CONSEIL D'ÉTAT

LISTENING TO CITIZENS, SERVING THE RULE OF LAW

2019 OVERVIEW OF ACTIVITIES FOR THE CONSEIL D'ÉTAT AND THE ADMINISTRATIVE COURT SYSTEM

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In 2019, the administrative court system worked once again to safeguard the rule of law, address citizens' needs and nourish the debate of ideas by providing its views on the conduct of public policy.

Bruno LASSERRE
Vice-President of the Conseil d'État

“ In 2019, the administrative court system continued to open up to the society it serves to gain a better sense of the tensions that run through it and the upheavals it faces, to be more accessible and to make its activities more transparent by showing more clearly what it is and what it does.

With regard to litigation, the Conseil d’État, the administrative courts of appeal, the administrative tribunals and the National Court of Asylum have seen a sharp increase in the number of new claims and have stepped up their efforts to continue to try cases smoothly, within satisfactory timelines. The most senior bodies of the Conseil d’État also met on several occasions. A number of key decisions resulted, for example, in the Litigation Assembly defining the regime of State responsibility in relation to unconstitutional laws and clarifying its jurisprudence with regard to soft law.

The Conseil d’État was also very active in terms of law-making and generating ideas: its advisory bodies examined all major reforms proposed by the Government and delivered important opinions, particularly on plans for constitutional reforms and the revamping of the pension system. The Report and Studies Section organised numerous symposia where academics, judges, administrators, lawyers, private-sector actors and students met to exchange views. It also authored a landmark study on sport and another on experimentation, giving it an opportunity to reflect further on public governance. This reflection will be continued up until the summer of 2020 as part of preparations for the next study, on the assessment of public policy.

To fulfil these missions in an increasingly relevant fashion, the administrative court system has continued to open up to the society it serves, to gain a better sense of the tensions that run through it and the upheavals it faces, to be more accessible and to make its activities more transparent by showing more clearly what it is and what it does.

For example, the Conseil d’État invited several delegations comprising members of the Senate and the National Assembly to attend summary proceedings, meetings relating to the management of the administrative court system and the work of the administration sections, or sittings of the General Assembly. All the facets of our work were highlighted, thereby consolidating the relationships of trust that we maintain with Parliament. Our ties with academia were further strengthened by awarding the Conseil d’État’s third series of prizes for public law dissertations and by hosting regular visits by students to hearings. The ongoing dialogue with our judicial and financial counterparts was deepened by holding symposia in partnership with the Cour de Cassation and the Cour des Comptes.

In 2019, the international opening up of the administrative court system was reflected by an exceptional conference of the heads of the Supreme Courts of the Member States of the Council of Europe, which was held in the Conseil constitutionnel, the Conseil d'État and the Cour de Cassation. Delegations from the Conseil d'État also travelled to China and Mexico. In the context of a globalised world, where economic and legal interactions between countries are becoming more complex by the day, these international exchanges are essential for ensuring the coherence of the law and enriching it with the experience of other countries.

"The Télérecours Citoyens app has been a real success, making the public justice service more fluid and closer to citizens.

The increasing move towards openness went hand in hand with the continuation of projects aimed at facilitating access to the administrative courts. The Télérecours Citoyens app, which now enables all litigants, where they are not represented by a lawyer, to easily file a claim and communicate with the court virtually, has been a real success, making the public justice service more fluid and closer to citizens. This closer relationship is expected to grow thanks to the ongoing development of oral proceedings within the Litigation Section. This unit is already experimenting with means of facilitating oral exchanges with the parties at hearings in order to give litigants more opportunity to speak and thus help judges to better grasp the underlying reality of the questions they must decide.

“The administrative court system is one that is on the move. It constantly observes the society around it, engages with it, nourishes it and is nourished by it in return.

As the administrative court system opens up to the outside world and becomes more porous to the society around it, it is also changing on the inside.

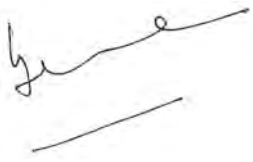
Its working methods are evolving: the development of oral proceedings, for example, has been complemented by the development of digital technologies, which hold out great promise. Within the framework of its new digital plan, which was recently approved, the administrative court system plans to invest in the development of artificial intelligence and innovative tools with a view to realising this potential while guarding against the risks it entails.

Its structure and the mind-sets of the women and men who are part of it are also evolving: for example, the administrative jurisdiction recently obtained “diversity” and “equality” labels as a tribute to the actions undertaken to foster diversity, inclusion and equality within our work community. These are the essential values that we continue to defend tirelessly.

As can be seen, the administrative court system is one that is on the move. It constantly observes the world around it, engages with it, is nourished by it and nourishes it in return, with an unvarying objective: serving our fellow citizens and preserving the rule of law that unites us as effectively as possible. While an unprecedented health crisis is raging as these lines are being written, it is clear that the administrative court system will continue along this path in 2020, true to its values and committed to adapting and modernising, with a view to assisting our changing world with resilience and determination.

It is in this spirit that this year we are inaugurating a new formula for the overview of activities of the Conseil d’État and the administrative court system. The aim of adopting this new, extended formula was to recount, decipher and explain the significance of the action undertaken by the Conseil d’État during the past year, while trying to make the reading process accessible to all, whether or not they are familiar with our institution.
I wish you a pleasant, instructive read.

Bruno LASSERRE



Judging

Conseil d'État

CASES REGISTERED

2017	2018
9,864	9,563
+1.9%	-3.1%
compared w/ 2016	compared w/ 2017

2019
10,216
+6.8%
compared w/ 2018

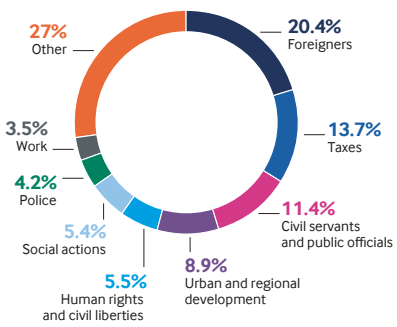
CASES JUDGED

2017	2018
10,139	9,583
-5.5%	-3.1%
compared w/ 2016	compared w/ 2017

2019
10,320
+7.9%
compared w/ 2018

Average timeline for delivering judgments
6 months
-35% between 2009 and 2019
(figures rounded)

Breakdown of cases registered by area of litigation



Administrative courts of appeal

CASES REGISTERED

2017	2018
31,283	33,773
stable	+8%
compared w/ 2016	compared w/ 2017

2019
35,684
+5.7%
compared w/ 2018

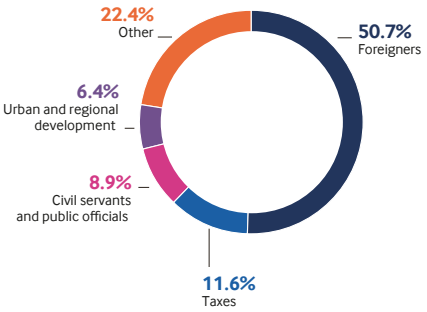
CASES JUDGED

2017	2018
31,283	32,854
+2.2%	+5%
compared w/ 2016	compared w/ 2017

2019
34,260
+6.8%
compared w/ 2018

Average timeline for delivering judgments
11 months
-13.7% between 2009 and 2019
(figures rounded)

Breakdown of cases registered by area of litigation



Administrative tribunals

CASES REGISTERED

2017	2018
197,243	213,029
+1.9%	+8%
compared w/ 2016	compared w/ 2017

2019
231,280
+8.6%
compared w/ 2018

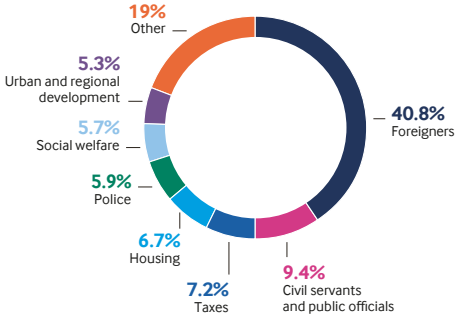
CASES JUDGED

2017	2018
201,460	209,618
+5%	+4%
compared w/ 2016	compared w/ 2017

2019
223,229
+6.5%
compared w/ 2018

Average timeline for delivering judgments
9 months
-21.5% bethween 2009 and 2019
(figures rounded)

Breakdown of cases registered by area of litigation



Advising

National court of asylum

CASES REGISTERED

2017	2018
53,581	58,671
+34% compared w/ 2016	**+9.3%** compared w/ 2017

2019

59,091

+0.9%
compared w/ 2018

CASES JUDGED

2017	2018
47,814	47,314
+11.3% compared w/ 2016	**-1%** compared w/ 2017

2019

66,464

+40.5%
compared w/ 2018

Average timeline recorded

7 months

Divided by 3 bethween 2009 and 2019
(figures rounded)

Asylum seekers' countries of origin

Albania **9%**	Bangladesh **5%**	Haiti **4%**
Georgia **9%**	Afghanistan **5%**	Mali **4%**
Guinea **8%**	Côte d'Ivoire **4%**	Nigeria **4%**
Democratic Republic of Congo **4%**		Other **44%**

Average timeline for examining bills

100%
are examined
in **less than two months**

Average timeline for examining draft regulatory decrees

99.4%
are examined
in **less than two months**

Number of texts examined

1,090
opinions delivered

NATURE OF TEXTS EXAMINED

93 Government bills	**3** legislative bills
57 draft ordinances	**619** draft regulatory decrees
20 bills concerning the law of the country	**283** draft non-regulatory decrees, individual, decrees, decisions

15
opinions delivered on questions for the Government or overseas authorities

Law-making

1

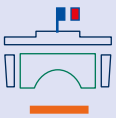
Preparation of the text

The Government prepares a bill. In accordance with the Constitution, it must submit the bill to the Conseil d'État for an opinion.

1

Preparation of the text

A member of the National Assembly or the Senate prepares a legislative bill. They may refer it to the Conseil d'État for an opinion.



2

Examination of the text by the Conseil d'État

Depending on the topic, the Government or legislative bill is assigned to one of five administrative sections (Home Affairs, Public Works, Administration, Finance or Social).

The text is first examined by a *rapporteur*,

then by the section,

and usually by the General Assembly of the Conseil d'État.

The Conseil d'État forwards a new version of its bill to the Government, together with an explanatory note, the **"OPINION"** of the Conseil d'État. Both are then examined by the Cabinet. In virtually all cases, the Government keeps the wording of the draft bill proposed by the Conseil d'État. The **"OPINION"** is published on Légifrance and on the website of the Conseil d'État.

The Conseil d'État forwards its **"OPINION"** on the legislative bill to the National Assembly or the Senate. The Deputy or Senator sponsoring the text can rely on this opinion to amend the legislative bill. The **"OPINION"** is published on the websites of the National Assembly and the Senate and the Conseil d'État.

3

Debate and vote on the law in Parliament

The Government or legislative bill is placed on the agenda of the National Assembly or the Senate. The text is examined in committee and then debated in a public sitting. It may be amended by parliamentarians, and is then adopted.

4

Possible decision by the Conseil constitutionnel

If a law is referred to it, the Conseil constitutionnel verifies, within one month, that the law that has just been adopted is constitutional.

5

Enactment of the law

The President of the Republic enacts the law, which is published in the Official Gazette.

What do the opinions of the Conseil d'État involve?

The Conseil d'État does not give its view on political choices. Rather, it delivers independent legal opinions. It verifies that the Government or legislative bill:

- Is compliant with the law, the French Constitution, and European and international commitments,
- Is understandable and applicable,
- Offers the best solutions for reaching the goals it has set itself.

Dispute resolution

A citizen, association or business is entitled to challenge a decision by the administration (the State, a local authority or public institution).
For example, in the event of refusal to grant approval for social assistance, a building permit or an urban development project, a prohibition on demonstrating or organising an event, or an entry ban, they may file an appeal with the administrative courts.

Stages in the judgment

1 → 2 → 3 → 4

Pre-trial phase
The appeal is examined by a judge.
The administrative authority concerned is asked to reply in writing.

Hearing
Lawyers present the facts of the case and their arguments.
The "*rapporteur public*" (consultant judge), a judge from the court, proposes the legal solution they deem most appropriate.
This is their personal analysis; they do not contribute to the judges' decision.

Discussion
At the end of the hearing, the judges discuss the case in order to reach a decision.
The decision is taken on a joint basis, and there is always an uneven number of judges to ensure there is a majority if it comes to a vote.

Decision
The **"DECISION"** is handed down around 15 to 20 days after the hearing.

Opting for mediation rather than a long trial

An alternative route exists for claimants in dispute with the administration: mediation.
A mediator is appointed at the request of the parties or the judge and can put forward a range of proposals aimed at reaching an amicable agreement.

What if the case is urgent?

Certain situations require the courts to act quickly. This is why a special procedure has been created, known as summary proceedings *(référé)*. This provides a means of asking the courts to take urgent provisional measures. The preliminary investigation is shortened; the hearing is held in a few days with a single judge; and the decision can be handed down within 48 hours.

The administrative courts

Administrative Tribunal

In the majority of cases, the claimant first files a claim with the administrative tribunal.

Administrative Court of Appeal

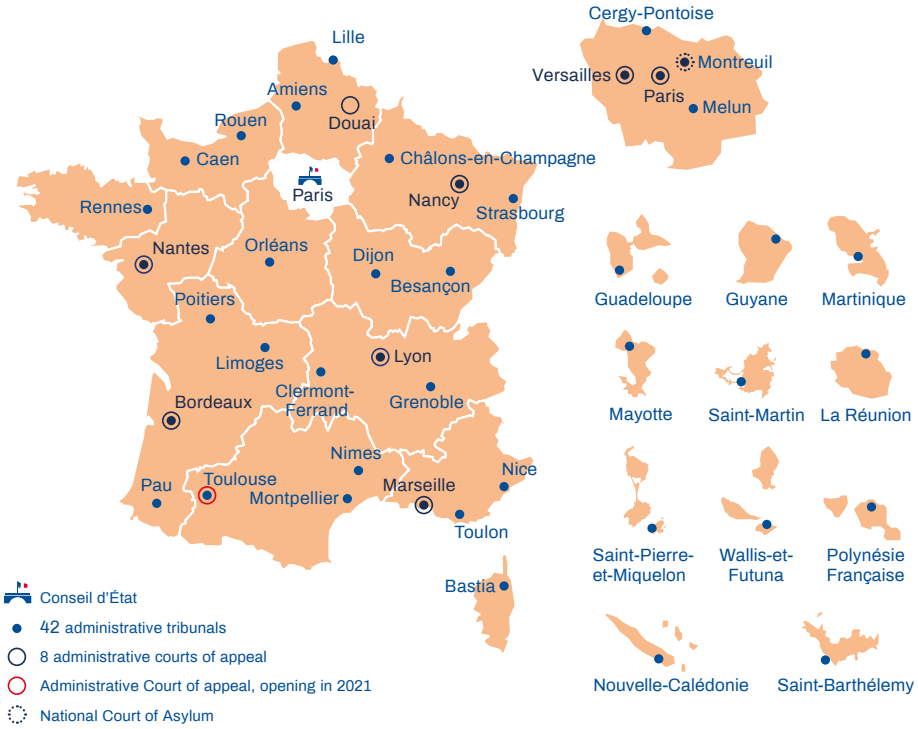
If the claimant wishes to appeal the decision of the administrative tribunal, their case is examined by an administrative court of appeal.

