

Is French Administrative Justice a Problem-Solving Justice?

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1. Introduction

The concept of problem-solving justice is not easy to handle. In this concept, the term ‘problem’ is the key word, insofar as justice has become more conscious of the societal effects of its decisions and seems to be more inclined to play a social role, to get involved and to solve the problem in the long term, beyond the single drafting of a judicial decision.¹ This is why one of the main characteristics of this approach is the presence of closer partnerships with other institutions (public and non-public) and all parties.²

In this perspective, it can certainly be said that France has a culture of problem-solving justice if one takes into account, for example, in criminal justice, the judge responsible for the execution of sentences (*juge d'application des peines* or JAP), identified as ‘the oldest Problem-Solving court’,³ and, in civil justice, the family judge and the judge supervising a guardianship. At the Consensus Conference on the Prevention of Recidivism organised by the French Ministry of Justice in 2012-2013, Martine Herzog-Evans compared the problem-solving courts to the French JAP. She noticed several differences: judicial intervention in monitoring quite closely, though more intensively, by problem-solving courts than the JAP, specialisation of problem-solving courts (drug courts, re-entry courts, domestic violence courts, mental illness courts, etc.) and common work of all services. All the actors (the social services, psychiatrists and psychologists, etc.) are located within the court, which allows for immediate care, and all these services work together with the judge and probation services. She concluded that the problem-solving courts have reinvented the JAP, but a JAP that would also be in close collaboration with all actors. Moreover, she considered this model as one of the most advanced in the world and one that has produced the most positive results, because the problem-solving courts reduce recidivism, and when recidivism does exist, they delay its occurrence or reduce its severity. They therefore save public funds considerably, which more than offsets their slight additional cost. This is why, according to her, it is not surprising that there are more than 3,000 of them today in the United States and are spreading throughout the world.

It can also be considered if the French administrative justice – which is managed separately from ordinary courts because it is managed by the Council of State (*Conseil d'Etat*)⁴ – is a problem-solving justice, but perhaps according to different criteria. Indeed, administrative justice is characterised by a specific purpose that leads it to check whether the decisions of the public administrations are lawful and to quash them if they are not.⁵ Moreover, in France, its organisation and procedure are original because of the emergence

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1 ‘The underlying notion of problem-solving justice is the idea that the justice system should do more than simply process cases.’ G. Berman & A. Fox, ‘The Future of Problem-Solving Justice: An international perspective’, (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender and Class*, Issue 1, p. 2.

2 G. Berman & J. Feinblatt, *Good courts. The case for Problem-Solving Justice* (2005).

3 M. Herzog-Evans, ‘Pas de Problème: Problem-Solving Courts in France’, (December 2013) 1 *Scottish Justice Matters*, Number 2, p. 36.

4 H. Pauliat, ‘Le modèle français d’administration de la justice : distinctions et convergences entre justice judiciaire et justice administrative’, (2008) *RFAP*, p. 93 ; P. Gonod, ‘Le Vice-Président du Conseil d’Etat : ministre de la justice administrative?’, (2007) 4 *Pouvoirs*, n°123.

5 H. Pauliat, ‘Les convergences européennes dans le déroulement du procès administratif’, *RFDA*, p. 225.

of the administrative courts within the administration itself.⁶ After the Revolution of 1789, the Act of 16-24 August 1790 and the Constitution of 3 September 1791, judicial power was delegated to the judges. As regards the settlement of administrative disputes, the solution that prevailed under the *Ancien Régime*⁷ was essentially maintained, that most of a dispute was adjudicated within the administration, and not by the judges, whereas the logic of the separation of powers required that the judges should have jurisdiction over all trials.⁸ As Professor Georges Vedel, former President of the French Constitutional Council, pointed out:

the Constituents, in reaction to the practices of Parliaments,⁹ denied the judges the power to issue injunctions to the Administration and to quash or reform its decisions marked by the seal of public authority. This is a French specificity because, in other countries claiming to have a separation of powers, this limitation on the jurisdiction of judges does not exist.¹⁰

This situation makes it all the more interesting to analyse the evolution of French administrative justice, which has gradually managed to emerge from the public administration,¹¹ but is still sometimes in an awkward situation with the principle of the separation of powers. How could this justice be identified then as problem-solving? Indeed, this approach does not only imply that the justice system should worry that its case law and its decisions do not pose a problem,¹² it also implies that the judge should resolve the problem during each dispute. This may seem contradictory to the fact that in administrative judicial proceedings, the problem for judges is generally limited to assessing the legality of administrative decisions, and the solution is limited to quashing illegal decisions. But French administrative law has evolved, under the influence of the Council of State and the French legislator, who have equipped the administrative justice system with tools for solving problems. Thus, administrative proceedings and the recent initiatives of the administrative courts must be particularly analysed as to their consequences on a possible qualification of certain methods of French administrative justice as problem-solving justice. A culture of problem solving is present since, for a long time, French administrative judges have been part of administrative commissions which aim to solve problems and which are composed of other categories of professionals and users. Administrative judges are becoming more involved in alternative dispute resolutions (ADR). This evolution makes research even more interesting in the context of a European movement around the issue of problem-solving justice. In the United Kingdom, the Senior President of Tribunals asserted that administrative justice must adopt a problem-solving approach.¹³ In France, this approach is not explicit in administrative (nor ordinary) justice and does not appear to be a contemporary issue. Indeed, there is no reference to it neither among politicians or judges nor in public law doctrine. It can nevertheless be considered to be present in certain procedural tools and practices of administrative courts.

