded on the theory that administrative acts were, in the main, discretionary in character and so long as they were within the technical competence of the authority performing them they were not permitted to be attacked for excess of power, even though they were contrary to the spirit of the law and were done for another purpose than that contemplated by the law. The council of state always refused to inquire into the motive which inspired the agent or the real object sought to be accomplished by the act. After 1872, however, it began to take a different view and in time there was developed the doctrine of "misapplication of power" (detournement de pouvoir) according to which it will annul an administrative act which, though within the legal competence of the agent, is in reality done for another purpose than that which the law authorizing it had in mind. Thus a municipal council is dissolved by a prefect ostensibly because of irregularities in the election but in reality because it is politically opposed to the prefect; a minister of war excludes a grain dealer from bidding for a government contract because his political opinions are opposed to those of the government; a mayor revokes a permit, refuses permission to a hackman to park his carriage at the railway station, forbids the ringing of church bells during certain hours, orders the closing of certain establishments-in all these cases for other reasons than those intended by the law. It is still a rule of the council of state, however, that it will not presume that an administrative agent intends to use his power for another purpose than that authorized by the law and as late as 1903 it denied that it was within its competence to inquire into the motives which animated officials in exercising their powers. But in 1914 it appears to have definitely abandoned this view and in a case involving the validity of a municipal ordinance for the "pretended" reorganization of a certain municipality it annulled the ordinance on the ground that the reason alleged was false, the real motive being to get rid of certain municipal employes because of their political hostility. The result of this extension of the doctrine of misapplication of power has been to reduce very greatly the discretion of the administrative authorities and to bring under the control of the council of state a large realm of administrative action which formerly escaped its watchful eye.Formerly mayors and prefects under the pretext of protecting the public health or safety frequently issued ordinances the real purpose of which was the financial interest of the local government, some railroad company or even the political interests of the government. Today their real motives in all such cases are subjected to the searching scrutiny of the council of state.

3.2 Persons Qualified to attack the legality of the administrative acts:

No less interesting has been the development of a new jurisprudence by which the doors of the council of state have been opened wider and wider to private individuals who may wish to attack the acts of the administrative authorities. For a long time no one who was unable to show that the act complained of violated a legal right of his was permitted to knock at its doors. Later the council of state began to admit the existence of mere interest on the part of theplaintiff as a sufficient ground of attack. But in the beginning it insisted that this interest must be direct and personal, pecuniary or material; mere impersonal interest such as any good citizen might have in the observance of the law was not sufficient. Gradually, however, the council of state began to admit one relaxation after another from the rigor of the early rule until today the plaintiff is merely required to show that he has a simple interest in the annulment of the act-an interest which may be only moral rather than material and which may not be detachable from the common interests of all citizens or from those of an association of which he may be a member. Thus any member of an association of functionaries has sufficient interest to attack an appointment, a promotion or a dismissal made in violation of ministerial civil service regulations. So has any member of a university faculty who wishes to attack the legality of a decision made by the faculty for the awarding of a prize, contrary to its own regulations. Similarly, the council of state has held that an inn-keeper whose house fronts on a public square has sufficient interest to attack the order of a mayor forbidding the holding of a market on the square, although the order violates no legal right of his. Recently the council of state has gone to the length of annulling appropriations made by municipal councils when they are not within its legal competence as well as ordinances relating to the management or disposal of the municipal patrimony or which involve the imposition of financial charges upon the municipality, when they are not authorized by law. Likewise any voter has sufficient interest to attack and have annulled a municipal ordinance dividing an election district in violation of the law. As a result of these "new conquests" the doors of the council of state today are open to nearly every citizen who may wish to attack as ultra vires any act of an administrative authority from the President down to the mayor, including also the acts of municipal councils.