Conseil d'État

The Conseil d'État is the court of last instance and only intervenes after the administrative tribunal and the administrative court of appeal. There is one exception: when an appeal is referred to it directly concerning decisions by the Government or an independent administrative authority.

The Conseil d'État and the administrative court system

Map of courts



Staffing

(as at 31 December 2019)

232
active members of the Conseil d'État

427
officers of the Conseil d'État

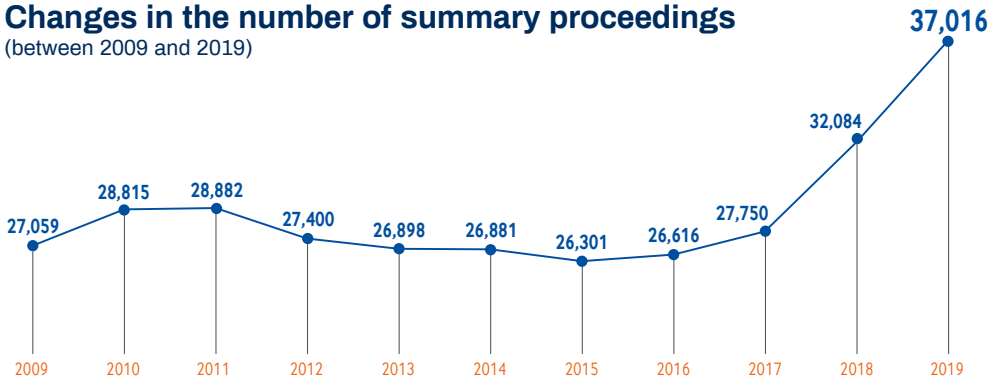
1,220
judges in the administrative tribunals and administrative courts of appeal

1,638
court registry officials in the administrative tribunals and administrative courts of appeal

602
officers at the National Court of Asylum

Changes in the number of summary proceedings

(between 2009 and 2019)



Expedited procedures

(stays and summary proceedings)

Administrative tribunals
34,880

Administrative courts of appeal
1,664

Conseil d'État
472

1,040
mediations
66% of the mediations undertaken at the initiative of the courts resulted in an agreement.

205,365
appeals filed electronically via **Télérecours**) of which
11,174 were filed through **Télérecours Citoyens**
(a dedicated app for private individuals without legal representation).

Increasingly open and accessible administrative justice

The Conseil d'État serves the rule of law by building a closer relationship with citizens and facilitating access to administrative justice. Once again this year, it demonstrated its commitment to greater openness and dialogue and its central role in debating ideas.

Addressing citizens' needs in practice

By simplifying the wording of decisions, developing new tools to help litigants, promoting administrative mediation, working to reduce the timeline for delivering judgments and providing citizens with useful answers, sometimes using expedited procedures, the Conseil d'État pursued its efforts to ensure high-quality administrative justice that is accessible, simpler and close to citizens throughout 2019.

Télérecours Citoyens: for easier access to justice

Introduced in late 2018, the Télérecours Citoyens app enables private individuals without legal representation to submit cases to the administrative courts quickly and easily. In 2019, the app proved its worth, with a steady increase in the number of users.

The Conseil d'État launched the Télérecours Citoyens app in late 2018 following on from Télérecours, which was piloted in 2005 in the Conseil d'État and certain courts in the Ile-de-France and then rolled out nationwide in 2013. Its use was made compulsory on 1 January 2017 for all parties represented by a lawyer and for the major administrative authorities.

Percentage of cases filed electronically in 2019:

70%
of cases heard by the administrative tribunals

90%
of cases heard by the administrative courts of appeal

75%
of cases heard by the Conseil d'État

Télérecours Citoyens allows any claimant, citizen, association or business that has not engaged a lawyer to lodge an appeal with an administrative court electronically. With Télérecours and Télérecours Citoyens, 100% of all procedures can now be handled online, ensuring easier access to justice for litigants and more efficient work for all actors within the administrative justice system.

To make the Télérecours Citoyens app as simple and intuitive as possible and facilitate access by non-specialist audiences, the Conseil d'État teams worked on its design in 2017-2018 with a user club. Composed of associations dealing with disadvantaged groups, this club helped to finalise the app with a view to improving its ergonomics, testing and fine-tuning the functions, and simplifying the legal terms. The app was then field tested from May to November 2018 in the administrative tribunals of Cergy-Pontoise and Melun and in the Conseil d'État, and then rolled out nationwide in late 2018.

11,174
cases filed via Télérecours Citoyens in 2019

The steady rise in the voluntary use of Télérecours Citoyens throughout 2019 (18.4% of eligible appeals in December 2019 compared with 7.3% in January) shows that litigants are increasingly relying on the new tool. For 2019 as a whole, 13.1% of litigants who submitted an appeal to a court without the assistance of a lawyer did so via the Télérecours Citoyens app.

This figure conceals some disparities: app usage was over 30% for urban development disputes in the courts and 23% for disputes concerning the civil service, but only 6.5% for social disputes (involving earned income supplement, job centres, personalised housing assistance, etc.), whereas the latter account for a large share of the cases taken up by the administrative tribunals. In the light of these results, fresh discussions are underway on making certain changes to the app with a view to further facilitating access for people who are not very familiar with digital technology and legal language.

Télérecours Citoyens, which can be accessed via the website www.telerecours.fr, offers many advantages for litigants: real-time monitoring of their case, option of receiving notification via email, reduction of costs due to the absence of postage and photocopies, and secure and simplified communication with the administrative courts. Unlike Télérecours, Télérecours Citoyens is not compulsory: appeals can still be filed at the court's reception desk or by mail.

Geneviève VERLEY-CHEYNEL
President of the Lyon administrative tribunal

What has the uptake been for Télérecours Citoyens by litigants in your tribunal?
With a Télérecours Citoyens utilisation rate of 17.3% of eligible cases in 2019 for the Lyon administrative tribunal, which is slightly higher than the nationwide average, we can say it has been a success.
It has been particularly widely used in cases relating to the civil service, higher education grants, urban development and taxes.
On a day-to-day basis, users have become accustomed to communicating digitally with the tax authorities or the family allowance fund (CAF), so using an app to file an appeal with the administrative tribunal is a natural next step.

Has this led to a change in the relationship between the tribunal and claimants?
The app has vastly simplified communication between the tribunal and litigants. The latter can monitor their case in real time and react to our requests, which results in significant time savings for document management.
Yet the processing of cases remains the same, regardless of the way cases are referred to the tribunal: people sometimes have to be reminded of this, because litigants might think that using the app means the judge will hand down their decision more rapidly.

How has the introduction of this new procedure played out in your tribunal?
For the registrar responsible for proceedings, the Télérecours Citoyens app has made it possible to harmonise the processing of cases with numerous advantages: fewer paper files to be entered, greater transparency for applications completed online – even though data sometimes have to be corrected because a number of citizens are not used to the rules of litigation – as well as savings on postage fees. ■

The 20th anniversary of summary proceedings *(référé)*

As far as administrative justice is concerned, the introduction of summary proceedings 20 years ago marked a milestone. A symposium organised in November 2019 at the Conseil d'État with the Litigation Section and the Report and Studies Section, in partnership with the Bar Association for the Conseil d'État and the Cour de Cassation, looked back on the issues and impacts of the creation of administrative summary proceedings.

The introduction of the urgent application for release *(référé-liberté)* or suspension *(référé-suspension)* (Act of 30 June 2000) was a real revolution, as was noted by the different speakers, members of the Conseil d'État and lawyers and law professors who expressed their views at this symposium devoted to 20 years of administrative justice under expedited procedures.
The introduction of summary proceedings radically changed the relationship between citizens and the administrative justice system as well as the practices of judges and lawyers. Now, judges are closer and more in touch with the concrete situation as the dispute is shaping up, with a view to intervening in good time: the timeline for justice henceforth matches the timeline for administrative action.

40%
The increase in summary proceedings over a five-year period

In 2019, summary proceedings were used in 40% more disputes than in 2015. Today, urgent applications for release or suspension account for the majority of cases submitted

Symposium on 20 years of summary proceedings.

to urgent applications judges *(juges des référés)*. With 21,225 new applications in 2019, i.e. nearly 10,000 more since 2015, they have become a preferred tool for litigants.

Recently, there has been a sharp increase in the number of summary proceedings: 400 ordinances *(ordonnances)* – decisions taken by emergency applications judges – were handed down in 2019 by the Conseil d'État as compared with 366 in 2018. This trend has been borne out in 2020 during the COVID-19 health crisis, with 150 ordinances handed down solely for the period from 16 March to 1 June 2020.
The introduction of summary proceedings enabled the dissemination of a culture of urgency within the administrative court system. It also led to the creation of a space for oral adversarial debate in an essentially written procedure. A necessity in summary proceedings owing to the urgency and nature of the questions raised, oral debate at the hearing forms the high point of the trial. The ensuing dialogue between the judge and the parties has proven its effectiveness by gearing the debate to the heart of the litigation, bringing about changes in positions on all sides and allowing a concrete, lasting solution to emerge as part of a co-construction process, whenever a case lends itself to such an approach.

Urgent applications for suspension or release

Applications for suspension allow for urgent applications to a judge for the suspension of execution of an administrative decision (for example a building permit, refusal to grant a residence permit, etc.). The applicant must provide proof that there is an urgent need and show that there is a serious doubt as to the legality of the decision. Measures imposed under summary proceedings are provisional, until the judge rules on the merits.

Urgent applications for release, as set out in Article L. 521-2 of the French Code of Administrative Justice, enable the judge to order, within 48 hours, any measures needed to safeguard a fundamental freedom which the administration, in the exercise of one of its powers, has allegedly breach in a clear and serious manner. To win the argument, the claimant must prove the existence of an urgent situation that requires the judge to act within 48 hours.

POINTS OF VIEW | **Summary proceedings: a significant advance and an incentive for administrative justice?**

Louis BORÉ
President of the Bar Association for the Conseil d'État and the Cour de Cassation

The introduction of summary proceedings really was a revolution for judges in the administrative courts but also, and perhaps first and foremost, for litigants and lawyers. Previously, proceedings in the administrative courts were rather slow and essentially written. In 2000, everything changed: proceedings became much more rapid, much more oral, with genuine and extremely effective expedited procedures. Summary proceedings offer a means of challenging the fait accompli policy of the administration, which must henceforth answer to the judge.
For us lawyers, our upstream advisory role is strengthened with litigants, so that they understand what can and cannot be argued before the urgent applications judge, since summary proceedings are subject to certain conditions. ■

Élisabeth BARADUC
Former President of the Bar Association for the Conseil d'État and the Cour de Cassation

I believe that the summary proceedings reform was viewed as a major upheaval in administrative disputes practices for three reasons: first, because it offered litigants a range of means for exercising their rights; second, because it gave the urgent applications judges different tools for dealing with emergency situations; and third, because the reform introduced oral debate, which makes the hearing the high point of the trial. For lawyers, the trial takes on new life at the hearing: it offers an opportunity for an adversarial debate and a negotiation between competing interests, in which the urgent applications judge plays an active part. In any event, whether they win or lose, litigants leave the hearing calmer, with the certainty that they have been heard. ■

Camille BROYELLE
Professor of public law at the University of Paris II - Panthéon-Assas

Before this reform, different elements had shown just how thinly the system was stretched and highlighted the need to legislate. To put it simply, administrative judges lacked the tools needed to protect private individuals. It is therefore safe to say that, especially with the urgent application for release procedure, this reform "saved" the administrative court system. Moreover, these procedures offer urgent applications judges a tool that helps adapt public action. Over the years, the requests made and the answers provided by urgent applications judges have helped the administration to move forward.
Judges impose positive legal obligations that correct the deficiencies in the administration. The purpose is not only to prevent the administration from "doing harm" but also to help it act in a sometimes quasi-collaborative process between the judge and the parties. ■

Mediation in the spotlight

In December 2019, the Conseil d'État held the first national conference on administrative mediation. The challenge was to share experiences, disseminate good practices and make an initial assessment of the actions undertaken, with a view to encouraging the development of this alternative method of dispute resolution.

Administrative mediation, which was created in 2016 via the Act on the modernisation of justice in the 21st century, is increasingly recognised as a genuine alternative to judicial proceedings, offering time savings and increased effectiveness for the benefit of both parties.
In quantitative terms, the number of mediations organised by the administrative tribunals has risen sharply, from 400 in 2017 to 786 in 2018[1] and 1,040 in 2019. Generally organised at the judge's initiative, mediations primarily deal with disputes relating to the civil service, public procurement and urban development. On a more qualitative level, over 66% of the cases that went to mediation resulted in an agreement. To quote David Moreau, Deputy Secretary General of the Conseil d'État responsible for the administrative courts and digital technology, "mediation makes it possible to bring litigation down to the human level and encourages the parties to focus on the real issue. Especially with civil service disputes, it helps to calm the employment relationship between the administration and its official and limits the risk of subsequent appeals."