6 The Constitution of 22 February, An VIII provided for the establishment of the Council of State, which was responsible for both preparing government texts and settling (by proposing a solution to the head of state) disputes 'arising in administrative matters'. The system was described as 'restrained justice' as the head of state makes the decision. See A. Gaillet, 'Le Conseil d'État français : histoire d'une exportation difficile en Europe, (2013) *RFDA*, p. 793.

7 The *Ancien Régime* is the period in the history of France from the Renaissance to the French Revolution.

8 J.-L. Mestre, 'Le contentieux administratif sous la Révolution française d'après des travaux récents, (1996) *RFDA*, p. 289.

9 Parliaments, under the *Ancien Régime*, were courts responsible for implementing the king's decisions but which regularly opposed them in the pre-revolutionary period. For further details, see J. Krynen, 'L'État de justice, France, XIIIe-XXe, I, L'idéologie de la magistrature ancienne', NRF 2009, Bibliothèque des histoires; and J. Krynen, 'L'État de justice, France, XIIIe-XXe, II, L'emprise contemporaine des juges', NRF 2012, Bibliothèque des histoires.

10 G. Vedel, 'La loi des 16-24 août 1790 : Texte ? Prétexte ? Contexte ?', (1990) *RFDA*, pp. 708-709.

11 Particularly, the Act of 24 May 1872 allowed the Council of State to move from 'restrained justice' to 'delegated justice', i.e. its decisions became enforceable without the need for the head of state or a minister to sign them. And the so-called decision 'Cadot' of the Council of State of 13 December 1889 abolished the 'Minister-judge' system, which had continued to exist in parallel (C.E., 13 déc. 1889, *Cadot*, Lebon p. 1148, concl. Jagerschmidt).

12 In this regard, the Council of State, which is the manager but also the judge of cassation of the administrative tribunals, the administrative courts of appeal and the national court for the right of asylum, has adopted a case law that is careful to limit the problems that can arise from the *ex post* intervention of court decisions, and in particular from the reversal of case law. It has decided that the administrative judge may exceptionally modulate over time the effects of the quashing of an administrative decision when the consequences would be manifestly excessive for the public and private interests involved. This allows in practice to delay the effects of the quashing to give the parties time to adapt. See C.E., ass., 11 mai 2004, *Association AC ! et autres*, Lebon p. 197, concl. Devys ; *RFDA* 2004, p. 454, concl. et p. 438, étude Stahl et Courrèges ; *AJDA* 2007, p. 1183, chron. Landais et Lenica, p. 1219, étude Beguin ; *GAJA*, 17e éd., 2009, n° 114.

13 *Senior President of Tribunals' Annual Report* (2016), p. 4. The tribunal system of the United Kingdom is part of the national system of administrative justice with tribunals classed as non-departmental public bodies and is headed by the Senior President of Tribunals.

To carry out this work, the study is based on an analysis of the literature on the subject, as well as an empirical method based on interviews with French administrative judges about the developments in administrative justice methods over the last ten years. Indeed, the analysis is based on interviews with administrative judges conducted as part of a research project.¹⁴ This project did not deal directly with the theme of problem-solving justice but with the renewal of the administrative judge's methods. Thus, the interviews are an important source of information on how administrative judges perceive their tasks and would like to see it evolve. The judges interviewed regularly mentioned the distance between the administrative judge and the litigants, as well as the lack of concrete solutions provided, and the powerlessness of administrative justice face to the gap between the judge's decision, which always comes after the dispute, and the damage that the administrative decision (possibly illegal) can cause to the citizen.¹⁵ It cannot be said that the judges demanded a more problem-solving approach, as the concept was unknown to them, but they were aware of providing a legal response and not always a solution to the problem caused by the administrative conflict. That is one of the reasons why administrative proceedings evolved significantly in the 2000s.¹⁶ A number of procedural tools and practices can be identified as having the characteristics of a problem-solving approach. But apart from the identification of the approach in French administrative justice, it is also the question of the limits of the problem-solving approach which can be asked through this French example. Certain initiatives of French administrative justice can lead us to consider the obstacles to such an approach, in particular the legal limitations, and to reflect on the possible extension of this form of justice. Moreover, the defining feature of the administrative litigation may not suit a problem-solving justice system. The study thus presents an analysis of the characteristics of French administrative justice as a problem-solving justice and questions the limits of this approach and its future evolution.

