



Association of the Councils of State and Supreme Administrative
Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives
suprêmes de l'Union européenne a.i.s.b.l.

INTERNSHIP REPORT AND SUMMARY

Identification of the participant

Surname: KASPRZYCKI

First name: JANUSZ

Nationality: POLISH

Seniority: 52

Identification of the internship

Host jurisdiction/institution: COUNCIL OF STATE

Town/city: PARIS

Country: FRANCE

Dates of the internship: 13 – 17 JUNE 2022



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SUMMARY

Internship programme

From 13 June to 17 June 2022, I completed an internship at the Council of State of the French Republic in Paris as part of the ACA-Europe judicial exchange programme.

On the first day of my internship, 13 June 2022, I was received by the Councillor of State for International Relations, who explained to me how the Council of State works and is organised.

In the following days, I was received by the Presidents of the organisational units of the Council of State – the Divisions – who described to me the tasks of the respective divisions and answered my questions, and I then attended one of the hearings in each of the divisions scheduled on the relevant date.

Thus:

- on 13 June I attended a hearing of the Administrative Claims Division;
- on 14 June, I was received by the Master of Requests, the Deputy Secretary General, who explained to me the role, missions and workings of the General Secretariat of the Council of State.

On the same day, I was also welcomed by the President of the Administrative Issues Division, who explained to me how this division works and, afterwards, I attended a hearing of this division.

- On 15 June, I met with the Councillor of State, a rapporteur of the Administrative Claims Division, who described to me the problems associated with reviews of constitutionality, after which I attended the hearing of this division,
- On 16 June, I took part in a visit to the Administrative Tribunal of Paris, where I was welcomed by the Vice-President and then received by the President of the Tribunal, who outlined the way it is organised and operates. I then attended the hearings scheduled for that date, which concerned in particular the extension of the right of residence and expulsion from French territory. I also met with the President of the Mediation Division, who explained the operating principles of this procedural institution.
- On 17 June, I was welcomed by the public rapporteur, who introduced me to the issues of administrative liability. On the same day, I was

received by the President of the Report and Studies Division, after which I met the Secretary of the Report

and Studies Division; after these meetings, I attended a hearing, as on the previous days.

II. Characteristics of the host institution

During my stay at the Council of State, I was able to familiarise myself with the organisational chart of this French public institution, which was created in 1799 by Napoleon Bonaparte within the framework of the Constitution of 22 Frimaire year VIII (Consulate), building on the old institutions that bore this name during the *Ancien Régime*. Since 1875, it has been based at the Palais Royal in Paris.

The Council of State is an institution in the tradition of the system of Roman law. It is one of the 'masses of granite' that Napoleon Bonaparte wanted to leave on French soil (in addition to, among others, the Civil Code, the prefect, the Bank of France, the Court of Auditors). It is also known as France's 'miracle of constitutional biology'.

The Presidency of the Council of State is held by the Vice-President.

This name goes back a long way, to a time when the Council was actually presided over by the Head of State.

The Vice-President performs the executive tasks entrusted to him or her, with the support of the General Secretariat. The following operate under his or her authority: the inspection programme of the administrative courts, the general secretariat of the administrative courts and tribunals and the Centre for Legal Research and Dissemination. The Vice-President also presides over the High Council of Administrative Tribunals and Administrative Courts of Appeal, which is responsible for guiding the careers of magistrates.

The General Secretariat includes: the Cabinet, the Human Resources Department, the Foresight and Finance Department, the Information Systems Department, the Equipment Department, the Communications Department, the Library and Archives Department, the Information Technology Department and the Administrative Jurisdiction Training Centre.

As the Master of Requests, the Deputy Secretary General, indicated in his brief presentation of the functions of the General Secretariat, the General Secretariat of the Council





of State is responsible for managing 42 administrative tribunals, nine administrative courts of appeal and the National Court of Asylum.

The Secretariat allocates staff resources and the operating budget to each court after a management conference with the head of the court and the Secretary General, which takes place every autumn, and on the basis of an analysis of the statistical results produced by its own services.

The Council of State maintains the court buildings, develops and provides the digital tools necessary for the operation of all courts (in particular *Telerecours* and *Telerecours citoyen*), the electronic documentation necessary for the work of the courts and judges. The Council also acts as a disciplinary body for judges. For the purpose of managing the administrative courts, the Council of State is independent of the Ministry of Justice.