Convinced of the value of mediation as an alternative dispute resolution method, the Conseil d'État has since 2017 worked towards its introduction in administrative justice, particularly within the framework of experimentation with the regulatory mechanism of mandatory prior mediation. As David Moreau notes, however, above and beyond the procedures implemented, the development of mediation implies "a genuine culture shift." In December 2019, for example, the Conseil d'État decided to go further by holding the first national conference on administrative mediation. The signature of an agreement between the Conseil d'État and the Bar Association for the Conseil d'État and the Cour de Cassation in May 2019 also reflects this common desire to promote and develop mediation.

In 2019, 66% of the mediations organised by administrative judges resulted in an agreement.

1 The figures given concern the administrative tribunals, as mediation is rarely used in the courts of appeal.

Over 30 actors in the administrative mediation field shared their feedback with over 400 major decision-makers from the public and private spheres.

" IN THEIR OWN WORDS

Hervé CARRÉ
Mediator for the city of Angers and the Departmental Council of Maine-et-Loire and President of the Association of Mediators for Local Authorities (AMCT)

Administrative disputes concerning local authorities are wide-ranging and relate to the powers of these bodies: in the case of a "*département*" (county), the cancellation of the self-care benefit ("*prestation autonome*") or the earned income supplement ("*revenu de solidarité active*"). In general, the dialogue is complicated to establish because it involves actors with very different positions. On the one side, there is the administration, bolstered by its authority and expertise, and on the other side, a private individual, who discovers that what they want to obtain depends on a regulation or legislative instrument. The gap is enormous: the majority of people have the impression that the battle is already lost. The aim of mediation is to try to create the conditions for rebalancing the dialogue so that the citizen can feel more confident and handle the debate with the local authority in a more relaxed manner. ■

Charline NICOLAS
Director of legal affairs for Public Assistance – Hospitals of Paris (AP-HP)

A long-standing practice in the civil service, mediation in medical malpractice cases took off at the same time as patients' rights. Mediation helps rebalance the doctor-patient relationship to the patient's benefit. It is inherent to medical practice: the first mediators are the doctors in charge of the patient, and mediation at the source is the best practice. The mediating doctor is the focal point for the healthcare team when the bond of trust is broken.
This professional quality is essential.
The mediating doctor's outside view and expertise help the patient understand the dysfunctions in the patient management process and better able to secure compensation. If an initial mediation at the local level does not succeed, to the use of a mediator makes it possible to move the debate outside the immediate setting. The Legal Affairs branch sometimes intervenes alongside the central mediator, with a view to symbolically recognising the fault committed by the hospital administration. Thus, mediation plays a certain role in appeasing the medical dispute, for the patient and the medical team alike. ■

Opening up to different audiences and to society

In 2019, the Conseil d'État maintained and enhanced its policy of opening up to the outside world. From the relationship with Parliament to partnerships with universities and hosting interns and school groups, the Conseil d'État threw open its doors to enhance the visibility of its actions for the citizens and actors who contribute to the rule of law.

A sustained dialogue with parliamentarians

Since the 2008 constitutional reform, the Conseil d'État has also provided Parliament with independent legal opinions. In this respect, it wished to open its doors more fully to parliamentarians in order to better inform them about its role.

A traditional adviser to Government, the Conseil d'État has, since the adoption of the 2008 constitutional reform, been entrusted with a broader legislative advisory role exercised at the request of the Presidents of the National Assembly and the Senate for allowing Parliament to obtain an opinion on legislative bills prior to their examination in committee. Accordingly, in 2019, three legislative bills were submitted to the Conseil d'État.
So that Parliament can avail itself fully of this option, the Conseil d'État regularly opened its doors to parliamentarians in 2019. Meetings organised with the different sections of the Conseil d'État and attendance at summary proceeding hearings all provided opportunities for explaining to the invited parliamentary delegations – seven in 2019, totalling nearly 70 Deputies and Senators – the functioning, expertise and missions of the institution.

“ IN THEIR OWN WORDS

Sophie PRIMAS
Senator and Chair of the Committee on Economic Affairs

At my request, in 2019 the President of the Senate referred to the Conseil d'État a legislative bill for guaranteeing consumers' freedom of choice in cyberspace, which aims to set a new regulatory framework for the digital economy. Ensuring a secure legal basis for this bill was particularly justified in a field where few texts are yet in force. I greatly appreciated the approach taken, which was constructive yet candid. By acting as a catalyst for parliamentary initiative rather than a censor, the upstream advisory role operated within a short period, the only timeline compatible with those of parliamentary debates. ■

Pierre MOREL-À-L'HUISSIER
Deputy and member of the Committee of Constitutional Law, Legislation and General Administration of the Republic

Drafting a legislative bill is a complex affair. The National Assembly's legal unit advises us on the appropriateness of legislating, provides us with suitable documents and gives us an overview of positive law, but the actual drafting of a text remains at our discretion as parliamentarians, and the task is often difficult.
Accordingly, I have referred texts to the Conseil d'État on two occasions, and I can assure you that its administrative sections did a tremendous, outstanding job: they dissected the text and analysed each article to ensure that the text met legislative needs. When the rapporteur for a legislative bill arrives at their committee with a text redrafted by the Conseil d'État, the analysis of the text is more serene. This does not hinder the work between the rapporteur and the committee members; rather, it provides a stronger legal basis for a better dialogue. ■

Visit by parliamentarians.

Hosting students

By hosting interns, organising discovery courses and introducing educational projects with higher education institutions, the Conseil d'État and the administrative courts have for some years been endeavouring to assist future generations of lawyers at a pedagogical level and, more broadly, help them discover how administrative justice operates.

From contributing to the training of future legal practitioners to offering high-quality professional experience to young people in conjunction with administrative court internships, showing that the law is a living matter, and making future citizens aware of administrative justice challenges and the role of the Conseil d'État as a guarantor of the rule of law: the Conseil d'État has been stepping up its initiatives aimed at students to address all these challenges.

35
visits organised in 2019 for students of universities or *"grandes écoles"*

over 100
students doing Master's internships

In 2015, the Conseil d'État launched an **award for doctoral theses on public law** to encourage and support university research in this field. Over 50 these were submitted for the third round in 2019, and the award went to Louis de Fournoux for his work on "the impartiality of the administration."

On 25 November 2019, the Conseil d'État hosted the **27th final of the National Public-speaking and Moot Competition** organised by the students of Paris II – Panthéon-Assas, before a jury chaired by Cédric Villani. This afforded an opportunity to recall the growing importance of oral expression in the context of hearings.

In June 2019, the **Conseil d'État hosted a mock trial** on liability arising from an accident caused by a self-driving car. With the support of students from the Lyon National Institute of Applied Sciences (INSA) and companies working on these technological projects, students were able to argue the case with input from first-level judges known as "auditors" *(auditeurs)* from the Conseil d'État.

The Conseil d'État, a partner in an innovative approach for testing and applying the law

Launched three years ago on the basis of the collaboration between the Lyon Administrative Court of Appeal and the Law Faculty of the Catholic University of Lyon (UCLy), the annual organisation of mock trials gives 16 law students an opportunity to take on the roles of judges and lawyers. The exercise helps them grasp the problems related to concrete cases of technology under development, in the light of existing law, in a context of fictional cases. As notes Régis Fraisse, the President of the Lyon Administrative Court of Appeal and a member of the teaching team, this training exercise offers a means of showing precisely that "the law is not a subject disconnected from reality; it is directly related to societal issues and pursues a purpose, namely fostering coexistence."
These trials also dovetail with a project on a European scale conducted in partnership with other universities and selected in 2019 by the European Commission in conjunction with the Erasmus + programme.

“ IN THEIR OWN WORDS

Michel CANNARSA
Director of the UCLy Law Faculty

The Lyon Administrative Court of Appeal played a leading role in this project, both in advance, on the choice of subjects, and with regard to training and pedagogical support. For lawyers, practising on concrete cases provides useful food for thought. The students appreciate the opportunity they are given to participate in this innovative pedagogical format.
At the hearing before the Conseil d'État, students had the privilege of presenting their arguments to four masters of petitions (*maîtres des requêtes*), who participated in the deliberations. It was an exceptional experience, the kind that nurtures vocations.

Marjolaine MONOT-FOULETIER
Professor at UCLy - HDR, Director of legal clinics

For students, being able to project themselves, in practical terms, into their future profession lets them confirm or pinpoint their career path. Placed in a real courtroom situation, some really come into their own, much more so than in traditional academic settings.
Students also have a chance to grasp the reality of the law and the profession of lawyer: knowing how to adapt to a situation involving different issues and displaying creativity to resolve it.

An institution that opens its doors to citizens

Throughout the year, the Conseil d'État welcomes the general public, in particular schoolchildren. The aim is to awaken civic-mindedness in both schoolchildren and older visitors, and raise awareness of the principles and values of the Republic.

In 2019, the Conseil d'État organised 16 school visits, from primary school to high school. The programme included the discovery of the Palais Royal, an emblematic building, but also, and above all, the missions of the Conseil d'État with which these future community stakeholders are often unfamiliar. Together with establishments in Ile-de-France, particularly those located in priority education zones, which have chosen to introduce so-called citizens' itineraries to discover these institutions, the Conseil d'État runs guided tours and plays an educational role. It also works with associations such as the Ligue de l'enseignement or Expressions de France in pursuit of the same goal: not only helping audiences who are often removed from public life to discover the institutions and workings of the State but also opening up the range of possible options through the provision of information on career opportunities in the civil service.

More than 8,000 visitors passed through the doors of the Conseil d'État during **the European Heritage Days celebrated on 21 and 22 September 2019**. Guided by 45 officials and members of the Conseil d'État, they had a chance to discover the different sites where the Conseil d'État exercises its missions on a day-to-day basis. On Sunday morning, this educational itinerary was enhanced by the presence of the Vice-President, who opened the doors of his office to field visitors' questions.

Enriching the debate of ideas and dialogue

As an actor in the public debate in France that wishes to assist with the transformations of society and offer public officials solutions for responding in the best way possible, the Conseil d'État also contributes to the dialogue of jurisdictions at the European and international levels.

Martine de BOISDEFFRE
President of the Report and Studies Section

The ideas factory

Informing action but also proposing solutions: through its brainstorming and forward-looking activities, the Conseil d'État endeavours to enhance the effectiveness of public policy by combining expertise and pragmatism. In the course of the studies, reports, symposia, seminars and meetings it organised in 2019, the Conseil d'État confirmed its role as an actor in the public debate.

The goal set by Bruno Lasserre is that "the Conseil d'État shall assert itself ever more strongly as a crossroads of reflection on public policy and a breeding ground for ideas aimed at improving public governance." How does the Report and Studies section help to achieve this objective and thus contribute to the "ideas factory"?

The mission of the Conseil d'État is to be a proactive source of ideas on the conduct of public policy. This mission, which is entrusted to the Report and Studies Section, is spelled out in Article L. 112-3 of the Code of Administrative Justice. The idea is for the Conseil d'État to participate in the debate of ideas by reaching an audience that is as broad and varied as possible. This also means making concrete, useful proposals to public decision-makers with a view to improving the conduct of public policy. This is how it participates in the "ideas factory".

How does your work feed into reflections, both within the Conseil d'État, in order to nurture the other sections and contribute to collective intelligence, and on the outside?

The section works on a cross-cutting basis with the other sections. Its way of working lets it leverage their expertise while circulating knowledge and ideas and feeding the debate within the Conseil d'État. A steering committee composed of members from the other sections is set up for each annual study. Likewise, the working groups, which prepare the studies commissioned by the Government, comprise members of all sections of the Conseil d'État.
The section organises symposia with the other sections. Its European law delegation answers questions raised by the advisory sections during the examination of texts. The 2016 study, on the simplification and quality of the law, provides a topical example of the way in which the section's work can feed into the other functions of the Conseil d'État. For the first time, the study proposed commitments for the Conseil d'État in its advisory activity (raising its level of requirements for impact studies, etc.) as well as its dispute settlement function (supporting the development of mediation, etc.). This has indeed been the case.

In practical terms, how has the opening up of the Conseil d'État affected the Report and Studies Section?

For the Reports and Studies section, the exercise of its duties forms part of a process of openness and ongoing dialogue with the administration, the legal professions, academia and civil society, both in France and abroad. This determination to open up is given concrete expression by hearings conducted in conjunction for the preparation of studies, the formation of contact and

working groups to associate qualified specialists with the work of the Conseil d'État, the holding of symposia with outside partners, and the publication and uploading of studies, activity reports and minutes of symposia.
Through their respective missions, delegations for international relations and European law also help enhance the international reputation of the Conseil d'État, with a view to raising awareness of the institution's specific characteristics and promoting the continental law model.

What led the Conseil d'État to devote its 2019 study to sport?

The Conseil d'État was already familiar with this cross-cutting public policy and its multiple implications through its litigation and advisory activities, It therefore made sense for it to devote an annual study to the topic. What is more, sport is a topical subject, which is of interest and concerns all our fellow citizens in its various forms. The idea was to make proposals with a view to adapting the French sporting model to contemporary challenges from the angle of the Paris Olympic and Paralympic Games in 2024, without forgetting, for example, the importance of sport for everyone's health. The choice of this subject also reflects a determination to open up. The cycle of lectures, combined with the research for the study, attracted groups to the Palais Royal who were not very familiar with the institution.

In your view, what are the main characteristics of a study by the Conseil d'État?

Conseil d'État studies are characterised by their objectives and methods. On the one hand, they are designed to be practical, operational and useful for public decision-makers. They contain theoretical analyses without seeking to serve as doctrine. Above and beyond the analysis of a situation and an assessment of public policy, they systematically make practical proposals aimed at enhancing the effectiveness of such policy. On the other hand, they endeavour to take the necessary time, maintain sufficient distance and gather a maximum amount of internal, external and comparative expertise.

What is the role of these studies, whether they are conducted at the Government's request or studies where the topic is chosen by the Conseil d'État?

The Conseil d'État reports on action taken in relation to study proposals in its activity reports. For example, the Framework Act of 15 April 2009 established the need to carry out an impact study for all draft legislation, in accordance with a study proposal made in 2006.

In close cooperation with the National Archives, in 2019 the Conseil d'État published **the Guide to research in the archives of the Conseil d'État**, a tool for researchers, academics, genealogists and students but also citizens interested in the institution's history. A symposium held on 26 March 2019 provided an opportunity for feedback on the contribution made by this type of research manual.