2. Some characteristic elements of problem-solving justice in French administrative justice

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 can be a member of an administrative committee created for problem-solving

The administrative judge is generally the chairman of the committee. The committee is made up of specialised professionals and concerned users. For example, local tax committees, which are chaired by an administrative judge and are composed, specifically, of accountants and taxpayers' representatives. This type of committee is proving very interesting to analyse because the role of the president is to bring the parties to a consensus on the *de facto* situation. Only the factual problem is thus managed, which does not

14 14 interviews with administrative judges were conducted as part of the QUALIJUS project. The questionnaires sent to the judges before the interview, which were the basis for the discussion, as well as the results of the research, are public. See L. Cluzel-Métayer et al. (eds.), *Rapport sur la prise en compte de la notion de qualité dans la mesure de la performance judiciaire (QUALIJUS) - Justice administrative, Recherche réalisée avec le soutien de la Mission Recherche Droit et justice* (2015), <<http://www.gip-recherche-justice.fr/publication/qualijus-aspect-administratif/>> (last visited 30 October 2018).

15 At the time, one of the main challenges of administrative justice was the excessive delays in judgments. See A. Binet-Grosclaude (et al.), *Mieux administrer la justice en interne et dans les pays du Conseil de l'Europe pour mieux juger (MAJICE), rapport ANR* (2012), <<https://hal.archives-ouvertes.fr/hal-00974917>> (last visited 30 October 2018).

16 The Vice-President's speeches often describe these developments, which are generally linked to the quality policy of administrative justice, <<http://www.conseil-etat.fr/Actualites/Discours-Interventions>> (last visited 30 October 2018).

prevent legal consequences on the potential trial in terms of burden of proof from arising.¹⁷ These local tax committees are very successful in solving problems, in particular because the tax administration does not hesitate to acknowledge when it has made a mistake, for example, in recalculating the turnover of a company.

There are other committees of this kind. In the area of immigration, there was a residence permits committee, but it was abolished in 2007 (see below). Local committees to settle disputes over the award of public contracts were created in 1991 but their functioning was simplified in 2010.¹⁸ Regional commissions of conciliation and compensation for medical accidents, iatrogenic diseases¹⁹ and nosocomial infections²⁰ are also of particular interest. The creation of this category of committee in 2002 was based on the argument that administrative tribunals were not sufficiently relevant due to their inadequate methods.²¹ In the event of one of these 'problems' occurring during hospitalisation (medical accidents, iatrogenic diseases or nosocomial infections), the insurance company must make an offer for compensation within four months after the report of the committee on the individual case. If the offer is accepted by the victim, there is a transaction. Otherwise, the victim can go to the administrative court. An administrative judge is chairman of this committee, which is also composed of experts and representatives of users. This example particularly demonstrates the consciousness of politicians, as well as judges,²² of the necessity in some cases of a partnership between judges, professionals and representatives of users to solve certain problems,²³ and sometimes of the inadequacy of the traditional justice model. But it should be made clear that these committees are not jurisdictions. They are administrative bodies presided over by administrative judges who guarantee them a status of independence and legal expertise. However, this does give a culture of problem-solving to the administrative judges who preside over them, a culture they can use in the implementation of other problem-solving tools.

2.2 Administrative judge can conduct/suggest a conciliation/mediation inside/outside the court

Developing conciliation and mediation was the will of the former Vice-President of the French Council of State,²⁴ and a recent law has facilitated the use of it.²⁵ 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 QUALIUS 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.²⁶

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

17 J.-P. Jullière, *Contentieux fiscal, Répertoire de droit commercial*, mai 2007, n° 6.

18 V. Haïm, 'Les comités consultatifs de règlement amiable des litiges : rôle et mission', (2013) *AJCT*, p. 186.

19 Diseases that are caused by medical treatment.

20 Hospital-acquired infections.

21 L. Hemlinger, 'Les commissions régionales de conciliation et d'indemnisation des accidents médicaux : ni excès d'honneur ni indignité', (2005) *AJDA*, p. 1875.

22 The author of the aforementioned article, which analyses the role of the regional commissions of conciliation and compensation, is an administrative judge.

23 It should be recalled that the collaboration of all the public and private actors concerned is a characteristic of problem-solving courts (Herzog-Evans, *supra* note 3).

24 Jean-Marc Sauv , 'La m diation et la conciliation devant la juridiction administrative', *Maison du Barreau*, 17 juin 2015, <<http://www.conseil-etat.fr/content/download/44351/384844/version/2/file/LamediationetlaconciliationdevantlesJA.pdf>> (last visited 30 October 2018); <<http://www.conseil-etat.fr/content/download/77619/723998/version/1/file/2016-11-24-MARL-BarreaudeParisVF.pdf>> (last visited 30 October 2018).

