



Identification of the participant

Surname: Tsarouchas

First name: Dimitrios

Nationality: Greek

Seniority: Master of Requests (14 years' service)

Identification of the internship

Host Council of State/institution: Council of State of France

Town/city: Paris

Country: France

Dates of the internship: from 6 to 17 November 2023

SUMMARY

Thanks to a comprehensive (and of sufficient duration, namely 2 weeks) internship programme with the French Council of State, which exercises both jurisdictional and administrative/consultative powers, also including (the internship) visits to other courts (Constitutional Council, Court of Jurisdictional Disputes, Administrative Tribunal of Paris) and public institutions (National Institute of Public Service), I had the opportunity to get to know not only a court and its eminent members, as well as, of course, its competences, organisation and functioning, but also, and above all, the working method and state of mind that are the basis of any successful system.

I. Internship programme

The programme for the internship at the French Council of State was perfectly organised: comprehensive and intensive, tailored to the needs and areas of interest that I had been asked about in advance, while providing me with prior information on the organisation and competences of the courts. I had the opportunity:

- not only to monitor the work of the judicial bodies (hearings and deliberations) and the administrative/consultative divisions (preparation of bills and decrees), but also
- to receive detailed information on the workings of the court from members of different grades (on the duties and working methods of the rapporteur and public rapporteur, the administration and management of the Council of State and the administrative courts, the



inspection of administrative courts and the professional ethics of members of the Council of State and administrative judges) and

- from senior staff from various departments of the Council of State (on communication, international relations and the library), as well as
- to follow the work of other courts on site (Constitutional Council hearings, hearings and deliberations of the Court of Jurisdictional Disputes),
- to learn about their organisation and operation (Administrative Tribunal of Paris, where I was briefed in detail by the head of the court and where I attended a deliberation after the hearing) or
- the organisation and operation of other key institutions of the French civil service (National Institute of Public Service - formerly the National School of Administration).
- I was also fortunate enough to attend the inaugural conference of the annual study conducted by the Council of State's (Annual) Report and Studies Division, whose activities were also presented to me in detail by its chairperson and another member of the Division.

II. The host institution

The French Council of State, with its long history (created by Article 52 of the Constitution of 1799 'under the direction of the consuls' and charged with 'drafting bills and regulations for public administration and resolving difficulties that arise in administrative matters'), is, in the words of B. Pacteau, 'unique' in that, although 'heir to a desire for state authoritarianism, it has, on the contrary, become the symbol of a controlled State and of the defence of individual rights against public excess', while retaining 'from its past features and almost traditions of participation in public action that prevent it from being fully assimilated to a judicial court and which are sometimes surprising, even shocking'¹. Thus, to date, the Council of State retains (albeit to a lesser extent, as shown by the annual statistics it publishes) significant 'administrative' (non-judicial) powers, resulting in some 1 100 opinions a year (1 141 in 2021 and 1 075 in 2022)² (on bills, local laws, regulatory and non-regulatory decrees and ordinances, as well as on questions from the Government), issued by its five 'administrative' divisions (in addition to a division responsible for drafting the annual report and studies on

1. *Contentieux administratif*, PUF, 6th ed. 2002, pp. 39 and 40.

2. For the key figures for 2022 mentioned in this report, see the Council's annual report in digital format here: <https://www.conseil-etat.fr/publications-colloques/rapports-d-activite/rapport-public-2022-des-juridictions-administratives>.

