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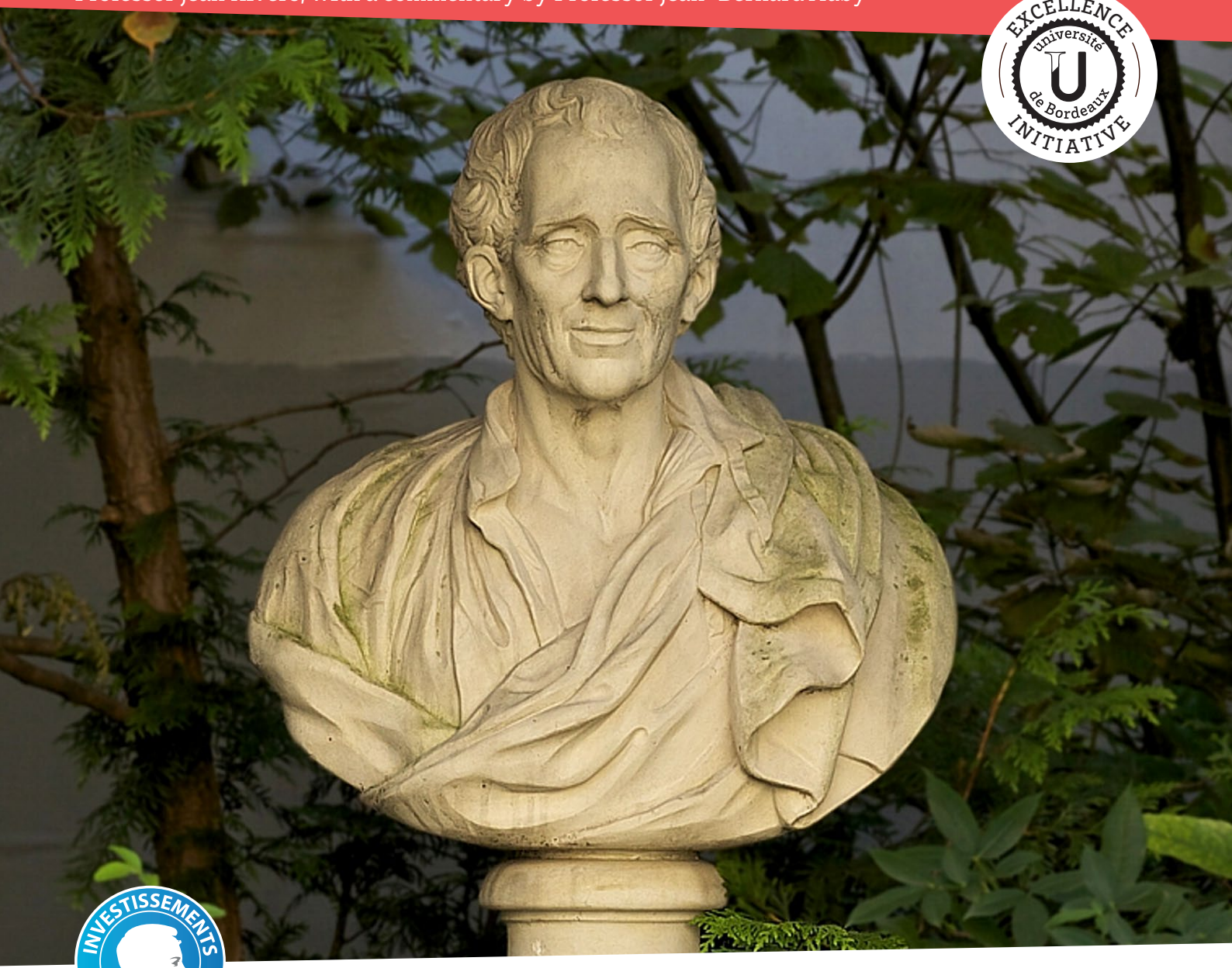
A Huron at the Palais-Royal
Professor Jean Rivero, with a commentary by Professor Jean-Bernard Auby



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Dialogues:

The Huron at the *Palais Royal*, or innocent remarks on judicial review

Professor Jean Rivero

J. Rivero, *« Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir »*, Dalloz, 1962, chron., p. 37. Translated to and published in English by kind permission of the publishers.