25 Act n  2016-1547 of 18 November 2016 modernising the Justice of the 21st Century.

26 In 2009, a sociological study on the use of administrative justice, users' practices and the practices of institutions, had indicated that in France, administrative justice is unknown to litigants and very distant. See J.-G. Contamin et al., 'Le recours   la justice administrative. Pratiques des usagers et usages des institutions', (2009) *La documentation fran aise*, p. 19.

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.²⁷ 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.²⁸ Indeed, the Departmental Council and the RATP²⁹ 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 1986,³⁰ 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.³¹ 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 2016.³² 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.³³ 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.³⁴ As one of the mediators points out, if the compliance of law is important, 'what I am trying to explain is that in difficult human situations, it would be good to instil a little equity'.³⁵

2.3 Administrative judge has problem-solving tools

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 State³⁶ 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

27 Sauvé, supra note 24.

28 E. Costa, 'La conciliation devant le juge administratif. L'exemple de la commission de règlement amiable de Seine-Saint-Denis', (2012) *Actualité juridique de droit administratif*, p. 1834.

29 RATP is the independent public company running the Parisian transport system.

30 Loi n°86-14 du 6 janvier 1986 fixant les règles garantissant l'indépendance des membres des tribunaux administratifs et cours administratives d'appel.

31 Costa, supra note 28.

32 Loi n° 2016-1547 du 18 novembre 2016 portant modernisation de la justice du XXI^e siècle.

33 This was particularly the case of the former president of the Administrative Court of Nantes who was appointed as departmental delegate of the Rights Defender (*Défenseur des droits*) in Loire-Atlantique. In an interview, he explained his satisfaction with mediation: 'I continue to practice law, but I no longer litigate'. M.-C. de Montecler & E. Maupin, 'Litiges sociaux : des délégués du Défenseur des droits aguerris à la médiation', (2018) *AJDA*, p. 1637. It is interesting to note that he set up the above mentioned conciliation to compensate the merchants of the city of Nantes whose turnover had suffered from the tramway works when he was president of the administrative tribunal (see above).

34 Ibid.

35 Ibid.

36 If French administrative law is mainly stated in case law, the legal precedent nature of administrative law is increasingly reconsidered. See R. Chapus, *Droit administratif général* (2001), p. 6 ; Y. Gaudemet, *Traité de droit administrative* (2001), p. 7 ; F. Melleray, 'Le droit administratif doit-il redevenir jurisprudentiel ? Remarques sur le déclin paradoxal de son caractère jurisprudentiel', (2005) *AJDA*, pp. 637-643 ; P. Gonod & O. Jouanjan, 'À propos des sources du droit administratif. Brèves notations sur de récentes remarques', (2005) *AJDA*, pp. 992-994 ; D. Truchet, 'Avons-nous encore besoin du droit administratif ?', in *Mélanges en l'honneur de J.-F. Lachaume, Dalloz* (2007), pp. 1039-1052.

the rule of law.³⁷ In the United States, such fears have also been expressed about the creation of problem-solving courts.³⁸ It was also feared that problem-solving courts were too intrusive, evoking the idea of a 'Big Brother style'.³⁹

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.⁴⁰ 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.⁴¹ 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 that a 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.⁴² 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.⁴³

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 n° 2006-872 of 13 July 2006 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.

37 C. Broyelle, 'L'impact du vice de procédure sur la légalité de l'acte administratif', JCP A, n° 13, 2 avril 2012, pp. 12-15, p. 14; C. Mialot, 'L'arrêt Danthony du point de vue du justiciable', (2012) *AJDA*, p. 1484; M. Rota, 'Vers la disparition des vices de forme?', RDP 2013, n° 3, pp. 641-662.

38 See Berman & Fox, supra note 1, p. 9: 'Like the British system from which it emerges, the American legal system is built on process and precedent. One of the core values of the system is a belief in due process and the rights of the accused. The question problem-solving courts initially raised for many sceptical defence lawyers and judges in the U.S. was a fundamental one: In their efforts to achieve better outcomes, were problem-solving courts guilty of trampling the rights of individual defendants.'

39 'were problem-solving courts an example of government overreach, of the state attempting to coerce individuals into treatment, big brother style'. Ibid., p. 10.

40 This is the principle since the decision of the Council of State of 8 March 1957, *Rozé*, Lebon p. 147. Conditions recently specified in C.E., Sect., 3 déc. 2003, *Préfet de la Seine-Maritime c. El Bahi*, req. n° 240267.

41 In the decision *Mme Hallal*, the Council of State accepts that the administration invokes 'a ground of law or fact, other than that initially stated', provided that it is 'also based on the factual situation existing at the date of that decision'. See C.E., 6 février 2004, *Mme Hallal*, req. n° 240560, (2004) *RFDA*, p. 740, concl. De Silva; (2004) *AJDA*, p. 436, chron. F. Donnat et D. Casas; (2005) *Dalloz*, somm. 29, obs. Frier. The Council of State has thus refuted an old decision: C.E., sect., 23 juill. 1976, *Min. du travail c/ URSSAFF du Jura*, Lebon p. 362, (1976) *AJDA*, p. 416, chron. Nauwelaers et Fabius, (1976) *Rev. adm.*, p. 607, concl. Dondoux.