2019: a busy year for the Report and Studies Section

- **150 hearings held for the two studies conducted in 2019:** "*Sport : quelle politique publique ?*" (Which public policy for sport?) and "*Les expérimentations: comment innover dans la conduite des politiques publiques?*" (Experimentation: How to innovate in the conduct of public policy?)
- **11 events organised,** with over 100 speakers and nearly 2,000 people in attendance.

November. Symposium organised in conjunction with *Entretiens du contentieux*: "*Le référé: les 20 ans de la justice administrative de l'urgence*" (Interviews on litigation: "Summary proceedings: 20 years of urgent administrative justice")

Symposium organised in conjunction with *Entretiens en droit public économique*: "*Concessions et privatisations: quelle articulation?*" (Interviews of public economic law: "What relationship between concessions and privatisations?")

October. Launch of the lecture series "*L'évaluation des politiques publiques*" (Evaluation of public policy), a 2020 annual study by the Conseil d'État, with two lectures given in 2019.

Publication of the study "*Les expérimentations: comment innover dans la conduite des politiques publiques?*" (Experimentation: How to innovate in the conduct of public policy?"), conducted at the request of the Government, the first comprehensive study on the subject.

Symposium in partnership with the Cour des Comptes on "*La responsabilité des gestionnaires publics*" (The liability of public managers)

September. Publication of the annual study by the Conseil d'État, "*Le sport: quelle politique publique ?*" (What public policy for sport?"), after a cycle of eight lectures.

April. Symposium within the framework of overlapping perspectives with the Cour des Comptes: "*Vers un nouveau droit du travail ?*" (Towards a new labour law?).

March. First study day on the "*réseau de l'exécution*" (implementation network), a network for exchanges and dialogue between the Report and Studies Section, the administrative tribunals and the administrative courts of appeal, which ensures the proper implementation of administrative court decisions.

February. Symposium in conjunction with the eighth edition of the Interviews of the Conseil d'État on social law: "*La régulation économique de la santé*" (The economic regulation of health).

Engaging with judges in other jurisdictions

In 2019, the Conseil d'État was extremely active internationally, with a twofold objective: raising awareness of the French model of administrative courts, and learning from foreign legal systems.

This activity takes many forms, including exchanges with supreme administrative courts, participation in European and international legal networks, training initiatives involving foreign senior judges, and conducting expert missions.

In a context where economies and societies have become globalised, the open, ongoing dialogue maintained between high courts has proven fundamental and is a guarantee of joint reflection, aimed at promoting the rule of law and high-quality justice. In this respect, the Conseil d'État provides support and training to foreign courts to assist with institutional reforms: in 2019, for example, its efforts benefited Tunisian judges in the field of electoral law.

At the European level, exchanges and meetings between counterparts, work done within the ACA, a body which brings together the Councils of State and Supreme Administrative Jurisdictions of the EU Member States, and the Court of Justice of the European Union promote the convergence of case law and seek to strengthen the community of jurisdictions.

13
legal seminars (9 bilateral and 4 multilateral) organised in 2019

12
expert missions abroad by members of the Conseil d'État

15
internships organised at the Council of Europe for 31 senior judges from 15 countries

more than 700
foreign visitors (judges and legal professionals, officials and political representatives, professors and students) hosted by the Conseil d'État in 2019

June 2019, in Mexico City: the triennial congress of the International Association of Supreme Administrative Courts (IASAJ), for which the Conseil d'État acts as the general secretariat and which brings together the supreme administrative courts of 60 countries. The programme included a practical case study on the law and new technologies by each country in the light of individual national legislation, with a view to stimulating debate and reflection.

The April seminar in Rome, with the *Consiglio di Stato*, provided an opportunity to discuss the organisation and functions of administrative justice systems.

The conference bringing together the heads of supreme courts of the member countries of the Council of Europe took place in Paris on 12 and 13 September 2019, on the occasion of the French presidency of this institution. As part of this exceptional event, co-organised by the Conseil constitutionnel, the Conseil d'État and the Cour de Cassation, a workshop on the relationship between national jurisdictions and the European Court of Human Rights was held at the Palais Royal.

The Conseil d'État in action

All throughout 2019, in both its opinions and decisions, the Conseil d'État endeavoured to state the law by proposing practical legal solutions in order to guarantee the freedoms of citizens and the general interest.
Public life, the environment, the economy, justice, digital technologies, health and work – these are all core concerns for the French and for the activity of the Conseil d'État.

Public life

How can we improve public governance, reconcile citizens with their elected officials and public action, enrich the democratic pact and support the evolution of the State and public action?
In 2019, in the course of its opinions and decisions rendered and in conjunction with the studies conducted, the Conseil d'État helped inform the action of decision-makers within the State and local authorities. The challenges were to meet the growing demand for transparency and participation; improve the performance of public action; and provide local authorities with a clear framework for their action, in line with the reality on the ground.

INSTITUTIONS

Supporting a renewal of democratic life

In June 2019, the Conseil d'État examined a constitutional law bill for the renewal of democratic life, accompanied by a draft framework act and an ordinary law bill.

This constitutional law bill takes up some of the provisions of the previous draft institutional reform "for a more effective, accountable and representative democracy", on which the Conseil d'État had delivered an opinion in May 2018. However, it is based on a broader inspiration, nourished by the lessons learned from the great national debate of 2019. Among the new measures, two received special attention: the broadening of the scope of referendums, and the reduction in the number of parliamentarians.

How do we change the system of liability of public managers?

This question was at the heart of the symposium "Liability of public managers", organised jointly in October 2019 by the Conseil d'État and the Cour des Comptes.

Based on a shared view, that of a crisis of trust in public officials, when administrative and financial judges have precisely the mission of generating trust in an honest and effective State, speakers exchanged views and feedback with a clear objective: outlining proposals for a future reform of the liability regime. Much is at stake: this evolution must provide public managers with a clear framework for the exercise of their responsibilities, making it possible to define rigorously when and how they are liable and penalising irregularities judiciously. At the same time, it must not prohibit these same managers from taking "sound and balanced" risks, which are essential in terms of the performance of public action, in order to "avoid an administration, paralysed by risk, which protects itself behind regulations and instructions," to quote Jean-Denis Combrexelle, President of the Litigation Section, during his presentation.

For further information

See the website of the Conseil d'État. *Regards croisés du Conseil d'État et de la Cour des comptes* (Overlapping perspectives of the Conseil d'État and the Cour des Comptes), symposium of 18 October 2019 on *"La responsabilité des gestionnaires publics"* (The liability of public managers).

The broadening of the scope of referendums provided for in Article 11 of the Constitution

The bill enlarges the scope of legislative referendums to "reforms relating to societal issues". The Conseil d'État noted that the concept of "societal issues" is not precisely defined and covers a wide range of subjects, from questions concerning rights to the life and privacy of citizens (such as reproduction, marriage or end of life) to collective issues (such as laïcité (securalism) or the integration of foreigners).

It stressed the need to exercise prudence and caution when organising referendums on such issues but recalled that bills subject to referendums had to respect all of the rights and freedoms guaranteed by the Constitution and that questions put to citizens had to be settled after careful consideration. It recommended excluding penal and tax matters from the questions covered by the proposed enlargement.

With regard to the shared initiative referendum (RIP), in the likely event that lowering the threshold to one-tenth of the members of Parliament (instead of the current one-fifth) and a million voters (as against one-fourth of the electorate today), combined with the broadening of the scope of the referendum to "societal issues", could lead to initiatives that did not meet constitutional requirements, hence the suggestion for a screening procedure entrusted to the Conseil constitutionnel.

Reduction in the number of parliamentarians and introduction of proportional representation

The bill further provided for a 25% reduction in the number of Deputies (from 577 to 433) and Senators (from 348 to 261). The Conseil d'État considered that it was not for it to take a stand on political choices but rather endeavoured to ensure, on the one hand, that the significant reduction in the number of electoral districts did not prevent National Assembly elections from taking place on essential demographic bases and, on the other hand, that the reform of elections to the Senate did not lead to excessively large gaps in representation between the most sparsely and most densely populated *départements*.
Lastly, the Conseil d'État verified that there was no constitutional obstacle to the new voting system foreseen for the election of Deputies, with the introduction of an element of proportional representation (20%) enabling 87 Deputies to be elected on proportional representation lists within a single electoral district.

For further information

Conseil d'État, Home Affairs Section, 20 June 2019, **OPINION** on a constitutional law bill and on an ordinary law bill for a renewal of democratic life, Nos. 397908, 397909 and 397910.
ConsiliaWeb: Nos. 397908, 397909 et 397910.

Declaration of assets for Deputiess

In a decision dated 19 July 2019, the Conseil d'État rejected a parliamentarian's appeal against an assessment by the High Authority for Transparency in Public Life (HATVP), considering that the declaration of assets in question did not meet the criteria of exhaustiveness, accuracy and truthfulness.

The HATVP, an independent administrative authority (AAI) established in 2014 following the adoption of the laws on transparency in public life of October 2013, is responsible for monitoring and assessing the exhaustiveness, accuracy and truthfulness of the declarations of assets of elected officials once they have taken office. In this connection, the publication of the declaration of the elected official's assets may be accompanied by an assessment of its content in terms of compliance with the requirements of exhaustiveness, accuracy and truthfulness.
While publication of this assessment does not imply transmission to the Bureau of

the chamber concerned or the Public Prosecutor's Office, it can damage the reputation of the elected official in question. A parliamentarian who contested the assessment of the HATVP regarding her declaration of assets appealed to the Conseil d'État. In a decision dated 19 July 2019, that body considered that the assessment, in the light of the significant effects it was likely to have on the parliamentarians and on voters, could be challenged before a judge. However, it rejected the appeal, considering that the arguments put forward by the parliamentarian did not call into question the assessment made by the HATVP.

For further information

DECISION by the Conseil d'État, 10 CH, 19 July 2019, Ms Le Pen, No. 426389.
ArianeWeb: No. 426389.

What is the State's liability in the case of an unconstitutional law?

What happens if a citizen, business or association considers that they have suffered harm owing to the enforcement of a law that entered into force and was subsequently rejected by the Conseil constitutionnel within the framework of a priority preliminary ruling on constitutionality? Can the State be held liable? In a decision dated 24 December 2019, the Conseil d'État replied that it could.

Since 2007, the State has been subject to civil liability in the form of compensation for harm suffered as a result of the enforcement of a law that is inconsistent with France's international and European commitments. However, the matter remained open with regard to the harm suffered as a result of an unconstitutional law. When examining an appeal on texts relating to employee savings plans that were declared unconstitutional by the Conseil constitutionnel in 2013, the Conseil d'État answered this question in December 2019: the State can, in principle, incur liability, and people who have suffered harm as a result of the enforcement of the law prior to its abrogation may obtain compensation accordingly.
The Conseil d'État stipulated the conditions under which liability is incurred: a declaration of unconstitutionality by the Conseil constitutionnel (which may decide to rule out or restrict the possibility of compensation); a direct causal link between the harm suffered and the enforcement of the unconstitutional law; and a request for compensation within four years following the date on which the harm suffered could be known "in all its reality and extent".

For further information

DECISION of the Conseil d'État, 1 CHR, 24 December 2019, Société hôtelière Paris Eiffel Suffren, No. 425983.
ArianeWeb: No. 4259833.

LOCAL AUTHORITIES

Bill relating to local life

On 15 July 2019, the Conseil d'État delivered an opinion on a bill relating to participation on local life (which became the Act of 27 December 2019).

In the course of reforms implemented in recent years, mayors, especially those at the head of small communes, have had the feeling that their mandate has been hollowed out. Accordingly, the bill had four main objectives: consolidating the role of mayors and elected officials of communes within inter-communal bodies; giving communes greater leeway for developing the scope of such bodies; strengthening the power

of mayors; and simplifying their daily lives. The Conseil d'État considered that the measures proposed met these objectives, in particular thanks to:

- The introduction of a governance pact for inter-communal bodies which makes it possible for a broad majority of elected officials to participate in the decisions of public bodies for inter-communal cooperation (EPCI) and to keep them better informed about the lives of such bodies;
- The possibility, up until 1 January 2020, of achieving a blocking minority to prevent the mandatory transfer of water and sanitation responsibilities to the EPCI;
- The introduction of the prefectoral ruling *(rescrit préfectoral)* whereby mayors can ask prefects to adopt a formal position on a question of law that might arise on the occasion of a decision they were preparing to take.

In an opinion delivered on 5 September 2019, the Conseil d'État ruled on a complementary section of the text aimed at reinforcing mayors' policing powers via administrative fines of up to 500 euros. This possibility would be available in the case of breaches of municipal by-laws with regard to hedge trimming and maintenance and to unlawful clutter or occupation of thoroughfares posing a risk to the safety of people.
The Conseil d'État noted that this power to sanction given to mayors represented a significant innovation. At a time when incivility was on the rise, the Conseil d'État considered that this new power was likely to reinforce the authority of mayors and enhance compliance with their decisions. However, it recommended circumscribing and limiting this power, as provided for in the bill, to particular circumstances and for specific purposes.

For further information

Conseil d'État, Home Affairs Section, 15 July 2019, **OPINION** on a bill relating to participation in local life and the proximity of public action, No. 398013. ConsiliaWeb: No. 398013.

Law No. 2019-1461 of 27 December 2019 relating to participation in local life and the proximity of public action.

Can a mayor object to the installation of "smart" electricity meters in their commune?

In a decision delivered in July 2019, the Conseil d'État ruled in the negative after examining an initiative by a mayor of a commune in Finistère who had suspended the installation of Linky smart meters, stressing their possible harmful effects for human health. The Conseil d'État recalled that, even though the mayor was empowered to take certain general policing measures for his commune, only the State was empowered on a nationwide basis to ensure the protection of public health by limiting public exposure to electromagnetic waves through reliance on expertise capacities and technical guarantees that were not available at the local level. The precautionary principle did not give a mayor greater powers to take such measures.

For further information

DECISION by the Conseil d'État, 3 / 8 CHR, 11 July 2019, Commune of Cast, No. 426060. ArianeWeb: No. 426060.

Can a town hall rent space to a cultual association?

Yes, but on certain conditions, as the Conseil d'État recalled in its decision of 7 March 2019 relating to the dispute between the commune of Valbonne and the association Bien Vivre à Garbejaïre Valbonne. The latter challenged the legality of a deliberation by the municipal council authorising the mayor to rent space to the association Musulmans de Valbonne Sophia Antipolis for the exercise of cultual activities. Local authorities may rent space from their private domain, even for exclusive and long-term use, to a cultual association without disregarding the provisions of the 1905 Law on the separation of Church and State provided that such rental entails compensation, especially of a financial nature.