various issues, at the request of the Prime Minister or on its own initiative), or exercised (these administrative powers) by its members - who are not qualified as 'magistrates' - outside the courts, in senior or advisory positions within the Government and the civil service. At the same time, and increasingly so (since 1953, when the administrative tribunals were created - of which there are now 42, and 1987, when the administrative courts of appeal were established - of which there are now 9, in addition to the National Court of Asylum), it is also the country's supreme administrative court, dealing for the most part with appeals in cassation (and appeals) against the rulings of the lower administrative courts, including the rulings of the National Court of Asylum (a total of 67.5 % of the 11 313 cases brought before the Council of State in 2021), while it remains competent to hear, at first and last instance, applications for the annulment (on grounds of ultra vires) of regulatory and non-regulatory decrees, other regulatory acts (ordinances, ministerial orders, etc.) and certain individual administrative acts (18 % in 2021). Cases are dealt with by the Administrative Claims Division of the Council of State, which is subdivided into 10 chambers (previously known as sub-sections), and by several formations: as a chamber 'sitting alone' (of three judges) for straightforward cases, as 'two chambers combined' (panel of nine judges) for cases of particular legal difficulty, as a division formation (15 judges) for cases presenting a particular difficulty or calling into question a jurisprudential solution adopted in that same formation, and as a judicial assembly (17 judges) for cases of exceptional importance (all of these formations heard a total of 40 % of the 11 633 cases dealt with by the Council of State in 2021) - all the aforementioned formations ruling on the submissions of the public rapporteur - in addition to the single-judge formations (president of the chamber or head of the Administrative Claims Division and the Councillors of State that he appoints for this purpose, respectively), which rule either, without holding a hearing, by order, on manifestly inadmissible applications, withdrawals, etc. (44.2 % in 2021) or, with or without holding a hearing, also by order, on applications for interim measures (8 % in 2021). The Council of State is made up of around 300 judges ('members of the Council of State'), auditors (from 2021 with a non-renewable 3-year term of office), Masters of Requests and Councillors of State, two thirds of whom sit on the Council (237 in 2022), compared with one third who hold rotating positions within the Government and the civil service (as well as within independent authorities, local authorities, etc.). The Council of State is chaired by its (Vice) President (see Article L121-1 of the Code of Administrative Justice), assisted by the General Secretariat, under the direction of a Councillor of State. The latter ensures the smooth running not only of the Council of State but also of the rest of the administrative justice system (administrative

tribunals and administrative courts of appeal and the National Court of Asylum), which employs some 1 250 magistrates (1 248 in 2022).

III. The law of the host country

Having studied in France some 20 years ago (postgraduate level, advanced studies in public law, at the Faculty of Law in Bordeaux), I still remember vividly the impression made on me by the French system for reviewing the constitutionality of laws: under Article 61 of the 1958 Constitution, this review was only allowed by a special supreme court, the Constitutional Council, on an a priori basis, i.e. before the law was promulgated, and only at the request of certain State authorities or, at least (and this has been the case since 1974), a parliamentary minority, i.e. it could not be referred to by ordinary citizens. The Council of State refused to examine the constitutionality of a law - either directly or indirectly (in the context of an action for annulment of an administrative act held to be in conformity with a law, even if it was contrary to the Constitution - the theory of the 'screen law') - without considering itself entitled to review the 'general will', of which the law is the expression (see CE, 6 Nov. 1936, Arrighi)³. Some academics argued against broadening the scope of referrals to the Constitutional Council on the grounds that 'it is undoubtedly better to take the slightest risk of legislative slippage than to see legal instability develop'⁴. My impression was all the stronger given that the Hellenic Council of State, in the first decision in its modern history (1/1929, Ass.), had declared itself competent to review, indirectly, the constitutionality of the laws on which the administrative acts challenged before it were based, and that Article 93(4) of the Hellenic Constitution provides that 'the courts [i.e. all courts, but only indirectly/by way of exception] are required not to apply a law, the content of which is contrary to the Constitution'. Several years later, the 2008 constitutional revision introduced a new Article 61-1 into the French Constitution, which now allows any citizen, in the course of a legal action, to challenge the conformity of a legislative provision (applicable to the dispute) with the rights and freedoms guaranteed by the Constitution. The new system came into force on 1 March 2010, following the adoption of the necessary legislation, and since then the Constitutional Council has handed down around 1 000 decisions on such challenges ('priority preliminary rulings on the issue of constitutionality'). If certain conditions are met, the priority preliminary ruling on the issue of