The Council also has an Administrative Claims Division for disputes between citizens, associations or companies; it is composed of 10 Chambers (see: Detailed organisation chart of the Council of State, p. 2/4, top). The first chamber is responsible for social welfare, health and urban planning; the second for post and telecommunications, sports, transport and foreigners; the third for fisheries, agriculture, economy and local authorities; the fourth deals with disputes involving schools, universities, employees with trade union mandates, social plans, health professionals (or the discipline of the medical professions); the fifth, disputes related to housing, radio and television, hospitals, points-based licences and paid parking; the sixth, disputes concerning hunting and the environment, judicial justice; the seventh, disputes relating to the armed forces, public establishments and professional elections; the eighth, taxation and the public domain (roads); the ninth, energy and taxation, and the tenth, culture, public liberties and overseas matters.

The Council also includes: the Interior Division, the Welfare and Social Security Division, the Public Works Division, the Finances Division, the Administrative Issues Division, the Report and Studies Division, the Delegation for the Execution of Judgments, the European Law Delegation and the International Relations Delegation.

Thus, as has been indicated, the General Secretariat ensures that the Council and the administrative tribunals, the administrative courts of appeal and the National Court of Asylum function properly.



The Advisory Division, which is also part of the Council, is composed of six sections that examine bills and regulations submitted to them by Government or Parliament.

The Report and Studies Division is responsible for drafting the annual report, the annual study and studies commissioned by the Government on various legal topics. It is also responsible for enforcing decisions and for relations between the Council of State and foreign courts.

'A fact-finding mission' monitors and evaluates the proper functioning of the administrative courts. Each year it draws up a programme of inspection visits, carries out a quality audit, measures the results obtained and recommends solutions to improve the quality of services to the public.

The Administrative Claims Division hears disputes between citizens, associations or companies and the administration. It also deals with disputes between two administrations: for example, the prefect against a municipality, a hospital against the Ministry of Health, etc.

The Council of State is based on the idea that the body exercising political power does not govern despotically, but takes decisions after listening to the opinions of the 'wise men' gathered in a council¹.

The tasks of the Council of State make it one of the pillars of the rule of law. On the one hand, it settles disputes between citizens, companies and associations and administrations. On the other hand, it proposes improvements to Government and Parliament in order to secure laws and regulations before they are voted on or come into force.

Two functions of the Council of State are therefore clearly visible: the first is a judicial function in which the acts of the administration are reviewed, and the second is an advisory and consultative function.

With regard to the first function performed by the Council of State, it is worth remembering that any citizen, association or company is entitled to challenge decisions taken by an administrative authority (local authorities, prefectures and decentralised state services,

¹ See S. Leroyer, *op cit.*, pp. 36 and 37.

hospitals, educational establishments, government, etc.) before an administrative tribunal if he or she believes that his or her rights and freedoms have not been respected.

Health, town planning, taxation, education, etc. Every day, public administrations make decisions that affect the lives of French citizens. Decisions

in these areas may be taken by national administrations - government, independent administrative bodies - but also by local administrations: local authorities, prefectures and decentralised state services, hospitals, educational establishments, etc. Any citizen, association or company can therefore challenge these decisions before an administrative court (administrative tribunal, administrative court of appeal, Council of State) if they feel that their rights and freedoms have not been respected. Any member of the public can, for example, challenge a tax imposed on him or her, a refusal of a building permit, a refusal of social support, the banning of a demonstration, etc.

Disputes in this area are generally settled by the administrative tribunals (first instance) and the administrative courts of appeal. However, it is possible for a dispute to be brought directly before the Council of State as the highest administrative court, when the contested decision originates from an authority at national level (President of the Republic, government and ministries, independent administrative authorities). Citizens can then take the matter directly to the Council of State. In contrast, when the contested decision has been taken by a local administration, citizens must first apply to the administrative tribunal closest to their place of residence. If they are contesting a court decision, they can appeal to the administrative court of appeal, and then take the matter to the Council of State.

In its decision, the Council of State verifies that the administration respects the law (the Constitution, international conventions and European law, French laws and regulations). In reaching its decision, the Council relies on the case-law of other courts, in particular the Court of Justice of the European Union, the European Court of Human Rights and the Constitutional Council, as well as on its own previous case-law.

The Council of State issues decisions that are binding on the administration and ensures that they are properly implemented.

It is also worth emphasising that, when ruling after the administrative tribunal and the administrative court of appeal, the Council of State does not re-examine the case in its entirety: it only checks whether the tribunal or court has applied the law correctly and whether due process has been observed. In the event of an annulment, it may rule on the merits of the case, but in most instances it will return the case to the court that issued the decision referred to it, leaving it to re-examine the case.

If the administration fails to enforce the Council of State's decision, the Council orders it to act or modify its action and ensures that it is properly implemented. And if the administration still does not act as indicated by the Council of State, the latter can force it to do so and even oblige it to repair the damage it may have caused to the individual concerned as a result of its irregular action.