He was a Huron, and a Huron lawyer at that. He sat at the foot of a copper beech that swayed in the breeze, occasionally dropping a leaf that came to rest on the Huron's shoulder like the clasp on a red epitoga (1). There he sat, teaching public law to the future warriors of his tribe. The tender hearts of those good and virtuous young men sang as his learned words described the wonderful devices invented by the Wise Men across the Great Ocean to protect humankind against actions *ultra vires*. The Huron dreamed of making a pilgrimage to the city where the beacon of administrative law burned so brightly. A UNESCO scholarship granted his most ardent wish, and off he flew to Paris.

At Orly airport, where I went to welcome him, his first words were: "Take me, if you please, to the place where your Great Council sits". As we stood in the courtyard of the *Palais Royal*, he prostrated himself, face down, saying "I kiss the ground where the great tree of judicial review takes root, "that most marvellous of lawyers' creations, the most effective, the most practical, the most economical weapon that exists in this world to protect freedoms" as your Gaston Jèze (2) wrote. Bastion of the oppressed, scourge of the oppressor who, at the very moment when he will strike a fatal blow, stops dead as he hears the dread voice of the judge proclaim: "You shall go no further!"".

Gently, I interrupted him: "My dear fellow, don't lose sight of the fact that legislators, in all their wisdom, have been unwilling to endow judicial review with a suspensory effect. It therefore doesn't fall to the court to stay the hand of the Administration when it is about to act; its dreaded censure comes after the event".

"I'm quite aware of that", said he, "but have you forgotten the judge's right to order a stay of execution?"

"No, indeed; but the law confines that power within some very narrow limits".

His face creased into an impish smile: "I know, but I also know about the marvellous ingenuity that your courts put to the service of freedom against the letter of an oppressive law; where the law on stays of execution left only enough room for a musquash to squeeze through, I imagine that case law has surely widened the gap to allow a whole herd of bison to pass with ease".

“The lower courts”, said I, “once tried to take that path; but the wise judges in the upper courts recognised their imprudence. They didn’t settle for ensuring that the conditions set by legislation for ordering a stay of execution were strictly observed, but instead added further requirements (3), and have generally been praised for it”.

He looked disappointed at this, but quickly recovered: “No matter, after all! Isn’t the main thing that final decision, which with a single word annihilates an unjust act, obliterates its consequences as the sun melts the ice on our Great Lakes, and gives the victim all that the law grants him, all that the Administration has refused him?”.

A misgiving made me start speaking again: “Careful now, the court’s power doesn’t extend that far! Generally, you know, the court isn’t permitted to order the Administration to do anything, and may certainly not substitute its own decision for that which it has just overturned. Even in full remedy proceedings, it may only order the Administration to pay: in judicial review cases, the court is forbidden to go beyond a pure and simple annulment of the act in question”.

“That’s a strict prohibition,” he sighed, “which law imposed it?”.

I smiled: “There’s no need for a law when the very nature of things is in command; and the nature of things demands that, within the Executive, judging a matter be distinct from taking action. Where would we end up if, on the basis of the annulment, the court were to draw out the necessary consequences, dictate the behaviour to be adopted by the Administration in order to restore the law, or dare to substitute a legally correct decision for that which has been annulled?”