3. See on all this and by way of information J.-F. Lachaume, *Droit administratif*, PUF, 13th ed. 2002, p. 31.

4. D. Lavroff, *Le droit constitutionnel de la V^e République*, Dalloz, 3rd ed. 1999, p. 244.

constitutionality, which is raised before the tribunal (either at first instance or for the first time even in cassation), is referred, by judgment of the competent supreme court (Council of State or Court of Cassation), to the Constitutional Council, which may repeal the provision if it considers it contrary to the Constitution [this power to declare invalid a legislative provision deemed contrary to the Constitution is entrusted in Greece only to the special Supreme Court - see Article 100(4) of the Constitution; on the contrary, the other courts, when, incidentally, they find a provision of law to be unconstitutional, simply do not apply it in the dispute in question. However, as has been noted⁵, when this power, which does not entail the annulment of the legislative provision, is exercised by a supreme court, such as the Council of State, it leads to the weakening of that provision, and it is precisely the exercise of this power that has gradually transformed the Hellenic Council of State into a constitutional court, giving it enormous political weight, given the political importance of the cases of public interest that it hears). It was therefore with great interest that I attended one of these hearings before the Constitutional Council, on 7 November 2023, during which a preliminary question from the Court of Cassation (ruling 999/12 September 2023) was discussed on the (un)constitutionality of the legislator's failure to provide for a remedy to allow the sale price by auction of seized intangible rights to be challenged before the civil courts. In a decision published on 17 November 2023 (2023-1068 QPC), the Constitutional Council ruled that this omission was contrary to the Constitution and decided that, until the relevant provision was adopted, and in any event no later than 1 December 2024, the date from which, according to the decision, the incomplete provision of the law deemed unconstitutional would be repealed, the provision applicable to tangible property would also apply in this case (apparently *mutatis mutandis*).

IV. The comparative law aspect of my internship

Although we learned very early on and are accustomed to saying that the Hellenic Council of State was inspired by the French Council of State, and although the Hellenic Council of State, created in its modern form in 1929, is characterised by the same 'functional duplication' as the French Council of State (jurisdictional and consultative powers exercised by the same people), this duality of functions is much more unequal in Greece: of the six chambers of the Hellenic Council of State, only one, the fifth, deals with the drafting of regulations, i.e. exclusively draft decrees, while the consultative competence of its General Assembly 'on matters of a more

5. See I. Sarmas, *The Democratic and Social Rule of Law* (in Greek), v. 2, Ant. N. Sakkoulas, 2003, pp. 710-711.

general nature, on the organisation and functioning of the jurisdiction [in this case the Council of State] and the administration of justice' is statistically insignificant (see Article 5(2)(b) of the Code on the Organisation of the Courts and the Status of Judges)⁶. Under these conditions, it would not be inaccurate to say that the Hellenic Council of State is a court, the country's supreme administrative court, and that the judges who sit on it throughout their careers are magistrates. This is irrespective of the Greek peculiarity of the consultative (and not deliberative) vote of Masters of Requests (i.e. judges with up to 25 years' service), except in a few cases (summary proceedings for non-admission without a hearing, emergency proceedings, opinions on draft decrees), and the fact that auditors do not take part in hearings and deliberations as independent rapporteurs of cases (except in the context of non-admission proceedings), since, by law (Article 1 of Codification Decree No 18/1989), the 'members of the Council' are only 'the President, the Vice Presidents and the Councillors of State'. Moreover, unlike the (compulsory) mobility of their French colleagues, the Hellenic Constitution already prohibits judges from participating in government (including related posts, even on the council), as well as from being assigned 'administrative tasks' (see Article 89(3) and (5)), and they are authorised only to 'be elected members of the Academy of Athens or of the teaching staff of higher education establishments', and to participate in councils or committees exercising disciplinary, supervisory or quasi-judicial powers and in committees for the preparation of legislation, provided that such participation is specifically provided for by law' Article 89(2)).

There are also differences, at the highest normative level, in the content of certain guarantees for the dispensation of justice: according to the provisions of Article 93(3) of the Hellenic Constitution, all judgments must be reasoned in a 'concrete and detailed/in-depth' manner and read at a public hearing and 'the opinion of the minority must be made public'. In France, on the other hand, although the (simple) statement of reasons is recognised as a 'fundamental guarantee of due process', in accordance with Article 6(1) ECHR, the Council of State has traditionally cultivated *imperatoria brevitatis*⁷, so that a brief list of the reasons given and the standard wording that 'none of these reasons is such as to allow the admission', for example, of the appeal (in cassation), are considered to be sufficient grounds for the judgment given (at least in non-admission proceedings), taking into account the reasoned conclusions of the public rapporteur (which would not be the case in Greece, where precisely this 'concrete and

6. On this point, see P. Pikrammenos, *Le Conseil d'Etat hellénique et ses fonctions consultatives*, *Theorie et pratique du droit administratif*, 4/2001, p. 367 et seq.

7. See Pacteau, *op. cit.*, pp. 286 and 287.

detailed statement of reasons' is considered essential for the legitimisation of the judicial function in the eyes of the parties and the public). Furthermore, what in Greece is constitutionally imposed as the highest manifestation of (individual) judicial independence, namely the publication of dissenting opinions, in France is considered a violation of the secrecy of deliberations and is denounced as an attack on the collegiate dispensation of justice.