The Council of State may also initiate enforcement proceedings, either on its own initiative or at the request of the applicant. After hearing the administration concerned, it may reopen the case if it feels that the administration has not complied with its decision. It can then issue a new decision and impose a fine on the administration to force it to comply.

What, then, is the procedural pattern that leads to a decision by the Council of State in a given case?

From what I observed during my time at the Administrative Tribunal and especially at the Council of State, the first step for the individual concerned is to appeal against the decision taken by the administration and to present his or her arguments in writing. The administration in turn is invited to submit a written response to the allegations of unlawful action made against it.

The rapporteur of the Administrative Claims Division examines the appeal and the arguments of the two parties.

A hearing is then arranged at which an independent judge – the public rapporteur – submits his or her proposal for resolving the dispute to the judges. The defence lawyers can then make additional comments and take the floor.

The hearing is followed by a discussion of the merits of the case, called 'the deliberation'.

At this stage, the magistrates discuss collegially. There may be between three and 17, depending on the complexity of the case. The decision is taken by a majority vote of the magistrates forming the bench.

As regards its second function – the advisory and consultative function – the Council of State acts as legal adviser to the government, the National Assembly and the Senate. It issues legal opinions on laws and regulations before they are debated and voted on in Parliament or before they come into force.

Its role is to guarantee the legal security of draft texts submitted to the Government. It ensures that these drafts comply with the Constitution and with European and national law, that they are consistent, understandable and applicable in everyday life. The Council of State gives advisory opinions and does not comment on the political choices of the government or MPs.

Laws, regulations, decrees ... the texts that enable citizens to live in society are constantly changing. The role of the Council of State is therefore to provide legal advice to Government and Parliament so that their draft legislation is legal, understandable to all and applicable in everyday life.

In accordance with the Constitution of the French Republic, all laws, regulations and important Government decrees are subject to the opinion of the Council of State before they are voted on by MPs or come into force. The Council of State may also advise the National Assembly or the Senate on their legislative proposals.

In all cases, the task of the Council of State is the same: to guarantee the legal security of the texts submitted to it. To protect citizens, it seeks to ensure that future laws and regulations are not inconsistent, complex, too often changed, not applicable in everyday life, and so on.

In its examination of the text, the Council of State is guided by a number of questions: Does it comply with French and European law, the Constitution and international treaties? Is it understandable to citizens and applicable in everyday life? Is it based on research that can predict the effects in real life? Is it necessary, or do existing laws and regulations serve the same purpose?

The Council of State's analysis is legal; it does not comment on the political choices of the government or of deputies and senators.

In the case of government bills, the Council of State also examines the impact assessment that accompanies the text and which will inform MPs' voting. It checks that this assessment is reliable and allows the economic, financial, social and environmental consequences to be anticipated.

After a collegial analysis, the Council of State proposes specific solutions for improving these texts, which it sets out in detailed 'opinions' on the most important draft legislative texts. These opinions are adopted - by the Advisory Divisions (Interior, Finances, Public Works, Administrative Issues, Welfare and Social Security) and then by the General Assembly of the Council of State. When an opinion is needed urgently, an exceptional composition (i.e. the Standing Committee) is convened to take a decision within a limited time frame.

The opinions of the Council of State are advisory and independent legal analyses and recommendations that the Government, deputies and senators may or may not follow. Opinions on bills are made public by the government, and opinions on parliamentary bills are also made public by the MPs who refer them to the Council of State.

Those who belong to one of the five advisory divisions of the institution responsible for examining the draft text are members of the Council of State.

To safeguard the independence and quality of the institution's work, members of the Council who draft texts are subject to specific requirements that guarantee their impartiality and prevent the risk of conflicts of interest; their obligations are set out in a code of ethics. In addition, in the event of an appeal to the administrative judge on a draft text, the members of the Council who worked on the draft may not participate in the corresponding decision-making.

At the same time, the Council of State can also deal with legal issues raised by the administration. Thus, the Government may at any time request its opinion on a new or complex legal issue. The Council of State may also, on its own initiative, draw the attention of the public authorities to reforms of a legislative, executive or administrative nature that it considers to be of general interest.

The Council of State may also answer specific questions raised by the administrative authorities of certain overseas local and regional authorities.

The Council of State's operating model in this respect is as follows. Depending on the subject matter, a bill or parliamentary bill is submitted to one of the five advisory divisions of the Council of State. The rapporteur of one of the advisory divisions then examines the file, holds a hearing with the representative of the administration concerned or Parliament and makes an initial assessment. The initial assessment is then discussed by the whole division. The different points of view are discussed, the rapporteur's analysis is examined in depth and then incorporated into the Council's opinion. More sensitive issues are discussed by the Councillors of State at the general meeting of all the Council's advisory divisions.