For further information

DECISION by the Conseil d'État, 7 March 2019, Commune of Valbonne. ArianeWeb: No. 417629.

Birth of the European Collectivity of Alsace

On 1 January 2021, the *départements* of Haut-Rhin and Bas-Rhin will merge into a single administrative unit, the "European Collectivity of Alsace" (CEA). In its opinion of 2 August 2019, the Conseil d'État noted that the name of "*département* of Alsace" would have been more suitable, as the term "European" could lead to confusion as to the exact status of the new collectivity created.
With regard to substance, neither the merging of the two *départements* into a single one nor the provisions recognizing specific powers for this collectivity, in keeping with the specificities of the territory (cross-border road transport, cross-border cooperation) gave rise to any comments by the Conseil d'État, which did however wonder, in terms of good administration, as to the appropriateness of maintaining two representatives of the State on the territory of the new collectivity.

For further information

Law No. 2019-816 of 2 August 2019 relating to the powers of the European Collectivity of Alsace.

Experimentation

From the rhythm of the school year to the earned income supplement (RSA), the Culture pass, voluntary military service or online filing of preliminary complaints in police stations… all of these systems have something in common: they were piloted before they came into widespread use. The number of pilots has increased steadily in recent years. But how effective are such trials?

To answer this question, in January 2019 the Prime Minister asked the Conseil d'État to conduct a study on the matter. The study "*Les expérimentations: comment innover dans la conduite des politiques publiques?*" (Experimentation: How to innovate in the conduct of public policy?), which was published in October 2019, provides the first assessments of pilots carried out and offers a real methodological guide.

Among the findings

Although it had not been widely used in the past in France, experimentation entered the Constitution with the Constitutional Act on the decentralised organisation of the Republic of 28 March 2003.

The first finding is that experimentation, perceived as a guarantee of greater effectiveness, has come into wide use in public action. Lawmakers have never before authorised so many pilots in such a short time: 103 trials were reported in the space of two years, between 2017 and 2019, compared with 43 between 2007 and 2012 and 96 between 2012 and 2017. The second finding was that while local authorities engage in a great deal of experimentation without exemptions, paragraph 4 of Article 72 is rarely used. Only four pilots have been conducted within this framework and scaled up since the Act of 28 March 2003, including the earned income supplement (RSA) and the social pricing of water supply. For the Conseil d'État, this is proof that the procedure is too cumbersome for local authorities, too binding and, as it stands, too binary, as outcomes are limited to either a nationwide rollout of the measure tested or its pure and simple abandonment.

Above and beyond these figures, for a number of pilots, the Conseil d'État has flagged the absence of a rigorous methodological framework for designing and conducting experimentation according to the rules: success criteria are not always identified; evaluation is often inadequate; and audiences are not sufficiently involved in the design, conduct and evaluation of trials.

Fourteen proposals for better experimentation

With a view to promoting public action and disseminating good practices in this field, the Conseil d'État has issued 14 proposals aimed at improving the use of experimentation. Among these are the circulation of a reference document setting out the methodological principles for experimentation (choice of duration, definition of objectives, success criteria, commitment of stakeholders (audiences, civil servants, elected officials, professional and trade union organisations, etc.).

To foster experimentation in local authorities, the Conseil d'État recommends allowing the rollout of experimental measures to only certain local authorities, while respecting the principle of equality; giving the competent local authorities more room for manoeuvre and responsibilities by amending the Framework Act of 1 August 2003 relating to experimentation by local authorities, and finally, promoting experimentation projects by local authorities via the introduction of a permanent window for the transmission of their proposals.

The methodological guide for better designing, conducting and evaluating pilots that resulted from the study has already been circulated to the regions, through their associations, to the mayors of France and to the presidents of departmental councils.

For further information

See the website of the Conseil d'État.
Study published on 3 October 2019:
"Les expérimentations: comment innover dans la conduite des politiques publiques?"
(Experimentation: How to innovate in the conduct of public policy?).

Worth knowing

Many pilots can be conducted without requiring an exemption from the law or regulations (for example, for experimenting with new schedules, equipment, new operating modes, etc.).

In the event that the pilot entails an exemption, this is covered by two articles of the Constitution arising out of the Constitutional Act of 28 March 2003:

- Article 37-1 allows the implementation of experiments in a broad range of public action by many operators, including the State;
- Paragraph 4 of Article 72 more specifically authorises local authorities to derogate from a national law or regulation governing the exercise of their powers, for the purposes of a pilot.

“For local authorities, the study highlighted a procedure for experimentation that was overly cumbersome and ultimately not very motivating, because the only two options were to drop everything or to extend the experiment to all local authorities, in keeping with the principle of equality. Yet this principle of equality must not be synonymous with uniformity; it allows for differences in situations. Hence the proposal by the Conseil d’État to amend the Framework Act of 2003 to give elected officials more leeway to innovate, better adapt the application of the law to local realities and encourage their initiatives.

Francis LAMY
Member of the Conseil d’État, Chair of the working group on experimentation

To conduct this study, the Conseil d’État convened a working group composed of members of the Conseil d’État, lawyers, members of the Economic, Social and Environmental Council and the central administrations of the State as well as, in what was a first, representatives of the three major associations of local elected officials (Association of Mayors of France, Assembly of the Departments of France, and Association of the Regions of France). “Benefiting from the perspective of these local actors and their experience was particularly valuable”, notes Francis Lamy, the Conseil d’État member who chaired the working group. Over 80 people were interviewed, ranging from parliamentarians and local elected officials, representatives of trade unions and professional associations, directors of large public administrations and public structures, to researchers and academics (including Esther Duflo, who has since won the Nobel Prize in Economics in 2019), business leaders and heads of international organisations.

A corollary to experimentation and an inescapable instrument for modernising the State to reach the performance level for public action that citizens expect, the evaluation of public policy is a fundamental tool of knowledge and enlightenment for decision-makers and citizens.

The evaluation of public policy, the next annual study by the Conseil d’État

The evaluation of public policy has become a focal point for the social sciences, the expectations of public managers and citizens’ demands for the improvement of the quality and performance of public policy. Accordingly, the Conseil d’État chose this topic for its next annual study. The inaugural lecture held on 10 October 2019 and devoted to “*L’évaluation des politiques publiques: quels enjeux aujourd’hui?*” (The evaluation of public policy: What are the issues today?), marked the launch of the tenth edition of the lecture cycle organised by the Conseil d’État to accompany the conduct of the annual study.
A second lecture, devoted to methods and expertise, was held in December 2019. Reflection continued in 2020, drawing on collective efforts, lectures and hearings bringing together parliamentarians, economists, experts, academics, etc. scheduled to culminate in the autumn with the rollout of the 2020 study by the Conseil d’État.

Civil service

The Act on the transformation of the civil service, adopted on 6 August 2019, radically changes the status and working conditions of over five million public officials. The Conseil d'État examined this bill and the draft enabling decrees. In the jurisdictional field, the civil service accounted for nearly 10% of all applications in 2019.

Transformation of the civil service

In its opinion of 27 March 2019, the Conseil d'État, through the bill on the transformation of the civil service referred to it, ensured respect for the broad principles and values governing the French civil service.

The bill on the transformation of the civil service comprehensively reforms the social dialogue within the civil service by restructuring its bodies and defining new tools in the form of management guidelines. It broadens the possibility of recruiting contract staff for all job categories; revamps methods for assessing professional value; and sets itself the goal of encouraging the mobility of public officials and ensuring the fluidity of professional career paths enriched by experience in the public and private sectors.

Although this bill is a driver of major reforms, it is not designed, as the Conseil d'État notes, "to call into question the broad principles governing the French civil service." The Conseil d'État carefully examined the different measures relating to both social dialogue and the organisation of human resources and made sure that the inbuilt high degree of flexibility was accompanied by respect for the fundamental principles of the civil service.

Accordingly, the Conseil d'État wished to note that, as the basic principle whereby permanent jobs in the civil service are occupied by career civil servants (Article 3 of the Act of 13 July 1983) was not called into question, the agreed recruitment of contract staff should continue to be done on the basis of derogation. Such derogation was possible to the extent that recruitment followed procedures guaranteeing respect for the principle of equal access to public service jobs contained in Article 6 of the Declaration of the Rights of Man and of the Citizen and provided that the contract staff so recruited were subject to the same requirements, particularly ethical obligations, as those applicable to civil servants.

In addition, the Conseil d'État emphasised that recourse to contract staff for permanent jobs was not accompanied by a change in the legal regime to which such staff are subject: they come under the public law system, not labour law, as some reports and studies had proposed.

In light of the already numerous possibilities of recruiting contract staff, the Conseil d'État warned as to the danger of a lack of intelligibility for the new measures and the difficulty of evaluating their consequences. It therefore invited the Government to complete the impact study in order to better understand, supported by figures, the effects of these measures. Finally, the Conseil d'État also moved some provisions initially provided for in the text of the bill (remuneration, detailed procedures, etc.) to the enabling decrees with a view to better differentiating between measures arising from the law and those arising from regulatory power.

When it examined the draft enabling decree for Article 15 of the Act on the transformation of the civil service relating to recruitment procedures applicable to contract staff for holding permanent jobs in the civil service, the Conseil d'État noted, in keeping with its opinion delivered on the bill, that in conjunction with the derogation to the principle where permanent jobs had to be occupied by civil servants, the examination of applications should only come "after an unsuccessful attempt to recruit a civil servant for a given job".

For further information

Conseil d'État, General Assembly (Administration Section), 21 March 2019, **OPINION** on a bill for the transformation of the civil service, No. 397088. ConsiliaWeb: No. 397088.

Decree No. 2019-1414 of 19 December 2019 relating to the recruitment procedure for filling permanent jobs in the civil service open to contract staff.

Since 1996, regardless of their status, contract staff working for an administrative public service have been officials who are subject to public law and thus come under the competence of the administrative courts.

When can a contractor claim a permanent contract?

On 10 September 2019, the Conseil d'État took two decisions in contentious matters concerning two former employees of the National Scientific Research Centre (CNRS) employed under successive fixed-term contracts and calling for the conversion of their employment contracts into permanent contracts after six years of effective public service[1]. In the first case, the Conseil d'État considered that the contractor was not entitled to claim a permanent contract, as part of the period had been covered by an ATER (Temporary Lecturer and Research Assistant) contract on behalf of a university, hence an employer other than the CNRS, which did not constitute exclusive research work.

In the second case, however, it upheld the judgment delivered by the Marseille Administrative Court of Appeal that acknowledged the right to a permanent contract, considering that the period where the petitioner worked as a self-employed person (autoentrepreneur) under a service provision contract should be included in the effective duration of public service performed at the CNRS.

For further information

DECISION of the Conseil d'État, 7 / 2 CHR, 9 October 2019, Centre national de la recherche scientifique, No. 422866.

DÉCISION du Conseil d'État, 7 / 2 CHR, 9 octobre 2019, Centre national de la recherche scientifique, n° 422874.

ArianeWeb : n° 422866 et 422874.

1. The Sauvadet law (2012) made possible the conversion of fixed-term contracts into permanent contracts for these contract agents, provided that they had at least six years of effective service life during the eight years prior to the publication of this law with the same public employer and in positions of the same hierarchical category.

Justice and public freedoms

Within the competencies conferred upon it, the Conseil d'État guarantees the necessary balance between public order and respect for rights and freedoms. Within this framework, it determines whether the restrictions that can be applied to these rights and freedoms, with a view to restoring or safeguarding public order, are "necessary, suitable and proportionate" under the rule of law. In 2019, the Conseil d'État dealt with different contentious matters concerning this complex balance. It also contributed to the preparation of a Juvenile Criminal Justice Code to replace the founding text dating back to 1945, which had become difficult to interpret owing to the many reforms that had occurred over more than 70 years.

The creation of a code of a Juvenile Criminal Justice Code

Restoring the priority given to educational measures and the reintegration of minors into society over punishment and implementing criminal justice procedures suited to minors that are understandable for both judges and litigants: this was the twofold imperative of the reform of juvenile criminal justice launched by the French Minister of Justice in 2019.

The Act of 23 March 2019 on planning for 2018-2022 and reform of the justice system authorised, by ordinance, the Government to replace the ordinance of 2 February 1945 on juvenile delinquency, amended on many occasions since then, by a Juvenile Criminal Justice Code.

One of the goals of this codification was rendering the relevant 267 articles accessible to all litigants, their families and the professionals who would be consulting them. This was achieved by rewriting the original provisions and structuring them according to an outline geared to the different phases of dealing with a juvenile delinquent. Examining the draft codification gave the Conseil d'État an opportunity to verify that the some 70 reforms since 1945 were

consistent with constitutional principles and conventional requirements, in particular protection of "the best interests of the child". No such overall check had been conducted over the past 75 years.

With regard to substance, the new code features several major changes: the introduction of the presumption of lack of responsibility under the age of 13; the intervention of a declaration of guilt at the latest three months after the trial opens (as compared with the current average of 18 months), followed by a break during which educational measures are implemented; and the subsequent intervention, in the light of the minor's behaviour during the break, of a judgment on the punishment in a maximum of 12 months.

The Conseil d'État validated these developments, designed to give juveniles who infringe the criminal law a chance to break out of a cycle of delinquency and punishment. It completed the code by establishing the arrangements for its entry into force with a view to ensuring, particularly with regard to so-called "security" measures applicable to juveniles, respect for the principle of the immediate application of the more lenient penal law.

For further information

Ordinance 2019-950 of 11 September 2019 relating to the legislative component of the of the Juvenile Criminal Justice Code.

In the course of 2019, the Conseil d'État was asked to examine many applications relating to public order and respect for freedoms. These often took the form of urgent applications for release, an expedited procedure for ending a serious and manifestly unlawful violation of a fundamental freedom (freedom of assembly, expression, etc.)