42 C.E., ass., 23 déc. 2011, *M. Danthony*, req. n° 335033.

43 C.E., 17 févr. 2012, *Sté Chiesi*, req. n° 332509.

Thus, the judge detects the illegality but the act in question can, by means of regularisation, be implemented. In the same vein, an Order of 18 July 2013⁴⁴ supplemented that mechanism by allowing the judge to stay the proceedings until the expiry of a period fixed by him/her for the intervention of the amending permit. These are very pragmatic legal texts and decisions, the purpose of which is to contribute to legal certainty.⁴⁵

2.4 Users can ask an administrative judge to solve a problem

The Act n° 80-539 of 16 July 1980⁴⁶ on penalty payments in administrative matters and the enforcement of judgments by legal persons governed by public law, supplemented by the Act n° 95-125 of 8 February 1995 on the organisation of courts and civil, criminal and administrative proceedings,⁴⁷ set up a system of *a priori* penalty payments in order to prevent a possible refusal of execution by public administration. Thus, when submissions are made to this effect, the administrative court can, in the same decision, attach a penalty payment to the injunction. But the joint efforts of the legislator and the Council of State did not stop there. A working group on emergency proceedings, convened at the initiative of the Vice-President of the Council of State in October 1997,⁴⁸ served as a basis for the reform of emergency proceedings. Indeed, on 30 June 2000, the French legislature introduced emergency proceedings before the administrative courts. From a problem-solving justice perspective, it is interesting that the French legislator has given competences to administrative courts to suspend administrative decisions that seem illegal, but also that these competences of the administrative courts were developed in subsequent case law in a way that further accentuates the problem-solving aspect. Indeed, the Council of State decided that the administrative judge can require the administration to behave in certain ways and has done so with a view to putting an end to the problem as quickly as possible. Thus, when the judge orders the suspension of an administrative decision, it can indicate certain obligations for the administration. For example, an injunction to stop a public building construction based on a building permit that seems illegal. The tool is useful from a practical point of view, since very often disputes stop at this stage, particularly in the case of ‘freedom’ emergency proceedings (for serious and manifestly unlawful infringement of a fundamental freedom), where an application on the merits does not have to be filed.⁴⁹

Similarly, with a view to ensuring greater legal certainty, prefects (representatives of the State at local level) may request legal advice from the administrative courts (R. 212-1 CJA) in order to clarify the interpretation of a legal provision. Tribunals and courts can request a legal opinion from the Council of State (L. 113-1 CJA). The idea is to limit as quickly as possible legal uncertainty and any problem in the application of the law.

In some cases, the administrative judge is used by politicians to put an end to a political/administrative problem. In 2007, the French legislator decided to dedicate an ‘enforceable right to housing’ (*droit au logement opposable* or DALO):⁵⁰ if a person has been declared a housing priority but has not been accommodated within the indicated time limit by the administration, the administrative judge shall order the prefect to proceed to create housing or accommodation for that person and can impose a penalty on the administration. However, many specialists regret the ‘instrumentalisation’ of the administrative judge in these cases.⁵¹ Indeed, the administration is in fact incapable of applying the injunctions of the administrative court in most cases.⁵² The legislator has set up a fund to which penalties imposed by the

44 Ordonnance n° 2013-638 du 18 juillet 2013 relative au contentieux de l’urbanisme.

45 The Council has also enshrined the principle of legal certainty. See C.E., ass., 24 mars 2006, *Société KPMG, Société Ernst & Young Audit*, Lebon p. 154 ; (2006) *AJDA*, p. 1028, chron. C. Landais et F. Lenica ; (2006) *Dalloz*, p. 1224 et p. 1190, chron. P. Cassia ; (2006) *RFDA*, p. 463, concl. Y. Aguila et p. 483, note F. Moderne ; (2006) *RTD civ.*, p. 527, obs. R. Encinas de Munagorri.

46 JO 17 juill. 1980, p. 1799 ; (1980) *Dalloz*, législ. p. 286.

47 JO 9 févr. 1995, p. 2175 ; F. Moderne, ‘Sur le nouveau pouvoir d’injonction du juge administratif’, (1996) *RFDA*, p. 56-57.

48 (2000) *RFDA*, p. 941.

49 For example, by a judicial ruling of 4 June 2006, the emergency applications judge of the Administrative Tribunal of Mayotte ordered the mayor of a municipality to prohibit a demonstration organised on 5 June by a collective of villagers aiming to expel aliens from their homes. The judge also ordered the Prefect of Mayotte to mobilise the police to prevent the demonstration from taking place and guarantee the safety of people and property: TA Mayotte, Ord. 4 June 2016, *CIMADE and others*, req. n° 1600461.