The opinion is then adopted. Practical solutions are put in place. In the case of a draft or a new regulation, a new text is proposed. The opinion is then submitted to Government or Parliament.

III. The law of the host State

I was particularly interested in the aspect concerning the application of interim measures by administrative tribunals, including the Council of State, which examines the appeal against such a measure as the highest court.

As specified in Article 5 of Act No 2021-1109 of 24 August 2021, amending Article L.2131-6 of the General Local and Regional Authorities Code, 'When the contested act is likely (...) seriously to undermine the principles of secularism and neutrality of public services, the president of the administrative tribunal or the magistrate delegated for this purpose shall order the suspension of the act within 48 hours. The decision on the suspension may be appealed to the Council of State (...).' It follows that in cases of urgency, the designated member of the Council of State may take interim measures within a few days or even hours to protect a fundamental freedom that the administration has violated or to suspend the implementation of an unlawful administrative decision.

During my internship, I had the opportunity to attend a hearing before the Council of State on an appeal against an interim measure decided by a judge of the administrative tribunal of Grenoble.



In May 2022, Grenoble City Council adopted new internal regulations for the four municipal swimming pools it manages. In particular, it introduced regulations under which some users could cover a significant part of their body. However, Article 10 of these regulations, which governs swimwear in swimming pools for reasons of hygiene and safety, established an exception to the obligation for swimming pool users to wear close-fitting swimwear that is shorter than mid-thigh length.

On 25 May 2022, the administrative tribunal of Grenoble decided to suspend the new regulations of Grenoble's municipal swimming pools allowing the wearing of the 'burkini' - a swimming costume designed for Muslim women and women of other cultures whose religion forbids the exposure of many parts of the body.

The municipality appealed to the Council of State against this judgment of the administrative tribunal. This is the first application of the new 'reference to secularism' resulting from the Act of 24 August 2021 reinforcing respect for the principles of the Republic, which concerns cases of serious infringement of the principles of secularism and neutrality of public services.

The interim proceedings judge of the Council of State confirmed the suspension. He concluded that a very specific derogation from the rules of ordinary law on the wearing of close-fitting swimwear, introduced for reasons of hygiene and safety, in order to satisfy a religious requirement, could affect the proper functioning of the public service and the equal treatment of users in conditions that violate the principle of neutrality of public services.

The interim proceedings judge of the Council of State recalled the case-law according to which the manager of a public service, in order to satisfy the general interest that the greatest number of users should have effective access to the public service, has the option of taking into account, over and above the legal and regulatory provisions that are binding on him, certain specificities of the public concerned, and if the principles of secularism and neutrality of the public service do not in themselves prevent these specificities from corresponding to religious convictions, it is not in principle necessary to take account of such convictions and users have no right to expect this to be the case, since the provisions of Article 1 of the Constitution prohibit anyone from taking advantage of their religious beliefs in order to circumvent the common rules governing relations between public authorities and

individuals. He also pointed out that the exercise of this right must not undermine public order or the proper functioning of the service. In his order, the interim proceedings judge of the Council of State reiterated that the proper functioning of the public service precludes adaptations that, because of their highly derogatory nature in relation to the rules of ordinary law and without any real justification, would make it difficult for users who do not benefit from the derogation to comply with these rules, or would lead to a clear violation of the equal treatment of users and would therefore disregard the duty of neutrality of the public service.

In this case, the interim proceedings judge noted that, contrary to the aim stated by the City of Grenoble, the adaptation of the internal regulations of municipal swimming pools was only intended to allow the wearing of the 'burkini' in order to satisfy a religious requirement. To this end, a derogation had been introduced from the common rule, established for reasons of hygiene and safety, on the wearing of close-fitting swimming costumes, for this group of users. This derogation is highly specific and deviates significantly from the common rule, without any real justification for the resulting difference in treatment. The result is that the City of Grenoble, by providing for very specific internal regulations that infringe the common rules for the use of public space – of municipal swimming pools, affects compliance with the rules of ordinary law by other users and, consequently, the proper functioning of the public service, which at the same time undermines the equal treatment of users, thereby compromising the neutrality of the public service.

For these reasons, the interim proceedings judge of the Council of State rejected the appeal of the City of Grenoble against the decision of the administrative tribunal suspending this provision of the regulations allowing Muslim women or women from other cultures whose religion forbids the display of many parts of the body in swimming pools.

IV. Comparative law aspect of the internship.

First of all, it must be emphasised that in Poland there is no such institution as the Council of State, which does not mean that the institution of the Council of State is totally alien to the Polish political tradition. In the nineteenth century, there was first the Council of

State of the Duchy of Warsaw, then the Council of State of the Kingdom of Poland². This topic was also debated after Poland regained its independence in 1918, and also later in the 1920s³.