It is also true that the additional time needed to comply faithfully with the aforementioned constitutional provisions is linked to the total length of the trial (which, as we know⁸, is often far from reasonable in Greece, according to the case-law of the European Court of Human Rights). The French administrative justice system has no problems with delays: in 2022, the average time taken to reach a decision by the Council of State was 7.5 months, by the administrative courts of appeal just over 11.5 months, by the administrative tribunals less than 10 months and by the National Court of Asylum 6.5 months. The effectiveness of the system, as I was able to observe, is multi-factorial and due mainly to its rational organisation and operation.

V. The European aspect of my internship

During my internship, I did not have the opportunity to observe the implementation of or references to instruments of EU law or the ECHR and, above all, 'vertical' dialogue procedures between the Council of State and the CJEU (reference for a preliminary ruling) or the European Court of Human Rights (request for an opinion). However, I did have the opportunity to observe the adaptation in practice of the administrative litigation procedure to the well-known case law of the European Court of Human Rights, *Cress v. France*, judgment of 7/6/2001, according to which the 'government commissioner', who at the time was making a proposal for the resolution of the dispute (submissions) at the hearing, like the 'Advocate General' of the CJEU, could not take part in the subsequent deliberations (as he had done until then), as he could influence the outcome of the trial without being bound by the adversarial principle, in breach of Article 6(1)(b) of the Convention. Since the 2009 reform, the 'government commissioner' has been known as the 'public rapporteur', his conclusions are public and may be contested by the parties, including by means of a memorandum, within a time limit set by the President of the panel (memorandum for the deliberations) and, above all, even when present at the deliberation, the public rapporteur does not take the floor.

8. See ECtHR, 21/12/2010, *Athanasίου and others v. Greece*, and among the most recent the judgment of 8/11/2018, *Malliakou and others v. Greece*.

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

It is clear that a court that delivers its judgments within 7.5 months of the application being lodged, without compromising the quality of the handling of cases and of the judgments handed down (subject only to the more than cursory reasoning of a large number of judgments, partially offset by the submissions of the public rapporteur, when his involvement is provided for), is an example to be followed. A number of factors (legislative framework, staffing and infrastructure, traditions and practices) contribute to this: firstly, once the application or appeal (summary written statement) has been lodged with the Council of State (electronically, via the Télérecours application, in the vast majority of cases) and deemed inadmissible prima facie by the experienced registrars of the Council of State, it is forwarded to the presidents of the chambers so that it can be dismissed by order. Otherwise, the file is kept at the court registry until the necessary notifications have been made and the file (which is normally digital) has been completed, and in particular until the filing, within a period of 3 months, of the prescribed additional written statement, in which the pleas raised in the initial written statement are developed. If the additional written statement is not lodged within the 3-month time limit, the appeal or application will likewise be dismissed by order of the court. If not, it is forwarded to the president of the chamber concerned so that, depending on the seriousness and complexity of the case, he can assign it to one of the chamber's rapporteurs (auditor, Master of Requests or Councillor of State) - and not in an automated fashion. The rapporteur prepares the case within a reasonable time and drafts a brief memorandum which he brings to the attention of the president of the chamber. The latter delegates to one of the two most senior councillors in the chamber, appointed (and designated by the head of the Administrative Claims Division) as 'assessors' (of the rapporteurs' notes and the case files), the review of the memorandum and the case file, which is the subject of a memorandum that is even shorter than that of the rapporteur (2-3 pages). The subsequent hearing (on a certain day each month) is attended by the president of the chamber, the two assessors and all the other members of the chamber, including the public rapporteur (18 in total at the chamber hearing I attended), during which the rapporteur presents the case (at the hearing I attended, there were five cases presented by three different rapporteurs) and receives comments from the assessor, the president and any other member of the chamber who has dealt with a similar case, has an idea of the solution to be adopted, etc. (this is also how case-law is homogenised at chamber level). If the assessor agrees with the rapporteur's memorandum and no one else disagrees, and the case does not

present any particular legal difficulties, the file is forwarded to the public rapporteur to prepare his (independent) submissions. If he agrees, the president and then the registrar of the chamber are informed so that the case can be entered on the docket for the next hearing of the chamber 'sitting alone' (the docket for the hearing I attended included 25 cases). Public hearings under this fast-track procedure are short (the hearing I attended lasted less than 2 hours). Then, after the lawyers and the public have left the room, the deliberations take place, followed by a vote on the draft prepared by the rapporteur.

