

The Evolving Role of the Judge in Ultra Vires Proceedings in French Administrative Litigation¹

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Abstract: *this article examines how the action for ultra vires (recours pour excès de pouvoir), created by the Conseil d'État, has been renewed in recent decades while remaining the structuring remedy of French administrative litigation. It first traces the widening of justiciable acts, in particular soft-law instruments with significant effects, and the limits of this trend, as shown by statements of political intent. It then analyses how the injunction powers introduced in 1995 led the Conseil d'État to develop a dynamic assessment of legality for refusals to repeal regulatory acts or to adopt general measures. The article argues that this approach should not extend to individual decisions, because the judge must not take the administration's place. Finally, the article discusses in-court rectification of unlawful acts in town-planning and environmental law and warns that the judge must not become one who never annuls.*

Keywords: *action for ultra vires; French administrative litigation; Conseil d'État; justiciability; soft law; dynamic assessment of legality; injunction powers; rectification of unlawful acts.*

Rezumat: *articolul analizează modul în care recursul pentru exces de putere (recours pour excès de pouvoir), creație a Consiliului de Stat francez, s-a înnoit în ultimele decenii, rămânând totodată calea de atac structurantă a contenciosului administrativ francez. Sunt prezentate mai întâi extinderea sferei actelor susceptibile de a fi atacate, în special a instrumentelor de drept suplu (soft law) care produc efecte semnificative, precum și limitele acestei evoluții, ilustrate de declarațiile de intenție politică. Articolul analizează apoi modul în care puterile de injoncțiune introduse în 1995 au determinat Consiliul de Stat să dezvolte o apreciere dinamică a legalității în cazul refuzurilor de a abroga acte normative sau de a adopta măsuri cu caracter general. Articolul arată că această abordare nu ar trebui extinsă la deciziile individuale, deoarece judecătorul nu trebuie să se substituie administrației. În final, articolul examinează regularizarea în cursul procesului a actelor nelegale în materie de urbanism și de mediu și avertizează că judecătorul nu trebuie să devină unul care nu mai anulează niciodată.*

Cuvinte-cheie: *recurs pentru exces de putere; contencios administrativ francez; Consiliul de Stat francez; caracterul atacabil al actelor; drept suplu (soft law); apreciere dinamică a legalității; puteri de injoncțiune; regularizarea actelor nelegale.*

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INTRODUCTION

The action for ultra vires (*recours pour excès de pouvoir*) is a creation of the Conseil d'État, dating back to the very first years of the nineteenth century. The Law of 24 May 1872, which guaranteed the independence of the administrative judge in France, enshrined the action for ultra vires, which then became the cornerstone upon which administrative law — and, with it, the Rule of Law — was built, at the very heart of the jurisdiction constitutionally entrusted to the administrative judge. *The recours pour excès de pouvoir* seeks the retroactive annulment of an unlawful act of the administration, as distinct from full-jurisdiction proceedings (*recours de plein contentieux*), which aim to establish the rights of individuals as at the date of the court's ruling. Only the former will be addressed here. The action for ultra vires has been, and remains, the fundamental tool compelling administrative authorities to comply with the law.

I will not, before such an audience of specialists, retrace the historical development of this action. I will instead present its profound renewal over the past decades, in light of the powers of injunction and periodic penalty payments which the legislature has conferred upon the administrative judge, the success of urgent summary proceedings, and the upheavals brought about by case law itself. We shall see that the action for ultra vires remains today the structuring remedy of administrative litigation — the very foundation upon which the review of legality rests — precisely because it has adapted to the evolution of administrative action.

My remarks will be organised in three parts: first, the limits to the justiciability of administrative acts; second, the limits to be placed on the search for the practical effectiveness of judicial decisions, in compliance with the separation of powers; and finally, the possible avenues for rectification by the administration before the court.

1. THE LIMITS TO THE JUSTICIABILITY OF ADMINISTRATIVE ACTS

The continued success of the action for ultra vires is undeniable, as evidenced by its ever-broader scope of admissibility. This is reflected not only in a flexible assessment of standing, but also in the widening of the field of justiciable acts. Initially confined to acts adopted by regulatory authorities, in particular in the economic sector (the *Société Fairvesta International* judgment of 2016), the justiciability of soft-law acts, on the ground of their significant effects, was extended in 2019 to an act emanating from an administrative authority other than a regulatory authority, before being recognised, in 2020, for all documents of general scope emanating from public authorities (the *GISTI* judgment of 2020).