“Thus”, said he, “no obstacle other than the nature of things prevents the court from enjoining the Administration to act, or even decide a matter in the Administration’s stead?”. I could only agree. He thought for a moment then continued: “The nature of things… that can be understood in any number of ways! Where I come from, we believe that the court’s role is to state what the Law demands in all matters; when our judge decides which of the two hunters contesting a caribou carcass has actually killed the caribou that each claims to have killed and can take it (away) in accordance with our hunting laws, we think that he remains a judge and does not become a caribou hunter. You reason differently, it seems, when it concerns administrative acts rather than caribou. Does the nature of men impose itself? I’m not sure. Incidentally, in your country as in mine no doubt, it seems to me that what the litigant hopes is that something in the reality of his day-to-day life be changed for the better: that he be able to do something that had been wrongly forbidden to him, or be allowed to take up a post that he had been refused illegally. Is it the abstraction that is the annulment that interests him? No; what interests him is the result that he expects from it. That being the case, is it not a matter of dissociating the annulment from its consequences rather than being unaware of the nature of things? In casting an act into oblivion but refusing to say what ought necessarily to follow from its disappearance, is the court not stopping short, without seeing its task through to the end? And what would be said of the lumberjack who chops through a tree’s roots but refuses to fell the tree itself, entrusting that task to the winter storms instead? It is one thing when the new definition is part of what I believe you call judicial discretion: that is not at all the judge’s remit – though I could well have said that yours does sometimes go beyond that, when he sees fit to do so. But when everything results from the

annulment by virtue of legal necessity, why does your judge, who is usually so fearless, not dare to substitute his own decision for the annulled act, or tell the Administration what it is bound to do?"
"He will indicate as much to the Administration, on occasion", I retorted, "not as an imperative in the court order, but rather as friendly advice in the grounds of the judgement. Authors cite a decision where this trend manifests itself (4); we would no doubt find others if we were to look. Incidentally, don't underestimate our judge's wisdom and prudence: if, in issuing an injunction, he sees that it comes to nought; if he is not obeyed; what would become of his prestige and authority? In confining himself simply to the annulment itself, he has saved the dignity of the judiciary, the very foundation of the legal system."

Astonishment was etched across my companion's face: "What? Is your judge the same as our weak *sachem* whose miserable rule was endured by my tribe for several years and who, knowing that that his authority was in dispute, found no better solution to allow him to rule peaceably than choosing never to use his authority as chief, safe in the knowledge that he would not be disobeyed when in fact he was in command of nothing at all? I could not believe it; anyway, is obedience not easier when order is clearly established? If, in my country, the judge were simply to tell those warriors in charge of the tribe's departments "your act is null and void", embarrassment would be written all over their faces; in order to obey, they expect to know what they must do and, unlike your civil servants in this respect, they definitely do not like initiatives and feel lighter when a clear decision stands between them and their responsibilities, just like those canvas shelters that offer protection from the great autumn rains. I for one don't doubt that if your judge – your prestigious and powerful judge – were to order it, his own authority, together with that of the Law, would reduce even the most recalcitrant of administrators to immediate obedience."

Here, I bent my head: "Alas! What makes me doubt that the judge would indeed be obeyed if he were to embark on the path of an injunction, is the fact that, when it comes to a simple annulment…". He interrupted me: "Do not suggest that the Administration defies annulment decisions and does not proceed with restoring the Law even in the absence of an injunction! I know that is not true and that the enforcement of annulment decisions poses not the slightest problem, seeing as the most learned works devoted to judicial review (5) make no mention of it anywhere, and the majority of authors do not tarry on this issue". (6)

"And what could they say about it?", I cried. "One of two things: either the Administration agrees to interpret the consequences of the annulment itself, if indeed this is materially possible despite the passage of time; else it refuses to do so. In such cases, what is the court to do? Can it summon the army? Do you see it mobilising a platoon of guards to compel the chief of police, their own commanding officer, or even the Minister of Culture to enforce an annulment decision, should any of them not comply?"

I could see that that he was beginning to reel. "And so? Is there no law that makes a civil servant's disobedience to the judge a crime punishable by a fine or a term of imprisonment? At the very least, should the person who so scorns the law not be personally liable for the same *vis-à-vis* his victim? Ruin would be just deserts for so great a crime."