In Poland, a two-tier administrative judicial system has been established to control the functioning of public administration, including local government authorities. The organisation of the administrative judiciary is determined by the Act on the System of Administrative Courts and the Act on Proceedings before Administrative Courts⁴.

Judicial review of public administration acts in Poland is limited to reviewing the legality of the operation of the administration. It is limited, constitutes an autonomous and direct review and is carried out in the context of formalised procedures of a processual nature.

The scope of the competence of the administrative court is defined in the Act – the Act on Proceedings before Administrative Courts (Article 3 of this Act) and includes the review of appeals against administrative decisions, orders issued in administrative proceedings, decisions issued in enforcement proceedings and summary proceedings, other acts or actions of the public administration concerning the rights or obligations arising from legal provisions, tax rescripts, local government acts, acts of local government authorities in matters of public administration, acts controlling the activity of local government authorities, deficiencies of administrative bodies in matters within their competence, other matters where the law

² See the doctoral thesis of Radosław Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji*, [The Council of State as an organ of jurisdictional protection of the Constitution in France], Warsaw 2017 and the literature cited therein, p. 9 - J. Bardach, B. Leśniorski, M. Pietrzak, *Historia ustroju i prawa polskiego*, Warszawa 2009, pp. 383-384 - 397-398; M. Kallas, *Historia ustroju Polski*, Warszawa 2005, pp. 202 and 215-217 ; A. Korobowicz, W. Witkowski, *Historia ustroju i prawa polskiego (1772-1778)*. Following the French model, the Council of State of the Duchy of Warsaw was responsible for drafting royal decrees and laws to be adopted by the Sejm, for monitoring state officials and holding them accountable, and for exercising certain judicial powers as the court of cassation, jurisdiction and administration of the Duchy of Warsaw (A. Korobowicz, W. Witkowski, op. cit., p. 59).

³ See the doctoral thesis of Radosław Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji*, Warsaw 2017 and the literature cited therein, p. 9.

⁴ Act of 25 July 2002 – Prawo o ustroju sądów administracyjnych (Dziennik Ustaw of 2021, text 137) and the Act of 30 August 2002 – Prawo o postępowaniu przed sądami administracyjnymi (Dziennik Ustaw of 2022, text 329).

provides for judicial review (Article 3(2) of the Act on Proceedings before Administrative Courts).

Just as before French administrative courts, administrative courts of appeal, the Council of State, control before Polish administrative courts – voivodship administrative courts as courts of first instance, and the Supreme Administrative Court, as a court of cassation – the second instance – is exercised with regard to the conformity of decisions and other administrative acts of public administration with the provisions of positive law and with the provisions of procedural law.

Thus, the court of first instance examines the administrative authority's compliance with the provisions regulating the proceedings before the administration in a given case, but also whether the administration has relied on the relevant provisions of substantive law applicable to the case, has interpreted them correctly (examination of the interpretation of these provisions) and has applied them. Thus, the administrative judge may annul the decision or order, in particular by identifying the most serious flaws. It may also overturn it when it finds a violation of substantive or procedural law affecting the resolution of the case, or when it finds a violation of the law giving rise to the resumption of administrative proceedings, it may find that a decision or an order has been issued in violation of the law. It may also annul an act, a rescript, an opinion or a refusal to issue an opinion as an interim measure or declare an act ineffective. Likewise, it may, in response to a petition against a deliberation or act of local law or of local authorities, declare the deliberation or act null and void in its entirety or in part, or declare that it was issued in violation of the law; it may annul an act of control, and in the case of petitions for failure to act on the part of an administrative authority, compel the administrative authority to issue a decision or other act within a specified period.

In contrast, in its decisions, the Supreme Administrative Court limits itself solely and exclusively to the scope of the cassation appeal (cassation appeal – a remedy available against the judgment of the administrative court of first instance) against the decision of the voivodship administrative court. As a rule, the Supreme Administrative Court examines the case within the limits of the cassation complaint, but takes into consideration *ex officio* the invalidity of the proceedings. The principle that this court is bound by the limits of the cassation complaint applies both to the examination of the case (Article 183(1) of the Act on

Proceedings before Administrative Courts) and to the judgment (Article 186 of the Act on Proceedings before Administrative Courts). The above rule, as a fundamental element determining the scope of review of the referred judgment, means that the SAC is bound by the appellant's request specifying the subject matter of the appeal (the whole or a specified part of the decision under appeal). Therefore, this court cannot review the uncontested part of the decision taken by the court of first instance, as this would mean acting *ex officio*, which – except in cases where the proceedings are invalid – is not permitted⁵.