50 Loi n° 2007-290 du 5 mars 2007 *instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale*.

51 S. Joubert, ‘Le droit au logement versus loi DALO : enseignements contentieux pour la justiciabilité des droits sociaux’, (2010) *Revue des droits sanitaires et sociaux*, p. 823.

52 P. Nguyen Duy, ‘Droit au logement opposable, acte II’, (2009) *AJDA*, p. 514.

judge are paid to finance personalised assistance of persons recognised as priority and to which a housing or an accommodation should be allocated urgently.⁵³ Thus, the intervention of the judge does not really solve the problem.

This raises the question of the limits to implementation of the problem-solving approach to French administrative justice.

3. The limits to implementation of problem-solving justice in French administrative justice

The example of French administrative justice shows that limits can appear to the implementation of this approach in the judicial systems. Tools and practices that can be characterised as problem-solving justice could eventually impose some legal difficulties mainly related to legal obstacles such as the right to a fair trial. In addition to legal limitations, limits to the application of the problem-solving approach may come from the distinctive feature of administrative justice which settles conflicts between citizens and administrations responsible for the public interest.

3.1 Legal limitations to implementation in French administrative justice

In the previous examples that allow a characterisation of French administrative justice as a problem-solving justice, a number of legal limits have emerged.

First of all, procedural requirements intervene as legal limitations to the 'pragmatic' tools mentioned above. However, these legal obstacles seem relatively limited in French administrative justice compared to other systems, and make it possible to argue in favour of a more developed problem-solving culture or at least of an administrative and judicial culture more open to the problem-solving approach. For example, the European Union Court of Justice cannot substitute grounds because it considers that the reasoning allows users and judges to understand administrative decisions.⁵⁴ In the United Kingdom, the introduction of the 'Makes no difference principle' is recent and has been the subject of much controversy as a potential breach of the rule of law.⁵⁵ This new principle, introduced by section 84 of the Criminal Justice and Courts Act 2015 into section 31 of the Senior Courts Act 1981, provides that in judicial review proceedings the High Court must refuse relief if it appears 'to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred', unless the granting of relief is appropriate 'for reasons of exceptional public interest'. This principle was introduced in the context where reforms were envisaged to make the British 'administrative' judge more investigative and to implement a problem-solving approach.⁵⁶

In France, substitution of legal basis, substitution of grounds, neutralisation of grounds and regularisation of planning permits have long been possible in administrative justice.⁵⁷ Specific conditions have now reassured a large number of the specialists.⁵⁸ In particular, the adversarial principle must be respected: the

53 Article 60 of the 2011 amending budget law of 29 July 2011 created a national fund to support housing (in French, Fonds national d'accompagnement vers et dans le logement - FNAVDL).

54 For example, it states in the judicial ruling of 12 November 2013, *North Drilling/Conseil*, T-552/12, EU:T:2013:590: '25. It must therefore be observed, first, that the Council thus invites the Tribunal of First Instance to substitute reasons on the basis of information which was not contained in its file. According to the case law, the legality of the contested measures can be assessed only on the basis of the factual and legal grounds on the basis of which it was adopted. The Tribunal of First Instance cannot agree with the Council's request that it should be substituted for the grounds on which those acts are based (see, to that effect: Tribunal of first instance, October 26th, 2012, *Oil Turbo Compressor/Conseil*, T-63/12, point 29).'

55 M. Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?', (January 2011) *Public Law*, n° 1, pp. 56-74.

56 As the Senior President of the Tribunals recently reaffirmed again: 'The question of how we can ensure that all judges are in a position to make the best quality decisions they can is not however simply an issue for the family courts. It is as pertinent to the criminal, the civil and the tribunals justice systems. It is particularly interesting at the present time because of the development of what has been described as a more problem-solving approach to judicial decision-making,' Sir Ernest Ryder, 'The role of the justice system in decision-making for children', BASPCAN 10th International Congress, University of Warwick, 9 April 2018.

57 If the term 'neutralisation' only recently appeared, the tool itself had appeared in case law long before, in particular with the judgment of the Council of State, ass., 13 May 1968, Dame Perrot, Rec. p. 39, *AJDA* 1968, p. 179, concl. J. Kahn. The first official uses of the term neutralisation come from the 2003 *El Bahi* and 2004 *Mme Hallal* decisions of the Council of State. The substitution of legal basis is known since 1957. The substitution of grounds and the regularisation of permits are more recent (see above).

58 'After eighteen months of observation, the *Danthony* jurisprudence seems to have proved its worth, while escaping the criticisms addressed to it: it did not lead to a drastic reduction in quashings for procedural irregularities, which would have been unfortunate, but it has allowed a more realistic and less automatic enforcement of the principle of legality than before. In our view, it has less complicated

administrative court must allow the parties to express remarks regarding facts and the law concerning the substitution. The judge must also verify that the user is not deprived of procedural guarantees to which she/he is entitled. In the substitution of grounds, which goes further than the substitution of legal basis, since it leads the judge to attribute to the administration a different reason from that stated by it, the judge cannot proceed on his/her 'own motion' to the substitution. The administration must ask him/her.