"Case law has sought to remedy the law's deficiencies", I replied. "A person who has been unable to secure the Administration's compliance with the court's decision has a simple, practical path

open to him: he applies for compensation for the damage suffered as a result; if refused, he brings another action before a judge, in a full court hearing, with the costly ministrations of a wise barrister. The judge will then order the Administration to pay the compensation requested; if the order is confirmed on appeal, the Administration will settle, almost certainly, one day or another."
"So, if I have understood correctly, on payment of a ransom that will be even less of a burden as that it is, I believe, paid out of the public purse which is in turn fed by the offerings made by taxpayers, the Administration will secure its own freedom once and for all, together with the right not to respect the Law… And what if the victim is poor, or ill-informed, or tired of pleading his case? It seems to me that time passes, going from one appeal to the next. So, if that person does not take the matter before the second court, what will happen then?"

"What do you want to happen? In ordering the annulment, the judge has fulfilled his duties; the court is divested of jurisdiction in the matter; the decision will be published; the exegetes will appreciate its great doctrinal importance and weigh up its finer points. Would you have them follow the sidekick applicant in their subsequent and often petty quarrels with the Administration? Moreover, is the pure and simple failure to comply with a judgement all that commonplace? There are no statistics allowing such an assertion to be made; out of its concern for lawfulness, the Administration has at its disposal, when it deems necessary, a number of avenues to avoid scandal: it can replace the regulations breached by the annulled act with a new text, on the basis of which it could make the same decision again tomorrow; I could give you a very recent example of this without looking much further than the *Théâtre Français* that you can see over there. If it thus intends to protect the past, all it has to do is secure the passage of a law that reverses the effects of the *res judicata* and restores the previous state of affairs by giving it supreme authority; it most often does so without any great difficulty (7); and the Rule of Law thereby reclaims its empire".

The Huron's candid features registered his astonishment: "Let us sum up", said he. "An apparently arbitrary administrative decision affects an individual; it is enforced, should the Administration so choose, without the judge preventing it. If this enforcement instantly takes full effect, all is said and done and an annulment after the event can only undo what has already been done. Where its effects are felt over a period of time, the annulment leaves the Administration with the task of deciding on the correct measures to take in order to restore the law; and all this without the court daring to do anything on this point other than suggest occasional, timid instructions without, for all that, consenting either to enjoin the Administration to act or to rule on the matter itself. Where the Administration refuses to draw the necessary conclusions, the victim has no recourse other than the remote possibility of compensation. But then why is it sometimes said that your great court acts as the Administration's overseer? There are claims that it is audacious; I find it over-cautious. I concede, of course, that it cannot wield the battle axe against the very authority that wears it at its belt; however, that impossibility aside, could it not give teeth to a platonic annulment that nonetheless leaves the Administration essentially free to impose the most implacable arbitrariness on citizens without the slightest hindrance?".

I made a vehement interruption: "Do not blaspheme! Judicial review is a great and glorious creation; even when it does not give concrete satisfaction to the person who brings the action successfully – though it does do so in many cases, in spite of it all – it maintains the principle that, above all contingencies, the Administration is subject to the Law. Firstly, it provides a means for

individuals to protest against arbitrariness, to voice their indignation; next, as a bare minimum, the satisfaction of being proved right against the Administration. Does a moral victory count for nothing, in your eyes? And do the services rendered to the Law, the endlessly more demanding and rigorous definition of legality, also count for nothing? Must I remind you of all that has flourished within the scope of such actions? The theory of general principles, the examination of the grounds…"

Now it was his turn to interrupt: "Whereas we noble savages, we are simple creatures: we believe that justice is made for litigants, and that its value is measured in terms of everyday life. It is not the development of the Law that concerns us, but rather the effective protection to be drawn from it by the individual. I thought that your great judicial review guaranteed that protection. Have I travelled so far to find that this is not so?".

There was such a woebegone look on his face that I tried to comfort him: "Do not despair! The progress made is a guarantee of future progress; judicial review has not given its last word and the future remains open. Place your trust in the court's liberalism."

He hung his head and said: "But why would it be tempted to start anew the very thing that everyone tells him over and over again is a fully-formed masterpiece? How can the court not fear that it will debase the thing, if it so much as dares touch it? When our tribe's artist has sculpted a new totem pole in secret, the tribe gathers around and looks at it. When the work is deemed fit for the god that it is intended to honour, the artist is forbidden to touch it again, for fear of angering the deity. Were I from your country, and if I were to admire your great Council and its judicial review as you all do, it seems to me that I would not stop denouncing its weaknesses rather than singing its praises, to encourage it to surpass itself and make it equal to the mighty god that you call the Rule of Law."