CHAPTER-III: LIMITATIONS IN IMPLEMENTATION OF FRENCH ADMINISTRATIVE JUSTICE

The relevance of the problem-solving approach to administrative justice can be questioned because of its specificity. One might think indeed that the nature of problems that appear in administrative litigation would not be suitable for a problem-solving approach. But this

does not seem to be the case. The problems caused by the public administrations, and to which the administrative judges must respond, are first of all of a legal nature: the failure to comply with legality, but they are not only. Through the legal problems outlined, which we have seen that they can be solved in a more pragmatic way, problems of a very different nature arise: financial and economic problems are also developing (a decrease in turnover, as seen previously, when an administration undertakes, for example, to build a tram or a metro line); psychological and moral problems (there are many potential examples in civil service litigation and more generally in cases of administrative liability. On this point, the discussion on the extent of damage and compensation could be a relevant case for a less traditional judicial approach, where the victim of a fault, the offending official and the representative of the administrative authority – possibly the hierarchical superior – could be invited to discuss by the judge); social problems also (for example, litigation relating to social benefits and allowances, rights granted as housing assistance). The proof of this is that conciliation and mediation already handle part of these problems. To this point, it is interesting to remind, as explained by Sophie Boyron, that when the reflections started on the subject of ADR, it was generally considered that they were not adapted to administrative disputes because the issue would not be quantifiable financially and only the strict application of administrative law would ensure the effective protection of the general interest and of the weakest people who are unprepared to face the administration. The many examples of ADR used by the French administrative judges and mentioned above show the opposite. However, a distinction must be made between conciliation and mediation concerning French administrative disputes. It is more than probable that, from the administrative justice perspective, the new system of mediation established in 2016 is based on a time-saving approach rather than a problem-solving approach. Mediation takes place outside the judicial procedure. It is even sometimes mandatory, with the idea that some disputes do not necessarily require the judge. The interview with the Delegate of the Rights Defender even shows that the interest of mediation comes more from the dysfunctions of the administration than from the administrative judges' approach which would be too legal and not individualized enough. The question remains nevertheless as to the usefulness of the judge in all problem- solving mechanisms. If these mediation experiments fail, should we conclude that justice should not delegate this search for problem solving? One might also think that, because of the defining feature of administrative law, the problem-solving tools and practices mentioned aboveonly take into account the public interest that administrations, and the administrative judge too, must safeguard. But that is not the reality either. They seek

to remedy the problems with regard to the public interest but also with regard to private interests. It also should be noted, that in France, the procedure followed before the administrative courts is very similar to that of criminal justice, with an inquisitorial procedure which gives a lot of powers to the criminal and administrative judges. This seems particularly appropriate for the establishment of a more problem-solving justice system as shown in the declaration in 2016 of the Senior President of Tribunals that proposed to help judges (as a whole) to adopt a more inquisitorial and problem- solving approach. The more important limitation to the application of a more global approach interms of problem-solving justice could possibly be then in the absence of dialogue with the actors concerned inside the administrative proceedings, while it is highly developed in problem-solving courts used in criminal justice. This situation was regularly mentioned during interviews with French administrative judges: the administrative judge lacks time to have more dialogue with the parties. The new procedural tools imply nevertheless a right of observations from each parties and the recent development of hearings before the administrative courts, following a number of procedural reforms, has certainly also led to a more participatory justice system in that the parties are now able to react to the conclusions of the public reporter. However, these improvements have not led to real collaboration between all actors.

CHAPTER- IV: CONCLUSION

Since then, French administrative justice is not only a justice to process cases, it is also a problem-solving justice that has the will and tools to solve problems. Nonetheless, affirming that French administrative justice is totally a problem-solving justice is difficult for many reasons. Firstly, because the concept has been so far studied and used mainly for criminal justice. Secondly, because the will and tools to solve problems are not systematically used in all cases by administrative judges. Thirdly and ultimately, these difficulties are all the more important since the concept is not present in official and academic discourses concerning the tools and practices mentioned here of French administrative justice. If the French administrative justice can be considered as a problem-solving justice, it can only be done in relation to characteristics that would be specific to administrative justice, and not by simply importing the model of problem-solving courts used in the criminal field. French administrative courts are therefore not problem-solving courts, insofar as they are not entirely oriented towards solving a problem and that despite the increasing importance of problem-solving tools, some of these tools are destined to develop outside it and others are limited. Despite the limited powers of the administrative

judges it is interesting to note that the same characteristics are identified as belonging to a problem-solving approach in the discourse concerning British administrative justice, a country in which it is known that problem-solving courts are in place. There should therefore be reflection on administrative justice across Europe. Further research, through the comparison of European administrative justice methods and their possible evolution, could answer the question of the relevance of such an approach, and even the implementation of problem-solving courts, in the administrative field. And perhaps this will help us to better understand the distinctive feature of administrative justice and its ability to be or become a problem-solving justice.