The handling of the criterion of significant effects can be formidable when it comes to opening the doors of the court. Today, online Frequently Asked Questions are very largely justiciable. But what of a tweet, or a statement made by an elected official in an interview? In 2023, in its *Association Greenpeace France* judgment, the Conseil d'État, seised of an application for the annulment of a declaration by the President of the Republic expressing his wish to see the operating life of certain existing nuclear power plants extended and a programme for the construction of new reactors carried out, dismissed the application on the ground that the realisation of the President's intention was conditional upon the adoption of several subsequent administrative acts which would themselves be open to challenge. Such a declaration was regarded as devoid of effects insofar as, in itself, it was deprived of legal

effectiveness. We are certainly only at the beginning of these jurisprudential developments concerning the acts amenable to the action for ultra vires.

2. THE LIMITS TO THE SEARCH FOR THE PRACTICAL EFFECTIVENESS OF THE ACTION FOR ULTRA VIRES

Described in 1929 by the great legal scholar Gaston Jèze as “the most effective, the most economical and the most practical weapon in the world to defend individual freedoms,” the action for ultra vires enables the rule of law to be stated so that the administration may submit to it. It has, however, been the object of growing criticism over the decades, in particular because of the often platonic nature of annulment.

The power conferred upon the judge, by a Law of 1995, to issue injunctions and impose periodic penalty payments has profoundly transformed its role. The practical effectiveness of that role has become a major — if not, at times, the principal — concern. This logic of giving practical effect to the annulment for ultra vires has led the Conseil d’État to embark upon a path of dynamic assessment of legality. In principle, the judge ruling on an action for ultra vires assesses the legality of an act as at the date on which it was adopted. Yet henceforth, in certain situations, the judge rules in the light of the legal and factual circumstances applicable at the date on which the judgment is delivered.

Litigation concerning the refusal to repeal a regulatory act, being essentially forward-looking and often having no other purpose than to obtain a repeal or an injunction, is now the subject of a contemporary, or dynamic, assessment of legality. Thus, in 2019, the Conseil d’État held (the *Association des Américains accidentels* judgment) that the practical effect of the annulment for ultra vires of a refusal to repeal an unlawful regulatory act lies in the obligation — which the judge may prescribe of its own motion — for the competent authority to proceed with the repeal of that act. Consequently, the legality of a refusal to repeal is assessed as at the date on which the judge rules. Initially confined to refusals to repeal regulatory acts, this solution has been extended to the soft-law acts I have just mentioned.

Several recent judgments of the Conseil d’État illustrate the extension of this logic to decisions refusing to adopt measures of general scope: in particular, the refusal of a request to take any useful measure regarding greenhouse-gas emissions (the well-known *Commune de Grande-Synthe* case law of 2020), or the refusal to enact regulatory measures implementing a statute. The same requirement of effectiveness and usefulness of judicial intervention has led the Conseil d’État to extend this case law to certain non-regulatory refusal decisions which are particularly vulnerable to the passage of time — for example, the refusal of the national data-protection authority to order the operator of a search engine to delist links to web pages. Likewise, in assessing the legality of a refusal of access to public archives, the Conseil d’État takes account of the passage of time and the evolution of legal and factual circumstances, in order to confer fully practical effect upon the judge’s intervention, having regard to the nature of the rights at stake.

What is thus referred to as the dynamic assessment of legality in ultra vires proceedings is, for the time being, confined to refusals to repeal a regulatory act or to adopt measures of general scope, subject to the few specific extensions to refusals to adopt certain individual decisions that I have just mentioned. This dynamic assessment has not been extended to challenges against all refusals to adopt individual acts, for such an extension would risk creating formidable difficulties for the judge, who would be required to investigate

applications in the place of the administrative authority. Accordingly, the Conseil d'État held in 2023, in an individual civil-service dispute, that where rights have been disregarded — even if the applicable provisions have since changed — the administration must place itself back at the date on which the unlawful decision was taken in order to issue a new decision, so as to safeguard the rights which were then available.