"That is wise advice", said I, "but there are some who will maintain that now is not the right time to push forward in the fight against arbitrariness and give fresh impetus to the development of judicial review on the road to effectiveness. We must, however, have faith in the future."

"I shall return", said he, "when the future will have answered to the faith that you place in it and when citizens will, through judicial review, have the effective remedies to which we humble Hurons attach what is doubtless too high a price."

That very evening, without so much as a glance at the Eiffel Tower all lit up, he sadly took the path home to his copper beech and his wigwam. When will we see him again?

Notes:

(1) Translator's note: French barristers wear red robes, known as epitogas

(2) Rapport à l'Institut international de droit public, *Annuaire de l'Institut*, 1929, p. 162

(3) *Conseil d'Etat*, 18 June 1954, *Préfet du Var*, D. 1955, Somm. 32; S. 1954. 3. 93, note by Guy Braibant; Long, Weil et Brabant, *Les grands arrêts de la jurisprudence administrative*, p. 411, for an analysis of the development of case law in this area.

(4) *Conseil d'Etat*, 26 December 1925, *Rodière*, S. 1925. 3. 49, note by Maurice Hauriou.

(5) This is undoubtedly the classic work by Raphaël Alibert, *Le contrôle juridictionnel de l'Administration au moyen du recours pour excès de pouvoir*, Payot, 1926, which indeed does not devote a separate chapter to the issue of the effects of judicial review.

(6) Our colleague is obviously unaware of the book by Prosper Weil, *Les consequences de l'annulation d'un acte administratif pour excès de pouvoir*, 1952.

(7) Cf. the many examples cited by Michel Lesage, *Les interventions du législateur dans le fonctionnement de la justice*, 1960.

Commentary by Professor Jean-Bernard Auby:

All administrative lawyers know what a heavy task it has been (and continues to be) to impose the respect of the rule of law on the administrative authorities in an efficient way; that is, in making sure that judgments made by the courts are both truly implemented and really repair the illegal damage done by administrative misbehaviour.

In the paper above, written in 1962, Jean Rivero shows, with biting humour, that French law was, at that time, far from ensuring in a quite satisfactory way the rule of law in administrative matters. Jean Rivero was a very well-known administrative lawyer, and he was also a comparative lawyer. This is what had led him to take the critical position he adopts in this paper, which he drafted using the same rhetoric process that Montesquieu used in his "*Lettres Persanes*".

His article especially underlines three weaknesses in the courts' supervision of administrative authorities: the first one deriving from the fact that challenges brought before the courts had – with very limited exceptions – no suspensory effect on the administrative course of action; the second one residing within the fact that courts did not recognize to themselves the right of issuing injunctions against the administration;, and the third one, somewhat linked to the second, coming from the fact that judgments made by the courts against the administrative authorities could in general consist only of an annulment of the decisions taken by the latter, and not in a reestablishment of the situation illegally disrupted.

It is important to stress that things have very much changed and that, due to reforms made essentially in 1996 and 2000, these three weaknesses, pinpointed and implicitly criticized by Jean Rivero, have been strongly attenuated. First, actions brought to court against administrative bodies still do not have an automatic interrupting effect, but a "*référé suspension*": these proceedings allow plaintiffs to make courts suspend challenged decisions where they can be seriously suspected of being illegal, and their implementation would cause significant harm; courts decide on these requests within a few days. Second, courts have received from legislation the right to issue injunctions when they are asked to do so by people challenging the administration before them. Finally, courts can, if required, add to the annulment of administrative decisions challenged before them an injunction to restore things to their previous situation or to re-examine a case within a certain period of time.

This is not to say that the French system has succeeded to perfectly discipline the administrative organizations to respect the law. Certainly, a lot has yet to be done, but dramatic progress has been made since Jean Rivero wrote "*Le Huron au Palais-Royal*".