Secondly, the principles of independence and impartiality are specifically mentioned as legal limitations in France, although in questionable circumstances sometimes. Indeed, it is by arguing that the principles of independence and impartiality were infringed that the presidency of the residence permits committee (see above) by an administrative judge was abolished by the legislature in 2007,⁵⁹ on the grounds that the administrative judge cannot be a member of such a committee which issues an opinion and be a judge of the court later eventually seized. This reasoning is surprising, on the one hand, because the case law of the European Court of Human Rights does not conclude that there is generally a violation of the European Convention on Human Rights in this type of case. The court is only concerned with independence and impartiality in the specific case and asks to verify that the judge who presided over the committee does not participate *a posteriori* in the litigation process.⁶⁰ On the other hand, it is surprising because the administrative judge exercises these two positions in similar committees, as we have seen above, without the principles of independence and impartiality being questioned by politicians. Actually, the participation of the administrative judge in this residence permits committee was regarded by the political majority as an obstacle to a results-oriented migration policy. Another commission was set up, without administrative judge, but according to the sociologist Alexis Spire: 'The only way of conciliation, opened by the establishment of the residence permits committees in 1989, fell into disuse in most prefectures'.⁶¹ The administrative judge was indeed perceived as the objective third party and a recognised expert of this type of case which often allowed the committee to find solutions to the problematic cases.

The question about the violation of the principles of independence and impartiality will probably be renewed if the problem-solving justice approach tends to be confirmed in the French administrative justice and to be accentuated, insofar as it would imply a closer relationship between the administrative judge and the parties. Indeed, difficulties could be posed by the proliferation of committees of which administrative judges are members, at the initiative of the parties or the administrative courts themselves. This was particularly the case for the creation of the Saint-Denis amicable settlement committee giving its opinion on applications for compensation for commercial damage to the occasion of the realisation of works of the tramway line (see above).⁶² The independence and impartiality of this committee have particularly raised questions because of its composition and dependence of its secretariat on the departmental administration:

The fact that the departmental services, otherwise the contracting authority, carries out the secretariat of the committee does not disregard the rights of defence or the principle of impartiality since, on one hand, the secretariat examines the files under the sole authority of the chairman of the committee⁶³ and, on the other hand, no member of the secretariat takes part in the opinion.⁶⁴

the function of the judge than it has channelled it into an ultimately official and unified method, so that today both the administration and the citizens can expect to find a judge always attentive to the principles, but also to the realities. Finally, the most striking point is that the *Danthony* case law calls upon the judge to pay even greater attention to the circumstances of the case than before. It is very fortunate, for there is no good justice above-ground.", X. Domino & A. Bretonneau, 'Jurisprudence Danthony : 18 mois après', (2013) *AJDA*, p. 1736. In the same way, see Ph. Zavoli, 'Des bienfaits de la jurisprudence Danthony appliquée au contentieux des règlements locaux de publicité', (2014) *AJDA*, p. 634.

59 Loi n° 2007-1631 du 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile.

60 E.C.H.R., *Kleyn c/ Pays Bas*, decision of 6 may 2003, n° 39343/98, 39651/98, 43147/98 et 46664/99, (2004) *RTDH*, p. 365, note Gonzalez. For the same position as regards to the French Council of State. See E.C.H.R., *Sacilor-Lormines c/ France*, decision of 9 november 2006, n° 65411/01, (2007) *RFDA*, n° 2, p. 352 ; comm. Jean-Louis Autin et Frédéric Sudre, 'L'impartialité structurelle du Conseil d'État hors de cause ?', p. 342. French administrative case law now applies this classical rule. For instance, the Council of State considered that the judge who presided over the local tax committee cannot be part of the judging section of the court, even though the committee declared itself incompetent: C.E., 23 décembre 2010, req. n° 306228, *Pizzone*, (2011) 12 *Revue de droit fiscal*, pp. 46-48.

61 A. Spire, *Accueillir ou Reconduire. Enquête sur les guichets de l'immigration* (2008).

62 Costa supra note 28.

63 The chairman of the committee is an administrative judge.

64 Costa supra note 28.

Even if the procedure followed is not contentious, it generally complies with the principles governing administrative trial, in such a way as to guarantee the independence and the impartiality of the committee and the rights of defence of the citizens concerned. As with the judicial decision, the obligation to state reasons protects the applicants, who are entitled to know the grounds on which the committee has found them right or wrong.⁶⁵

This example shows the existence of a tendency towards greater flexibility and proximity of administrative justice with 'litigants', and a concern for effectiveness of the judicial work, that characterises problem-solving justice. It demonstrates the need for more pragmatic answers than the traditional judicial decision can offer, including the administrative area. But this does not mean that all disputes can be handled in this way.