It is, however, important to recall that the judge is not the administration. It is not for the judge to investigate cases, nor does the judge enjoy the margin of appreciation inherent in administrative action — for instance, in disciplinary matters, where the administration may lawfully impose, within the same group of sanctions, two different penalties. This respect for the respective roles of the administration and of the administrative judge has led the Conseil d'État to set aside, as I have just indicated, the extension of dynamic review of legality to individual decisions — that is to say, to the bulk of administrative litigation. Such a dynamic assessment would in fact require the situation or the rights of the person concerned to be re-examined in the light of new factual elements. It would be necessary to conduct, before the judge and under its supervision, a fresh investigation of the case, and very often without the administration having the material and human means to respond quickly. This would amount to shifting the administration's burden onto the judge, and would blur the respective roles of the administration and the judge in the eyes of citizens. By the same token, it is healthy that when the judge annuls an unlawfully adopted decision — save where the administration can only grant the application — the matter is returned to the administration.

Nor must we forget one of the functions of the judge ruling on actions for *ultra vires*, which is to restate the rule of law. There are forms of litigation which are symbolic, or which yield little practical effect, but in which applicants nonetheless expect the rule to be restated. The mere affirmation of the rule of law is a necessary compass for administrative action: administrations take note of the judicial decision in order to amend their practices and bring them into compliance with the rule. The practical effect therefore also lies in the annulment itself.

This concern not to draw the judge onto the terrain of the administration gave rise to the so-called *ELENA* case law of 2021. The Conseil d'État recalled that, when seised of an application for the annulment of a regulatory act, the judge in *ultra vires* proceedings assesses the legality of that act as at the date of its enactment, but may also be seised, on a subsidiary basis, of an application that the very same act be repealed on the ground of an illegality resulting from a change in legal or factual circumstances occurring after its enactment, so that the unlawful infringements which a regulatory act may inflict upon the legal order can always be sanctioned. When ruling on such subsidiary submissions seeking the mere repeal of the act, the judge then rules in the light of the rules and circumstances prevailing on the date of the decision. This case law is limited to regulatory acts and has not been extended to individual acts. Examining submissions seeking the repeal of an individual act would in fact lead the judge to determine, on the basis of new elements which, by their very nature, had not been produced before the administration, whether, on the date of the ruling, the decision remains lawful. This does not fall within the judge's role.

3. EXPLORING THE AVENUES OF RECTIFICATION BEFORE THE COURT

Possibilities for rectifying the contested act have been introduced by the legislature in the fields of town planning and environmental law, thereby limiting the situations in which

the judge will have to annul an act on the ground of its unlawfulness. The administration thus has the possibility of curing the defect affecting the act, leaving it to the judge to draw the appropriate consequences.

For more than ten years, the case law of the Conseil d'État has accepted that the administration may rectify a decision affected by an unlawfulness through the adoption of a new decision having necessarily retroactive effect — for example, in the case of a budgetary subsidy or of an authorisation to conclude a contract. The legislature, however, has gone further by permitting, or requiring, the judge to stay the proceedings so that the administration may rectify its decision through the adoption of an amending act or a new act free of the defects identified by the judge. Once the new act has been adopted, the judge resumes the proceedings and takes note of the rectification, which may of course itself be challenged before the judge. The purpose of this new function of the judge in *ultra vires* proceedings is to limit the annulment of town-planning or environmental authorisations where they can be purged of their unlawfulness.

The Conseil d'État has broadened this in-court rectification by allowing the judge to stay the proceedings on an action against a declaration of public utility entailing the bringing of a town-planning document into compliance, so as to allow the rectification of a defect affecting it. The extension of rectification to other fields would deserve to be explored, but with caution, for the administrative judge cannot become a judge who never annuls. A number of complex procedural questions have not yet all been resolved within this new framework set out by the legislature.

These are the few avenues of reflection that I wished to share with you, while reaffirming, in conclusion, that the action for *ultra vires* remains the structuring remedy of administrative litigation, capable of ensuring respect for legality by the administrative authorities — a pillar of our Rule of Law.