The powers of the Polish Court are limited, in principle, to decisions on cassation. The Court cannot rule on the merits of the administrative case, in other words, issue a decision that would per se modify the act or action referred to it, even if, due to the nature of the flaws found (e.g. violation of substantive law only, which affected the outcome of the case), or based on the evidentiary procedure carried out by the court, the conditions for such a decision on the merits of the case

would be fulfilled. (Except for exceptional and limited possibilities provided for in the Act on Proceedings before Administrative Courts, in other words, when it finds that the proceedings before an administration have become irrelevant and cannot be continued after the court has annulled the decision or order,) the court may at the same time dismiss the administrative proceedings, and may also require the administration to issue a decision or order within a specified period of time, indicating the way in which the case is to be settled or its solution, unless the solution has been left to the discretion of the administration; in cases where the administration has not issued a decision or order, the appellant may request a judgment establishing the existence or non-existence of a right or obligation. The Court makes such a decision in this matter if the elements of the case so permit. It may also, *ex officio* or at the request of the party, impose a fine on the administration or award a sum of money to the party as compensation. Similarly, the Court, when examining an appeal against the administration's failure to act, by finding that it has failed to act, may require the administration to issue a

⁵ Cf. T. Woś, Dwuinstancyjne sądownictwo administracyjne a konstytucyjne prawo do rozpatrzenia sprawy „bez nieuzasadnionej zwłoki”, PiP 2003, z. 8, p. 33)

decision or an order within the time allowed, rule on the existence or non-existence of a right or obligation, if the nature of the case so permits or if the elements of fact and law, which leave no room for reasonable doubt, so permit. In addition, in the event that a judgment upholding a complaint of failure to act or procedural delay is not enforced, the court may also rule on the existence or non-existence of a right or obligation, if the nature of the case and the factual and legal elements that leave no room for reasonable doubt so permit).

It follows that as far as the control of public administration by the French administrative courts, including the Council of State, and by the Polish administrative courts is concerned, the procedural model is similar.

However, the question of reviews of constitutionality is somewhat different.

From what I observed during my time at the Council of State, in the event of a dispute brought before a court, French regulations allow each party to the proceedings to challenge the legality of the law that concerns them, including the rights and freedoms guaranteed by the French Constitution.

This challenge is first examined by the court competent to rule on the merits of the dispute in question (the court with jurisdiction as to the substance of the matter). It may refuse to review the constitutionality of the contested provision. The decision in this respect can only be challenged by the litigant by appealing the decision before a higher court. In cases where the question of the constitutionality of a provision is considered important, the constitutionality review (the

PQC - priority question of constitutionality) is carried out by the Council of State or the Court of Cassation, depending on the jurisdiction⁶. In cases where the question of constitutionality review is substantial, the court of first instance must suspend its decision until the Council of State or the Court of Cassation has given its opinion. These courts have 3 months to reach a decision, failing which the case will be referred to the court with jurisdiction as to the substance of the matter. The Constitutional Council also has 3 months to carry out a constitutionality review. Thus, the plea that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, raised during proceedings pending before the court,

⁶ The Court of Cassation is the final court of appeal in the French Republic for civil and criminal cases.

triggers this constitutionality review mechanism. However, Article 23-1 of the Organic Law, which governs organisation and proceedings before the Constitutional Council, stipulates that such a request is only admissible ‘before the courts of the Council of State or the Court of Cassation’. In administrative matters, the Council of State has exclusive competence to initiate a review in this regard before the Constitutional Council. It receives questions relating to general jurisdiction from administrative tribunals and administrative courts of appeal, as well as from special tribunals such as financial tribunals, migration and asylum tribunals or disciplinary tribunals. At present, the French Constitution provides the basis for the subsequent assessment of the compatibility of the provisions of a law with constitutional rights and freedoms. The Council of State (as well as the Court of Cassation) are therefore constitutional courts of ‘first instance’, competent to resolve

doubts concerning these issues on a preliminary basis. They can avoid this by referring the matter to the Constitutional Council⁷. The Constitutional Council is competent when the contested legislative provision is applicable in the context of the resolution of a dispute or a procedure, the provision has not yet been declared unconstitutional in the grounds and the operative part of the decision of the Constitutional Council, unless the circumstances have changed (*de jure* and *de facto*), the question is new and of a serious nature. The review model adopted in this way – the so-called ‘double filter’ – is intended to lighten the burden of the Constitutional Council and to prevent it from becoming clogged. It should also be pointed out that, firstly, strict deadlines for review apply at all levels of review in order to avoid delays in proceedings.