3.2 Limitations related to the defining feature of 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).⁶⁶ 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,⁶⁷ 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 financially⁶⁸ 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.⁶⁹ The interview with the Delegate of the Rights Defender even shows that the interest of mediation comes more from the dysfunctions of the administration⁷⁰ than from the administrative judges' approach which would be too legal and not individualised enough.⁷¹ The question remains nevertheless as to the usefulness of

65 Ibid.

66 As the director of the legal department of a local authority stated: 'it is clear to us (...) that the questions raised before the administrative tribunal are not always very legal, but require a social perspective'. See de Montecler & Maupin, *supra* note 33.

67 S. Boyron, 'Mediation in administrative law: the identification of conflicting paradigms', (2007) 13 *European Public Law*, Issue 2, p. 267.

68 Michael Adler, 'The idea of proportionality in dispute resolution', (2008) 30 *Journal of Social Security Law*, Issue 4, p. 314.

69 The Justice 21 Act introduced an experiment on a compulsory mediation procedure before the appeal to administrative justice in two areas: social disputes and civil service disputes: Art. 5 IV of Act of 18 November 2016. It began on 1 April 2018 and will end on 18 November 2020. It should be pointed out that the mediator is not compulsorily an administrative judge.

70 It often happens that the delegate has to explain to a claimant why the family allowance fund (*caisse d'allocations familiales*) is legally right. According to him, it is linked to the lack of spokesperson in this administration and the decisions that are poorly motivated. Consequently, the delegate often contacts the social agencies to ask for explanations and communicate them to the citizens. de Montecler & Maupin, *supra* note 33.

71 Individualised justice is one of the underlying principles of problem-solving justice: Berman & Fox, *supra* note 1, p. 3.

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?⁷²

One might also think that, because of the defining feature of administrative law, the problem-solving tools and practices mentioned above only 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 interest⁷³ but also with regard to private interests.⁷⁴ 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.⁷⁵ 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.⁷⁶

The more important limitation to the application of a more global approach in terms 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 parties⁷⁷ 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.⁷⁸ However, these improvements have not led to real collaboration between all actors.

4. 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

72 As the Delegate of the Human Rights Defender pointed out, among 30 or so requests for mandatory prior mediation, one citizen who was obviously not convinced of the interest of the procedure indicated almost immediately that he was withdrawing his request for mediation and going to court. de Montecler & Maupin, *supra* note 3.

73 In particular, the case law *Association AC!* of the Council of State of 2004 is concerned about the consequences of the (retroactive) quashing for the public as for the private interests involved. For instance, concerning public interest, it applied in a case where the irregularity of the appointment of a judge resulted in the unlawfulness of the judgments and proceedings to which he contributed. The council then considered that the (retroactive) quashing of the judge's appointment would be manifestly excessively prejudicial to the functioning of the public service of justice and that the quashing of the appointment should only be pronounced at the end of a period of one month from the date of its judicial decision. See C.E. 12 déc. 2007, *M. Sire*, n° 296072, (2008) *AJDA*, p. 638, concl. Guyomar.

74 For example, the *Association française des opérateurs de réseaux et de services de télécommunications*, which includes telecommunications service operators using or likely to use the local loop, had an interest in (temporarily) maintaining the (illegal) decision of the *Autorité de régulation des télécommunications*. See C.E., Sect., 25 févr. 2005, *France Télécom*, Lebon p. 486, (2005) *RFDA*, p. 787, concl. E. Prada-Bordenave. Similarly, the quashing of some articles of a decree appointing members of the High Council of the State Civil Service, which would have called into question the situation of many civil servants, did not take retroactive effect. See C.E., 21 déc. 2006, *Union syndicale solidaires fonctions publiques et assimilés*, Lebon p. 576.

75 Caroline Foulquier, *La preuve et la justice administrative française* (2013), L'Harmattan, p. 686.

76 He also proposed particularly to adopt it in administrative justice. Senior President of Tribunals, *Annual Report* (2016), p. 4.

77 In the application of the *Association AC!* case law, the administrative judge must also collect the observations of the parties.

78 Décret n° 2009-14 du 7 janvier 2009 *relatif au rapporteur public des juridictions administratives et au déroulement de l'audience devant ces juridictions*. The public reporter is the judge responsible for setting out the questions raised in the proceedings and giving its assessment of the factual circumstances and the applicable rules as well as its opinion on the solutions to the dispute: C.E., 29 juillet 1998, *Mme Esclatine*, Lebon p. 321, concl. Chauvaux.

the increasing importance of problem-solving tools, some of these tools are destined to develop outside it and others are limited.⁷⁹

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.⁸⁰ 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. ■

79 F. Melleray, 'Requiem pour le vice de procédure?', (2018) *AJDA*, p. 1241.

80 On the occasion of the inauguration of the recently established Family Court, the Senior President of Tribunals said: 'We developed a style of justice that is genuinely problem solving and therefore by definition more effective.' Lord Justice Ryder, Senior President of Tribunals, Legal Wales Conference, 9 October 2015.