Right to demonstrate

The decree of 20 March 2019, published following the violence on the Champs-Élysées during the "yellow vest" movement, increased the fine for participation in a banned demonstration on public roads from 38 euros to 135 euros. After the matter was referred in an expedited procedure on 21 March by the Ligue des droits de l'homme (League of Human Rights) and the CGT trade union, which were calling for the suspension of the decree which, in the applicants' view, violated the freedom of expression guaranteed by the Constitution and the European Convention on Human Rights, the urgent applications judge at the Conseil d'État rejected the application. He recalled in his decision that "respect for freedom to demonstrate must be reconciled with the maintenance of public order" and that the decree, which merely reinforced an existing prohibition in the Code on Internal Security by increasing the fine provided for, did not violate the freedom to demonstrate given that the decree only concerned banned demonstrations and that its application was accompanied by sufficient safeguards.

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 29 March 2019, Ligue des droits de l'homme, No. 429028. ArianeWeb: No. 4290285.

Worth knowing

Enactment of the law for the reform of justice

The Act on planning for 2018-2022 and reform of the justice system was enacted in March 2019. The Conseil d'État, to which the Act had been referred on 16 March 2018 and again on 29 March 2018 for rectification, delivered its opinion on 12 April 2018.

Use of the LBD-40

The LBD-40, a gun for firing defensive rubber bullets classified as an "intermediate" weapon, was at the forefront of the news in 2019. Was its use sufficiently well-regulated and proportionate for law enforcement operations? Did it clash with the freedom to demonstrate? In a context marked by recurrent demonstrations and an increase recorded in the number of rubber bullets fired, the Conseil d'État was called to rule on several occasions.

In April, following the controversy triggered by the police's use of the LBD-40, the Ligue des droits de l'homme and various other associations asked the Conseil d'État to refer to the Conseil constitutionnel for a preliminary ruling on constitutionality, particularly with regard to freedom of expression, assembly and demonstration, of the legislative provisions regulating the use of weapons by the police and the gendarmerie.
The Conseil d'État did not refer the matter to the Conseil constitutionnel. It considered that the disputed legislative provisions did not result in the prohibition of peaceful demonstrations but only let law enforcement officers use their weapons for the sole purpose of restoring order or protecting their physical safety, exclusively in the case of absolute necessity and in a strictly proportionate fashion. It further noted that these provisions implied an obligation for the administration to only equip the competent police and gendarmerie services with weapons whose use was suited to law enforcement operations.

For further information

DECISIONS of the Conseil d'État, 9 / 10 CHR, 12 April 2019, Ligue des droits de l'homme and other, Nos. 427638 and 428895. ArianeWeb: Nos. 427638 and 428895.

Right to travel

In an order dated 30 April 2019, the Minister of the Interior banned fans of the Olympique de Marseille football team from attending the match between their team and that of Racing Club de Strasbourg, scheduled to take place in Strasbourg on Friday 3 May. The ban, designed to prevent possible incidents and disturbances of public order, was challenged in summary proceedings by the Association nationale des supporters (National Fans Club).
In its decision of 3 May, the urgent applications judge at the Conseil d'État rejected the application, considering, on the one hand, that this restriction was limited in time, in terms of the scope and people concerned, and, on the other hand, was due to a specific context marked by the mobilisation of police forces on other fronts (the "yellow vests" protests, celebrations and terrorist risks). Consequently, the Conseil d'État deemed that the ban did not entail "a manifestly unlawful violation of the freedom to come and go".

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 2 May 2019, Association nationale des supporters, No. 430339. ArianeWeb: No. 430339..

Conditions of detention

Although an administrative judge is not called upon to rule on the conduct of judicial proceedings, they are competent to pass judgment on the administrative functioning of the public prison service. In this connection, they ensure respect for the fundamental rights and freedoms of inmates, taking into consideration the constraints linked to the penitentiary system.

Decisions by prison administrations to place an inmate in solitary confinement (placement of the inmate alone in a cell in a special wing), whether it be administrative segregation, emergency confinement or temporary solitary confinement, can be appealed. Whereas, in its decision of 7 June 2019 in response to an appeal by a female inmate whose placement in solitary confinement had been renewed for three months, the Conseil d'État dismissed the case, in view of the fact that the measure had ended before a final ruling had been handed down, it pointed out that decisions to place or maintain an inmate in solitary confinement, given that they constituted a serious and immediate violation of the situation of the detained individual as a matter of principle, resulted in a presumption of urgency. This would provide justification for a judge ruling on an application for suspension to order a stay of enforcement if they considered that there was serious doubt as to the lawfulness of the application. Even though a great many urgent applications for suspension appealing such decisions for placement in solitary confinement had been previously rejected by the administrative tribunals on the ground of a lack of urgency, in this way the Conseil d'État avoided a situation where inmates had to prove, to justify the condition of urgency, that their state of health required an immediate end to the solitary confinement measure.

For further information

DECISION of the Conseil d'État, 10 / 9 CHR, 7 June 2019, Ms M., No. 426772. ArianeWeb: No. 4267725.

Law concerning foreign nationals

Actions filed by foreign nationals, the number of which has grown steadily, now account for around half of all cases referred to the administrative tribunals and the administrative courts of appeal and over 20% of the cases handled by the Conseil d'État. Throughout the year, the Conseil d'État had to deal with sensitive cases with a view to striking a balance between respect for the fundamental rights of foreign nationals and the applicable rules of law, while the National Court of Asylum (CNDA), the administrative court specialising in the right of asylum placed under the control of the Conseil d'État, delivered over 66,000 decisions on asylum requests in 2019.

Biometric database for foreign minors

In late February 2019, 19 associations sought an urgent order from the Conseil d'État to stay the enforcement of the decree of 30 January 2019, taken pursuant to the Asylum and Immigration Act of 10 September 2018, authorising the creation of a national biometric database for assessing the minor status of young unaccompanied foreigners.

The associations considered that the decree, by establishing a database incorporating different personal data (photographs, fingerprints, etc.), violated the requirement to protect the best interests of the child, the fundamental interests of children – and in particular the right to the protection of personal data and the principles of the right to privacy – and that it constituted a "corruption of child protection for the purposes of migration control".

The urgent applications judge at the Conseil d'État rejected the application on 3 April 2019. On the one hand, he considered that, contrary to what the associations feared, the decree did not foresee that a refusal by an applicant for minor status to communicate their personal data would enable the public authorities to presume that they were of age. On the other hand, the Conseil d'État deemed that the existence of a suspensory appeal of the expulsion decision, which would allow the judge to rule on the minor status of the persons concerned, as well as the principle whereby the person concerned enjoyed the benefit of the doubt as to their status as a minor, made it possible to guarantee the right to an effective remedy for those concerned and the need to protect children.

In a decision dated 15 May 2019, the Conseil d'État referred a preliminary ruling on constitutionality to the Conseil constitutionnel, relating to the constitutionality of the legislative provisions authorising the creation of a biometric database. On 26 July 2019, the Conseil constitutionnel validated the introduction of the database, noting that it offered sufficient data processing guarantees and that by preventing a minor from appearing before several departments, it aimed to "facilitate the work of the authorities responsible for the protection of minors and combat foreigners from illegally entering and remaining in France." The Conseil constitutionnel considered that legislators had struck a balance between safeguarding law and order and the right to respect for privacy that was not disproportionate.

For further information

Decree No. 2019-57 of 30 January 2019 on arrangements for assessing persons claiming to be minors and temporarily or permanently deprived of the protection of their family and authorising the creation of processing of the personal data relating to these persons.

Ordinance of the urgent applications judge at the Conseil d'État, 3 April 2019, Unicef et al., Nos. 428477 and 428831.
ArianeWeb: Nos. 428477 and 428831.

Material reception conditions

In a decision dated 31 July 2019, the Conseil d'État deemed unlawful two key provisions of the decree of 28 December 2018 on phasing out material reception conditions (MRCs) for several categories of asylum seekers.

The decree provided that the French Office of Immigration and Integration (OFII) could automatically deny or withdraw the right to accommodation and an asylum seeker's allowance (ADA), particularly for persons whose asylum rights must be examined by another European country (under the "Dublin Regulation)" in a situation of "flight" or who had not complied with referral to accommodation or a region of residence. The Conseil d'État ruled that by creating cases of automatic denial and withdrawal of material reception conditions and precluding any possibility for the restoration of these conditions, the law and the decree were incompatible with the aims of the European Directive of 26 June 2013 (known as the "Reception Conditions Directive") establishing standards for the reception of persons requesting international protection.
Pending the alignment of these texts, the Conseil d'État defined a transitional regime governing decisions that deprive asylum seekers of material reception conditions. For example, it stipulated that the OFII can, after examining the specific situation of an asylum seeker, suspend the benefit of material reception conditions where the asylum seeker has abandoned the accommodation site or failed to comply with the requirement of the asylum-granting authorities. If the material reception conditions are suspended, the asylum seeker may seek to have them restored.

For further information

DECISION of the Conseil d'État, 2 / 7 CHR, 31 July 2019, Association la Cimade et al., Nos. 428530 and 428564. ArianeWeb: Nos. 428530 and 428564.

Living conditions in a migrant camp

At the end of April 2019, two exiles, with the backing of nine humanitarian associations, filed an urgent application for release requesting that urgent measures be taken to safeguard the dignity and ensure respect for the fundamental rights of hundreds of persons living in Grande-Synthe (Nord) in extremely precarious sanitary conditions.

This application was rejected on 9 May by the urgent applications judge in Lille. On appeal, the Conseil d'État, in light of the situation in Grande-Synthe, noted the authorities' shortcomings with regard to access to water, hygiene and sanitary installations. In its decision of 21 June, it ordered the prefect of the Nord to install, within eight days, "a sufficient number of" water taps, showers and sanitary installations near a gymnasium and to establish information patrols to distribute documents to migrants in order to inform them of their rights. However, in this same decision, it denied the asylum seekers' request for a "stay of expulsions" and the installation at Grande-Synthe of emergency housing structures.

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 21 June 2019, Mr. F et al., No. 431115. ArianeWeb: No. 4311153.

Reporting of migrants

Some 30 associations filed an action for annulment with the Conseil d'État accompanied by an urgent application for suspension against the ministerial direction of 4 July 2019 relating to "cooperation between the integrated reception and referral services (SIAO) and the French Office of Immigration and Integration (OFII) for taking care of asylum seekers and beneficiaries of international protection".

At the heart of the debate was the monthly transmission to OFII by the emergency shelters of the list of asylum seekers or beneficiaries of international protection they housed. Although, in a decision handed down on 6 November 2019, the Conseil d'État rejected the appeal, considering that the guarantees offered by the texts were sufficient, it provided clarifications with regard to the implementation of the ministerial direction: the information communicated to the OFII officials alone could not be used to question admission to emergency shelters or to identify and located people whose asylum applications had been turned down to expel them from the territory.

For further information

DECISION of the Conseil d'État, 2 / 7 CHR, 6 November 2019, Fédération des acteurs de la solidarité et al., Nos. 434376 and 434377. ArianeWeb: Nos. 434376 and 434377..

Dominique KIMMERLIN
President of the National Court of Asylum (CNDA)

The National Court of Asylum (CNDA) examines appeals against decisions by the French Refugee and Stateless Persons Protection Office (OFPRA) with regard to requests for asylum. Created in 2007 to replace the Refugee Appeals Board, in 2019 it delivered 66,464 decisions, a historic peak. Here is an interview with its President, Dominique Kimmerlin.

How are you coping with the increased number of appeals to the CNDA?

The CNDA is in a particular situation within the administrative courts because it is facing exponential growth in the number of appeals submitted to it, which has more than doubled over 10 years. To cope with this increase and keep the average timeline for delivering judgements as short as possible, the CNDA has gone from 15 to 23 chambers in less than three years and has introduced separate preliminary investigation and judgment channels for the detection and referral of appeals according to the formation of the court on which they depend.

We face three main challenges: recruiting, training and integrating new staff; constantly adapting our processes with a view to handling thousands of cases per year; and guaranteeing that every asylum seeker will have an individual, impartial examination of their appeal involving both sides.

Some see the CNDA as too lax while others see it as too rigid. What are the criteria for its judges?

The difficulty with our mission is that the subject of asylum has become an issue for political debate that couples migration policy with the right to asylum. The discussions and confusion to which they give rise sometimes makes people lose sight of the fact that the CNDA is not per se a migration policy actor but, more modestly, is responsible for implementing and enforcing the international texts that France has signed, whether it be the Geneva Convention or European directives.

As such, it must guarantee, as a fully independent body, the full and proper implementation of these texts under the supervision of its ultimate authority, the Conseil d'État, and in keeping with the case law of the Conseil constitutionnel, the Court of Justice of the European Union and the European Court of Human Rights, all of which contribute in varying degrees to the development of the right to asylum.

In this respect, I think that the court fully plays its role of ensuring the application of texts, as evidenced by the very low rate of rulings that are overturned.

The asylum judge has a delicate job: he or she must determine the need for protection of an asylum seeker in the light of the personal fears expressed, related to a fast-changing sociopolitical context. This requires real questioning.

How is the CNDA helping to build better-harmonised asylum law in Europe?

The CNDA is part of the network of European courts and those of other continents with which it shares the mission, notably, of applying the Geneva Convention. Designed after the Second World War, this treaty was adopted to settle questions of the protection of populations fleeing persecution in a post-war political and diplomatic context that was very different from the present-day one. The nature of conflicts has changed, terrorism has emerged, and protection needs have changed and must take into consideration new issues linked to gender, the existence of international criminal networks, etc.

The role of the asylum judge is to adapt protection instruments to these new challenges, in line with the rulings of their counterparts in courts in Europe and on other continents.

Environment

Even though environmental protection has found broad consensus, as reflected by the increasingly abundant legislation on this topic, how can we ensure the effectiveness of environmental law while striking a balance between numerous diverging interests, in keeping with land-use planning and economic and social development? In the course of its decisions and opinions delivered in 2019 on environmental questions and the challenges of energy transition, the Conseil d'État has helped to determine the respective share of each of these interests and the arrangements for effective consideration of environmental law.