Secondly, a formal condition must be fulfilled for this constitutionality review to take place, namely that it is only possible to challenge a legal provision in relation to constitutionally guaranteed rights and freedoms, and that any disputes concerning the jurisdiction of the respective courts or proceedings are excluded. In the context of an existing dispute, such a model makes it possible to critique the legal provision in question.

⁷ See the doctoral thesis of Radosław Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji*, Warsaw 2017, p. 471.

The decision of the Constitutional Council is taken after a public hearing involving the parties to the dispute and the Prime Minister's office (for the defence of the law). Whenever the Constitutional Council declares a provision unconstitutional, it is repealed. It is also possible to challenge the future effects of the removal of the legal trade provision. It is important to note that this model of constitutionality review is not incompatible with EU law⁸.

In Poland, however, the model is different. The Constitution of the Republic of Poland has adopted the concept that the assessment of the conformity of the law with the Constitution is of an exclusive nature and falls exclusively within the competence of the Constitutional Court. It has been stressed that the provision of

Article 193 of the Polish Constitution establishes, in essence, the obligation of the court to address a legal question concerning the constitutionality of a provision relevant to the solution of the case. At the same time, this has been seen as prohibiting the court from making an independent assessment of the constitutionality of a law, leading to a refusal to apply it in the case in question. Thus, any court may submit to the Constitutional Court a question of law concerning the conformity of a normative act with the Constitution, ratified international agreements or a law, if the solution of the case pending before the court depends on the answer to that question. This approach to constitutionality review may be described as conservative. It is based on certain assumptions about the purpose, function and content of the Constitution, taking into account its primacy and direct application. However, the crisis surrounding the Constitutional Court and, as a corollary, the dysfunction of this institution, have created extraordinary circumstances. It has become necessary to change the approach to constitutionality review and to recognise – on the basis of the principle of necessity – that, since the Constitutional Court cannot review the constitutionality of the law, this task must be taken over by the judicial courts and the administrative tribunals, and consequently the Supreme Court and the Supreme Administrative Court. As is natural in the case of any legal act, this second approach takes into account the need to take into consideration those elements that affect the interpretation and understanding of the Constitution within the framework of

⁸ CJEU judgment of 22 June 2010, Melki and Abdeli, C-188/10 and C-189/10.

its established text, linked to changes in the philosophy of law, the theory of law, and in the social, political, legal and economic spheres. Therefore, this approach assumes that, since the Constitution of the Republic of Poland is a normative act and, moreover, establishes the principle of its primacy and direct application, it must be taken into account in every act of law enforcement. It follows that the judge is obliged, in all cases, to take into account the provisions of the Constitution in the process of interpretation and to examine whether the law that forms the basis for the solution of the case is compatible with the Constitution. If it is not possible to reconcile the law with the Constitution, the court has the option, in the process of interpretation – although it must be emphasised that this is only a last resort, after additional conditions have been met – to refuse to apply the law, referring to the principle of ‘lex superior derogat legi inferiori’.

The first model is general-abstract and is based on derogatory power; the second model, which currently works with varying results, is specific-individual and is based on the obligation to establish an individual and specific judicial norm that is compatible with the Constitution

As for the advisory and consultative function of the Council of State, this is an area that does not function in this form in Poland. There is only the Government Centre for Legislation (Rzadowe Centrum Legislacji) as a state organisational entity, subordinate to the Prime Minister, which coordinates the legislative activity of the Council of Ministers, the Prime Minister and other government administration entities and legal services for the Council of Ministers. As regards legislation, it prepares draft legislative texts and other government documents and is responsible for publishing Dziennik Ustaw and Monitor Polski.

French legislation has also established the liability of the administration for damages for wrongful acts. Such an institution does not exist in this form within the Polish legal system.

Generally speaking, it can be said that, in the light of this legislation and, above all, of the case-law developed in this area, including that of the Council of State, the administration is liable when an administrative decision has been taken in violation of the procedure and when it is concomitantly established that, taking into account the nature and seriousness of

this violation, the same decision could have been different if this violation had not occurred. The court always examines these issues on a case-by-case basis, and the administration is liable only to the extent of its responsibility for the damage caused. The idea is that

the institution should not become 'a damage insurer'. To date, case-law has assumed that gross negligence on the part of the administration is a condition for liability to be incurred. Under current case-law, it is also possible to hold the administration liable without any fault on its part. The administration is liable in law, for example, for inequality in the payment of public taxes in various types of proceedings, for damage caused to third parties by public works or structures, and for a lack of adequate access for disabled persons to court premises or other public facilities. It is also clear from the document presented to me on this subject that compensation disputes also concern searches of premises to prevent terrorist threats, or in cases involving the Police.