On the other hand, if, during the hearing, the chamber appears divided, or if the case presents a particular legal difficulty, or if, at the next stage, the public rapporteur does not agree with the solution proposed by the rapporteur, the case is brought to the hearing according to the 'normal' procedure, i.e. before an enlarged panel of 'two chambers combined'. In this case, there are fewer cases on the docket (eight at the hearing I attended) and deliberations naturally last longer. In one case, which I attended, the rapporteur had prepared two draft judgments. A very productive discussion took place during the deliberations, at the end of which a vote was held and the decision taken by a majority, after which there was a debate on the exact wording of the judgment (in which, of course, no dissenting opinions were expressed). A few days later, the judgment was read.

VII. Benefits of the internship

Reference has already been made to the procedure before the Council of State, which enables cases to be sorted and 'matured' as soon as the application is lodged, and to dematerialised workflows (although not entirely in all chambers), as factors in the system's success. Similar efforts at reform are currently under way in the Hellenic Council of State, and this experience will be used to develop and implement the corresponding plans. There are, of course, other factors contributing in the same way, the transfer of which to the current Greek system comes up against prima facie restrictive rules, budgetary constraints or different traditions:

- the provision of a budget of, for example, 476.3 million euros in 2022, which is managed by the Council of State through its General Secretariat, solely for administrative justice (whereas the total budget of the Hellenic Ministry of Justice for 2024 is 625 million euros compared with 581 million euros in 2023, from which the salaries of the magistrates and court officials and the Ministry's civil servants are paid),
- flexible recruitment procedures, especially in sufficient numbers (for the French Council of State alone, the number of staff was set at 442 for 2022, including 70 assigned to the

Administrative Claims Division), enabling the recruitment, on a contract basis, of appropriate specialists, for example graphic designers for the Information and Communication Department and archivists for the Library Department, and on the other hand, young lawyers (as legal assistants - currently 11 in number, or as trainees/decision-making support - currently 50

➤ in number), confidence in the abilities of the youngest members of the body and the allocation of tasks and posts on the basis of merit and not primarily seniority (as a presumption of experience).

Many other experiences gained during the internship were also valuable, and the presentation and related documentation provided will be used to improve existing structures and procedures or to create new ones:

➤ the system of administering and managing administrative justice by the General Secretariat of the Council of State (whose Senior Councillor of State I had the opportunity to meet),

➤ the key role played by the heads of the lower courts (administrative tribunals and administrative courts of appeal), who undertake to meet the objectives agreed with the General Secretariat of the Council of State (and for which they are provided with the appropriate material and human resources) by themselves inspecting and monitoring the magistrates in the courts they head [my meetings with the judicial head of the Administrative Tribunal of Paris, the largest in the country, with 83 magistrates, and with the Councillor of State in charge of the Administrative Courts Inspection Mission, who is only responsible for inspecting the courts, as well as disciplining (but not inspecting) their magistrates, were particularly enlightening in this respect - the relevant information will be brought to the attention of the General State Commissioner in charge of the Hellenic administrative courts],

➤ the consultative powers of the College of Ethics of Administrative Justice (whose body of opinions will be forwarded to its Greek counterpart),

➤ the organisation and operation of the Library of the Council of State (whose 'Charters' will serve as inspiration for the new regulations of the Library of the Hellenic Council of State),

➤ the information and communication policies of the Council of State's Department of the same name, etc.

VIII. Suggestions

It is very difficult to imagine how a programme that has been running for several years and has undeniably been a success, which is also an essential part of ACA-Europe's activities, such





as the exchange programme for judges, when it is organised in such an exemplary and professional manner as my internship with the welcoming French Council of State, can be improved upon. It is well understood that the maximum benefit from such exchanges can only be achieved if the judges on the internship have an excellent knowledge of the working language of the host court, so that they can follow its work easily and in full (i.e. not only to get to know each other and improve mutual understanding of the Councils of State and Supreme Administrative Courts, but also to exchange ideas, experience and good practice), without needing to communicate in a third language (which would also be a burden for the judges of the host court). It is also useful for judges on internships to gather a certain amount of information in advance about the legal system of the country they are going to visit and about the host court (organisation, operation and, in particular, jurisdiction). In this respect too, the organisation of my internship at the French Council of State was exemplary, since I was given all the relevant information in advance so that the programme of the visit could be tailored to my specific needs and interests, which was the case. In view of the above, and in addition to thanking the Association and the Council of State for their warm welcome, I can only hope that the programme will be continued and extended so that more colleagues can benefit from these fruitful exchanges.