The bill on combating waste and the circular economy

Following the referral of this bill in June 2019, on 4 July the Conseil d'État delivered an opinion in which it clarified the requirements with regard to efforts to combat food waste and non-food waste concerning the provisions applicable to the producers, importers and distributors of non-food productions for the reemployment, recycling or reuse of their unsold new products. As the impact study for this bill showed, every year these unsold non-food products account for some €800 million out of total consumption of €140 billion, and the bulk (€630 million) are destroyed.
The Conseil d'État considered, first of all, that it was necessary to change a title in the Environmental Code, which referred solely to food products, to bring it into line with the desire to

combat waste broadened to non-food products. It also proposed to improve the wording relating to exceptions to this reemployment, recycling and reuse obligation.
In the bill submitted to the Conseil d'État, two exceptions were foreseen: one related to the nature of products, where reuse and recycling pose serious threats to health and safety; and the other in the light of an "impossibility of reemployment, reuse or recycling." Noting the overly general nature of the wording of this exception, the Conseil d'État proposed new wording: the exception applies where the necessary conditions for reemployment, reuse or recycling have an adverse effect on the sustainable development goals.

For further information

Conseil d'État, General Assembly (Public Works Section), 4 July 2019, **OPINION** on a bill on combating waste and the circular economy, No. 397960. ConsiliaWeb: No. 397960.

The energy and climate bill

Composed of eight articles, the bill on energy, climate and the environment sets ambitious goals for French climate and energy policy, modifying those set previously in the Act of 17 August 2015 on the energy transition and for green growth, fixing the objective of carbon neutrality by 2050.
After this bill was referred to it three times in the first months of 2019, the Conseil d'État delivered its opinion on 25 April, examining the realism of the stated objectives in the light of the resources allocated for their achievement.
With regard to the replacement of the "Factor 4", i.e. the goal of a fourfold decrease in greenhouse gas (GHG) emissions (between 1990 and 2050), by "carbon neutrality" by 2050, i.e. a sixfold decrease in these same emissions, the Conseil d'État considered that this goal, linking the concept of carbon neutrality with a target figure, did not seem inconsistent with the one presented by the impact study for the bill.
With regard to the proposed capping of GHG emissions in certain fossil fuel-fired power plants, including France's last four coal-fired power plants, from 1 January 2022, the Conseil d'État considered that this was legally valid. However, on the question of shutting down coal-fired power plants, it wished to remind the Government that it was for the latter to ensure that the shutdown did not compromise France's security of electricity supply, which remained a major goal of energy policy. Moreover, it saw a need to allow sufficient time between the adoption of the text and its entry into force in order to "take into consideration the preparatory technical measures for shutting down the power plants and above all, the time required to take all necessary steps concerning the plant staff who will lose their jobs."
During 2019, the Conseil d'État received many applications from associations on topics relating to environmental protection and preservation. Associations have gradually entered the contentious field in this area and now play a leading role.

For further information

Conseil d'État, General Assembly (Public Works Section), 25 April 2019, **OPINION** on a bill relating to energy, climate and the environment, No. 397668. ConsiliaWeb: No. 397668.8.

Zooming in on mining code reform

The Government launched a reform bill in May 2019 to adapt the Mining Code, which broadly dates back to an 1810 law that was revised on several occasions. It is to be implemented via three texts, including an ordinance that amends the provisions relating to the granting and extension of exploration and operating permits for geothermal sites.
After receiving this draft ordinance, the Conseil d'État delivered a favourable opinion, subject to amendments to ensure the compliance of French mining law with EU competition rules. Where concessions and operating permits for geothermal sites must be extended, in the view of the Conseil d'État, a competitive bidding process is required for the renewal of operating permits, except in cases where the company fails to reach an economic equilibrium within the period initially foreseen.

During 2019, the Conseil d'État received many applications from associations on topics relating to environmental protection and preservation. Associations have gradually entered the contentious field in this area and now play a leading role.

Biodiversity

Curlew hunting

Following the submission of an application by the Ligue de protection des oiseaux (Bird Protection League), on 29 August 2019, the Conseil d'État ordered the immediate suspension of hunting of the Eurasian curlew, a wader included on the IUCN Red List of Threatened Species. The hunting of 6,000 curlews had been authorised in the maritime public domain by an order dated 31 July 2019, notwithstanding the opinion of the Committee of Experts on Adaptive Management, as was recalled by the judge, and thus without elements relating to a quota enabling "adaptive management of the Eurasian curlew".

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 26 August 2019, Ligue pour la protection des oiseaux, No. 433434.
ArianeWeb: No. 433434.

Killing of wolves

Wolves are a protected species. Accordingly, the number of wolves that can be killed is capped by decree and a ministerial order. Two environmental associations filed appeals against these texts with the Conseil d'État.
In its decision of 18 December 2019, the Conseil d'État validated the ceiling of 10% of the wolf population that could be killed, as well as the possibility of defensive shots within the limit of an additional 2% by order of the prefect coordinating the national plan of action on wolves. Nevertheless, the Conseil d'État ruled that the possibility for the prefect of granting authorisation for defensive shots above and beyond the cumulative ceiling of 12% was unlawful if it was not regulated "by either a quantitative limit or specific conditions";

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 18 December 2019, Association One Voice, Nos. 428811 and 428812.
ArianeWeb: Nos. 428811 and 428812.

Who should cover the cost of restoring a site that hosted an installation classified for the protection of the environment (ICPE)?

This question arose for the city of Marennes, in Charente-Maritime. The small port of Seynes enjoys a privileged location, suited to a development project. However, the site, occupied up to the 1930s by Saint-Gobain, which produced artificial fertilizers there, was diagnosed in 2009 as contaminated. As the former operator had ceased all activity at the site over thirty years previously, it was not subject to a reclamation liability under limitation rules. Given the situation, the Conseil d'État ruled that the State could, without being obliged to do so, finance the clean-up operations itself. However, in the event that the contamination posed a serious threat to health, public health and safety or the environment, the State was bound to use its policing powers by conducting the soil decontamination operations, in order to ensure the safety of the site and remedy the serious threat identified.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 13 November 2019, City of Marennes, No. 416860.
ArianeWeb: No. 4168600.

Renewable energy

Rejection of appeals filed against the wind farm in the Bay of Saint-Brieuc

Even though there is no maritime wind farm in operation in France as yet, there has been an increase in the number of legal disputes related to the creation of such farms, which date back less than ten years.

With regard to the wind farm off the coast of Saint-Brieuc (Côtes d'Armor), the Conseil d'État received an application from an environmental protection association and the firm deprived of the contract. They challenged the Government's 2012 decision to create the wind farm and to award the contract for its installation and operation to the company Ailes Marines.

Although the Conseil d'État ruled that the process used to select the wind farm operator was unlawful and sentenced the State to pay the applicant company the sum of 2.5 million euros as compensation for the harm suffered, it considered that this was not sufficient to call the project into question and rejected the appeals filed against the establishment of the wind farm, thereby validating its creation.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 24 July 2019, Société Nass & Wind smart services, No. 416862. ArianeWeb: No. 4168622.

Pesticides

Launch and terms of use

After receiving an appeal against an interministerial order relating to the launch and terms of use for plant protection products and their adjuvants (more commonly known as "pesticides") from a group of associations, the Conseil d'État, in a decision of 26 June 2019, quashed several provisions of the order concerned, on the grounds that they provided sufficient protection for citizens' health and the environment, particularly water courses and water supplies, against risks linked to the use of these products.

The Conseil d'État deemed the order unlawful owing, in particular, to the absence of indications of "re-entry intervals" (the amount of time during which no-one can enter the area where a pesticide was applied) where these products are used on soils free of vegetation and in the absence of specific measures for avoiding or reducing the risk of runoff in case of heavy rainfall.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 26 June 2019, association Générations futures and association Eau et rivières de Bretagne, Nos. 415426 and 415431. ArianeWeb: Nos. 415426 and 4154316.

Major projects

The bill for the post-fire restoration and conservation of the cathedral Notre-Dame de Paris mobilised several administrative sections of the Conseil d'État for its consideration under an expedited procedure, particularly concerning the introduction of a national fundraising campaign and the creation of a dedicated public corporation. Although there is consensus on the restoration of Notre-Dame, this does not hold true for certain major infrastructure projects on which the Conseil d'État was called to deliver rulings in 2019. Examples include the EPR nuclear reactor at Flamanville or the Strasbourg bypass project (GCO) – all cases concerning major projects where economic, social and environmental issues are intertwined.

The restoration of Notre-Dame de Paris

On 18 April 2019, just a few days after the fire in Notre-Dame de Paris, the Government submitted a bill on the restoration of the cathedral to the Conseil d'État. Six days later, while clarifying a number of points in the text, the Conseil d'État delivered a favourable opinion on the overall mechanism creating the legal and financial framework for completion of the works within a five-year period. The law was enacted on 29 July 2019.

An essential objective of the bill was to encourage donations for financing the reconstruction of the cathedral. To this end, the text provided for an increase from 66% to 75% (up to a maximum of 1,000 euros per year) in the tax reduction rate for donations by private individuals up until the end of 2019. Such donations, made to the Treasury, the National Monuments Centre and the three public utility foundations, must be forwarded to the State or the public corporation in charge of the restoration of the cathedral.

Considering that this tax advantage, which is time bound, was not contrary to the principle of equal taxation in light of the general interest attached to the operation, the Conseil d'État noted that there was no legal obstacle to such a mechanism, making it possible to mobilise the means required for the rapid collection of donations while helping to keep them secure.

In addition, the text empowers the Government to create, by ordinance, a public corporation responsible

for designing, conducting and coordinating the restoration and conservation work on the cathedral of Notre-Dame de Paris. Whereas the creation of a public corporation falls within the purview of the Government when it falls within an existing category, the Conseil d'État deemed the passing of legislation justified given that the Government intended to include on the corporation's board of directors both the local authorities concerned and the diocese of Paris, the main user of the cathedral, a provision which departs from the rules applicable to existing public corporations.

Finally, the Conseil d'État considered that the restoration of Notre-Dame de Paris was so clearly in the public interest that it justified certain exemptions, limited to what would be strictly necessary for the smooth conduct of the works and the rules of urban development and environmental protection.

For further information

Conseil d'État, Permanent Commission (Home Affairs Section, Finance Section, Public Works Section, Administrative Section), 23 April 2019, **OPINION** on a bill on the restoration and conservation of the cathedral Notre-Dame de Paris, No. 397683. ConsiliaWeb: No. 397683.

Should regional plans for connecting to the renewable energies network be exempt from the environmental assessment requirement or not?

The "Grenelle II" Act of 12 July 2010 introduced regional plans for connecting to the renewable energies network (S3R) with a view to facilitating and planning the development of renewable energies. These plans, which provide for the creation or pooling of infrastructure, require an environmental assessment prior to their adoption.
After receiving a draft decree on the adaption of the rules for connection in May 2019, the Conseil d'État delivered a favourable opinion except for the article stipulating that the S3R should no longer be subject to this assessment obligation.
Basing itself on an EU directive of 2001 and on the principle of non-retrogression enshrined in the Environmental Code, the Conseil d'État considered that this kind of exclusion would pose a very high risk for development projects around legal certainty.

Works on the Strasbourg western bypass

The A 355 motorway project, known as the "Strasbourg western bypass", was declared an urgent matter of public interest via a decree of 23 January 2008. The necessary expropriations were authorised within a period of 10 years from publication of the decree. A new decree, issued in January 2018, extended this deadline until January 2026. After receiving two applications, one submitted by the association Alsace nature and the other by the city of Kolsbeim requesting the quashing of this decree, the Conseil d'État rejected both applications in a decision dated 13 March 2019. It considered that the competent authority could legally extend a declaration of public interest "unless the operation was no longer likely to be legally implemented owing to changes in the applicable law or if it appeared that the project had lost its public utility status following a change in factual circumstances", without proceeding to conduct a new public survey, which would only be necessary if the project characteristics had been substantially modified.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 13 March 2019, association Alsace nature and commune of Kolbsheim, Nos. 418994 and 419239. ArianeWeb: Nos. 418994 and 419239.

The EPR reactor at Flamanville

On two occasions in 2019, the Conseil d'État was called, in conjunction with its judging activity, to examine the case of the European pressurized reactor (EPR) in Flamanville (Manche).

Basing its view on the opinion delivered by the French Nuclear Safety Authority (ASN) in 2017, concluding, that there was no reason to question the future commissioning and use of the installation due to anomalies alone, which had since been corrected in a manner deemed satisfactory by the ASN, the Conseil d'État, in a decision of 11 April 2019, rejected the application by eight associations calling for the repeal of the decree of 10 April 2007 authorising the creation of the EPR. In a decision dated 24 July 2019, it also rejected the application by four associations against the authorisation granted by the ASN in 2018 for the commissioning of the reactor vessel.
Whereas the associations asserted the existence of an "unacceptable" risk owing to the defects found in the vessel, the Conseil d'État deemed the issuance of the authorisation by the ASN, coupled with specific conditions such as the controls to be implemented and a time limit on the authorisation, to be lawful. It noted, in particular, that the ASN had ensured, following a special examination conducted under the conditions it had set, that the vessel of the EPR at the Flamanville nuclear power plant, notwithstanding the anomalies reported, was safe in terms of compliance with legal requirements.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 11 April 2019, Association Greenpeace France et al., No. 413548.

DECISION of the Conseil d'État, 6 / 5 CHR, 24 July 2019, Association réseau sortir du nucléaire et al., Nos. 416140 and 425780.

ArianeWeb: Nos. 413548, 416140 and 425780.

Cities, housing and mobility

Urban projects contribute to the development of the territory and land-use planning and make it possible to respond to the needs of citizens, particularly with regard to housing. Changes in building regulations, compliance with urban planning law and safeguards for citizens' rights, such as the right to property, must be balanced against the economic and social issues associated with implementing projects – a balance the Conseil d'État endeavoured to strike throughout 2019.

For a "permit to experiment" in construction

The Act of 10 August 2018 on the State's role in building a society of' of trust sets itself the goal, in Article 49, of "facilitating the implementation of construction projects and promoting innovation".

The first stage, scheduled in 2019, was the introduction of a "permit to experiment", authorising contracting authorities to derogate from the regulations in force and implement alternative construction solutions, if these solutions achieve equivalent results. In early 2019, the Conseil d'État examined the related draft decree.

The "permit to experiment", which is regulated by the ordinance of 30 October 2018, constitutes a first transitional stage: a new ordinance is expected in 2020 in order to extend the right to derogate across the board and

thereby authorise contracting authorities to implement innovative technical or architectural solutions over the long term. In light of not only the temporary nature of the draft decree but also the prospects opened up in terms of the simplification of the Building Code, the Conseil d'État recalled, while examining the decree, that it was responsible for verifying not only its lawfulness but also its linkage with the long-term mechanism to be defined. Within this framework, it clarified several points in the wording of the decree.