In Poland, the liability of the administration for damage caused is also provided for, but this is a civil-law matter, not an administrative one, and is provided for in Article 417 of the Civil Code⁹. In the light of paragraph 1 of this provision, the State Treasury or a local authority entity or other legal person exercising such authority by law is liable for damage caused by an unlawful act or omission in the exercise of public authority. If, on the other hand, the performance of tasks falling within the scope of public authority has been entrusted, on the basis of an agreement, to a local authority entity or another legal person, liability for the damage caused is borne jointly and severally by the supplier and the local authority entity that entrusted the supplier with the performance of the task, or the State Treasury (paragraph 2). Thus, according to the aforementioned provision, the primary condition for the liability of the State Treasury and legal entities of the State is the illegal act of an organisational entity of the administration that exercises public power, that is to say, its failures with regard to acts belonging to the sphere of the imperium.

⁹ Act of 23 April 1964 Civil Code; Journal of Laws 2022, point 1360.

V. The European aspect of the internship.

During my internship I did not have the opportunity to observe the implementation of instruments of EU law.

There were, however, two issues related in some way to the European Convention on Human Rights; firstly, that of the application of an interim measure - the suspension of the application of the provisions of an internal regulation governing swimwear in the municipal swimming pools of Grenoble, which in some way affected the restriction of the freedom to manifest one's religion, as referred to in Article 9(2) of the European Convention on Human Rights. The Human Rights Commission has previously stated that Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a manner dictated by one's beliefs. The Commission has in the past considered as compatible with freedom of religion certain obligations relating to submission to certain rules of conduct established to ensure respect for the rights and freedoms of others.

Secondly, the opportunity to find out about an OQTF hearing.

Briefly, this may be characterised as an obligation to leave French territory (OQTF), and the decision is taken within 30 days before notification of the prefectural expulsion order. The foreigner must be notified of the order in writing and in French (even if the person is illiterate or does not speak French) by administrative means (identity check, administrative procedure, etc.) or by post. The notification mentions the country of return, which is usually the foreigner's country of nationality.

It can be difficult for foreigners without identity documents to collect a registered letter from the post office. In the case of notification by post, the expulsion decision cannot be enforced for a period of 7 days following receipt of the letter. The foreigner has 15 days to collect the letter from the post office, after which the administration is entitled to assume that he or she has received the letter.

The foreigner can appeal against the prefectural order before the competent administrative tribunal (time to find legal aid and make preparations). If the order is notified administratively, it cannot be enforced for a period of 48 hours following notification. When a foreigner has been arrested in an irregular situation (i.e. with an irregular residence status), he or she is placed in administrative detention, during which he or she is notified of the expulsion decision. An appeal for annulment before the administrative tribunal may be lodged either against the order itself, or against the expulsion decision in the country of reference, or against both at the same time (the two decisions are separate). The appeal has suspensive effect.

VI. The 'good practice' aspect of the jurisdiction visited.

During such a short stay, it is difficult to assess what are the good practices of administrative law or the positive aspects of the rules governing judicial proceedings in France. Certainly, the system of time limits for the application of interim measures and time limits for reviewing the constitutionality of legal norms by the Council of State or the Constitutional Council deserves to be closely examined and considered in the light of its introduction into the Polish legal system.

VII. Benefits of the internship.

First of all, my time at the Council of State allowed me to discover a different legal culture, albeit a European one. Secondly, and most importantly, it gave me an insight into the structure, functioning and competences of the Council of State as the highest administrative court in France. In particular, the advisory and consultative role of the Council of State was an interesting discovery, although I found it very difficult, if not impossible, to grasp all the details in such a short time.

I also found very interesting the possibility to attend hearings before the French administrative court of first instance - the Administrative Tribunal of Paris - concerning the OQTF procedure.



VIII. Suggestions

In my opinion, the proposal of frequent exchanges of judges is relevant because it allows judges to get acquainted, for example, with the workings of similar institutions in other countries of the European Union, which also helps to broaden the experience of judges from Member States, who are European judges and not only judges from their country of origin.

Summary

The Council of State is a different institution from its Polish counterpart (Naczelny Sąd Administracyjny - the Supreme Administrative Court), due to the difference between the legal systems and the organisation of the judiciary in France. It is not only the 'mass of granite' that Napoleon Bonaparte left on French soil, but above all, it is the highest administrative court in France, protecting the citizen against unlawful acts of the administration. It is also an institution that is described as belonging to the 'miracle of constitutional biology'; in fact, in the French system of constitutionality review, it exercises, alongside the Constitutional Council, a constitutionality review limited to acts of public authority. It also has missions involving 'advice to the Government' and ensures not only the legislative regularity of texts but also their conformity with acts of higher order and the relevance of the solutions adopted therein.