Consequently, it saw a need for the decree to set out , the construction regulations concerned precisely, area by area, as the Government foresaw for the long-term mechanism. It also requested clarification, among the regulations listed, that only those that constituted obligations to use best endeavours could be subject to derogation. In addition, it introduced additional provisions with a view to better defining the basis on which the contracting authority, availing itself of the right to experiment, could demonstrate that its technical solution made it possible to achieve effects that were "equivalent" (the same performance or results) and met the same objectives as those assigned by existing regulations.

Can the digital housing record be compulsory?

In December 2019, the Conseil d'État delivered an unfavourable opinion on the draft decree defining the arrangements for implementing a digital housing record that would be compulsory from 2020 for new buildings and from 2025 for renovated housing.

The Act of 23 November 2018 on changes in housing, land management and digital technology (known as the ELAN Act) provided for the introduction of a digital housing record, a kind of electronic

"health record". The aim is to allow access to the main details of a building (blueprints, energy performance assessment, etc.) throughout its existence. After receiving the draft enabling decree specifying the arrangements for implementing the digital record, the Conseil d'État noted several flaws in the planned provisions and delivered an unfavourable opinion in December 2019.

It began by highlighting the absence of a clear public interest purpose that could justify this kind of obligation which, as it stood, constituted a "manifestly disproportionate violation of the right to property" and freedoms. Although improving a building's energy performance was a public interest objective which, in itself, "could justify the obligation for the owner to conserve relevant information in line with this objective", the Conseil d'État pointed out that the absence of a precise definition of the elements to be documented and that there were many of them contradicted this point.

The Conseil d'État also flagged, first of all, "the high risk" of disputes, and hence the blockage of the sale and rental of properties, given the great many "ill-defined" documents to be produced, and second, a problem of personal data protection, linked to the obligation to keep documents in a digital container managed by a third party. This unfavourable opinion by the Conseil d'État led the Government to revise the arrangements for the application and entry into force of the digital housing record.

Town planning permits generate a great many disputes, creating a major legal and financial challenge. Legislators have intervened on several occasions in recent years to prevent appeals against town planning permits (building, demolition and renovation permits) from systematically stopping projects. This has paved the way for correcting irregularities that do not call the integrity of a project into question. The Conseil d'État clarified the application of this mechanism. The issue at stake: saving time to avoid penalising a project.

The conditions for implementing regularisation mechanisms

Today, there are two different tracks for regularisation: it can be conducted during the judicial proceedings, within a deadline set for the parties to proceed with regularisation; or it can take place following a partial annulment allowing the parties to adopt the necessary deed of regularisation to ensure the legality of the rest of a town planning permit.

In a decision of 15 February 2019, the Conseil d'État stipulated the conditions for implementing these mechanisms for regularising building permits. In so doing, it was careful to maintain a balance between the interest pursued by legislators in accelerating administrative and judicial proceedings and the compliance requirement for the town planning permits finally issued.

For further information

DECISION of the Conseil d'État, 6 CH, 15 July 2019, Commune of Cogolin, No. 401384.
ArianeWeb: No. 401384.

From speed limits on two-way roads…

The decision to reduce speed limits on two-way roads to 80 kph sparked wide debate and many applications filed with the Conseil d'État calling for the quashing of the decree of 15 June 2018 on maximum allowed speeds for vehicles.

Ruling in an expedited procedure in July 2018, the Conseil d'État refused to suspend the execution of the decree concerned. In its decision of 24 July 2019, the Conseil d'État rejected all of the applications appealing the same decree filed by associations (the Ligue de défense des conducteurs and the association Automobile-Club des avocats), private individuals and local authorities (Auvergne-Rhône-Alpes region).
After rejecting the different grounds relating to the conditions for the preparation of the decree (signatories, consultations and the procedure followed), the Conseil d'État considered that all studies showed that roads outside built-up areas were the deadliest, especially two-way departmental and national roads without a median strip, and that lowering the speed limit to 80 kph was likely to reduce the number of road traffic deaths. Consequently, it concluded that there was no error of assessment regarding the means employed to obtain the expected outcomes. It further rejected the argument of non-compliance with the principle of equal treatment put forward by the applicants, who denounced a measure that affected inhabitants of rural areas more than city-dwellers, recalling that this principle did not imply "treating persons placed in different situations differently".

For further information

DECISION of the Conseil d'État, 5 / 6 CHR, 24 July 2019, Ligue de défense des conducteurs et al., Nos. 421603, 421651, 421669, 421705, 423099 and 423487.
ArianeWeb: Nos. 421603, 421651, 421669, 421705, 423099 and 423487.

… To the use of electric scooters in town

The regulation of new modes of locomotion has also given rise to much debate.

On 14 November 2019, the emergency applications judge at the Conseil d'État received an application from the Association philanthropique d'action contre l'anarchie urbaine vecteur d'incivilités (Philanthropic Association for action against urban anarchy as a vector of incivilities) calling for the suspension of the execution of the decree of 23 October 2019 regulating so-called "personal transporters".

This application was rejected by the Conseil d'État, which deemed "purely speculative" the argument raised that insufficient measures had been taken to ensure public safety and considered unfounded the argument whereby driving such vehicles had to be subject to the same condition of holding a driving licence as mopeds (motorised vehicles which go faster than 25 kph).
As the decree applied precisely to personal transporters which do not go faster than 25 kph, it cannot be blamed for stipulating different conditions.

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 14 November 2019, Association philanthropique d'action contre l'anarchie urbaine vecteur d'incivilités, No. 435816. ArianeWeb: No. 435816.

Economy

How does one help ensure the optimal operation of the economy, regulate without hindering freedom of entrepreneurship and promote economic activity? The Conseil d'État provided concrete answers to these questions by helping to define the legal framework of economic activities and by ensuring respect for the freedoms involved (freedom of entrepreneurship, the right to competition, etc.). In 2019, it examined, in particular, different measures provided for under the PACTE Act adopted in May 2019, such as the privatisation of La Française des jeux. It also contributed to thinking on the complex topic of privatisations and concessions during the Entretiens en droit public économique (Meetings on public economic law), while judicial decisions throughout the year helped illustrate its role with regard to the regulation of business life.

Privatisation of La Française des jeux

The PACTE Act of 22 May 2019 authorised the transfer of a majority of the share capital of La Française des jeux to the private sector, while granting the company, for a term of up to 25 years, exclusive operating rights to the lottery games and sports betting distributed within its physical network.

When it examined the bill, the Conseil d'État considered that there were no constitutional obstacles to privatising La Française des jeux, as it did not provide a national public service. This point was subsequently confirmed by the Conseil constitutionnel.

The PACTE Act also empowered the Government to redefine the body of measures for regulating the gambling sector. To implement these provisions, prior to the launch of the privatisation of La Française des jeux and the opening of

the subscription, on 7 November 2019 the Government submitted a series of texts to the Conseil d'État for examination: an ordinance of 2 October 2019 reforming the regulation of gambling and games of chance, a bill on the ratification of this ordinance, as well as two enabling decrees, one dated 17 October relating to State control of La Française des jeux and the other on the creation of the National Gambling Authority (decree published on 4 March 2020).

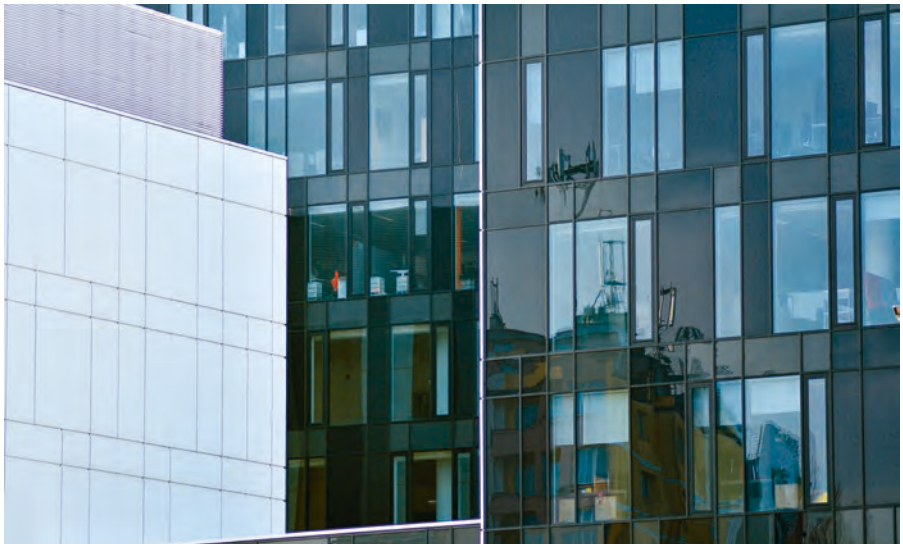
All these texts thoroughly modernise the gambling industry and the State's relationship with its component companies, confirming and extending the development started by the Act of 12 May 2010 relating to the opening up to competition and the regulation of online gambling, gaming and betting. The Online Gambling Regulatory Authority (Arjel), created in 2010, is being replaced by the National Gambling Authority (ANJ), which will have broad powers and will also control exclusive gaming rights (the lottery of La Française des jeux and betting on horse racing and sporting events within the physical network).

The Conseil d'État made sure that the respective powers of this authority and the ministerial jurisdictions are clearly defined and that the rules relating to the organisation and functioning of the ANJ guarantee both its independence and the effectiveness of its action. It also ensured the compliance, with EU law, of the process for transferring a majority of the share capital of La Française des jeux to the private sector, which implies in particular that the State will maintain close control over this company.

Worth knowing

La Française des jeux is not a public service

In a decision of 27 October 1999, the Conseil d'État considered that it could not be concluded from either the provisions of the Finance Act of 1933 authorising the Government to create the National Lottery or the general characteristics of gambling activities that the mission entrusted to La Française des jeux had the status of a public service mission. The Conseil d'État recalled this element to substantiate its analysis on the absence of a constitutional obstacle to the privatisation of La Française des jeux as provided by the PACTE Act.



Regulation of financial markets

On 6 November 2019, the Conseil d'État delivered a ruling which, while confirming the merits of the sanction pronounced by the French Financial Markets Authority (AMF) against Natixis, reduced the fine.

The AMF's Sanctions Commission, after having noted serious shortcomings relating to the management of formula funds marketed since 2005, issued against Natixis (group Banques populaires – Caisses d'épargne) a warning and an exemplary, historic monetary fine, combined with the publication of this decision on the AMF's website for a five-year period.

After receiving an appeal from Natixis calling for the sanction to be quashed, the Conseil d'État maintained the warning and confirmed the principal reasons justifying the AMF's decision, considering that the regulatory authority had correctly applied the principles of compliance with the primacy of investor interests and the prohibition on having such interests bear unjustified costs. It nevertheless reduced the monetary penalty to 20 million euros in conjunction with the proportionality of the sanction in the light of the shortcomings.

For further information

DECISION of the Conseil d'État, 6 / 5 CHR, 6 November 2019, Société Natixis Asset Management, No. 414659.
ArianeWeb: No. 414659.

The right linkage between concessions and privatisations

This was the complex question that the speakers – academics, lawyers, business leaders, economists, administrators and policy-makers – were invited to discuss at the most recent Entretiens en droit public économique (Meetings on public economic law) event organised by the Conseil d'État on 15 November 2019. This topic was at the heart of current events and debates on economic and tax-related subjects, echoing the PACTE Act organising the privatisation of Aéroports de Paris (the Paris airports).

Since 1986, the management of large public infrastructure, particularly motorways and airports, has been increasingly entrusted to private operators, and many companies carrying out public-sector tasks have been privatised. Why this choice? Speakers stressed that this was often due to the size of the investments to be made, the operating costs, and the complexity of the management. Others emphasised the value of complementarity between the public sector and the private sector in these fields. The discussions related to the protection available to users of the public services privatised against tariff increases proposed by private operators, particularly for large infrastructure where there was little competition. The speakers also endeavoured to examine the different forms of regulation that were possible when the State privatised formerly public operators, with a view to safeguarding both the interests of the public and users and the interests of private investors. At the close of two round tables, several pragmatic ways forward emerged. Many speakers felt that concession contracts in our modern economy were too long and that their conditions of application were insufficiently transparent. The point was made that the management objectives and measures set out in the contracts had to be evaluated and revised in advance by the competent regulatory authorities, then closely monitored by the administrative courts.

For further information

See the website of the Conseil d'État.
Les Entretiens du Conseil d'État en droit public économique (Meetings of the Conseil d'État on public economic law), symposium of 15 November 2019 on *"Concessions et privatisations: quelle articulation?"* (What linkage between concessions and privatisations?).

In ruling on the privatisation of the Toulouse-Blagnac Airport and the regulator's refusal to certify the rate increase invoiced by the Nice regulator, the Conseil d'État recalled that, although competition was necessary in the sector, it had to be regulated to protect users from excessive airport fee increases.

Privatisation of Toulouse-Blagnac Airport

On 9 October 2019, the Conseil d'État upheld as lawful the 2015 decision by the Minister of the Economy and Finance to select the Symbiose consortium as the acquirer of the State's shares in the capital of the company ATB, the operator of Toulouse-Blagnac Airport.
On 16 April 2019, several trade unions and private individuals had this decision set aside by the Paris Administrative Court of Appeal. However, the Conseil d'État, ruling at last instance, considered that the ministers had made their choice after due process and that the designation of the acquirer was not vitiated by any "manifest error of assessment".

For further information

DECISION of the Conseil d'État, 9 / 10 CHR, 9 October 2018, Minister of the Economy and Finance c/M. G... et al. SAS Casil Europe c/M. G... et al., Nos. 430538 and 431689.
ArianeWeb: Nos. 430538 and 431689.

Determination of the amount of airport fees

The amount of fees which airline companies must pay to the operators of the land, infrastructure, installations, premises and equipment directly necessary for the operation of aircraft or an air transport service is a long-standing bone of contention between these actors, along with the scope of the activities and services included in the calculation of the amount of such charges. An independent administrative authority, the Transport Regulatory Authority (ART), ensures balanced fees by issuing prior opinions on fee-setting agreements between the actors concerned.
The operator of the Nice airport initiated judicial proceedings to appeal the decision by the ART not to approve the former's fees for 2019 and then to set them itself by deciding on a 33% increase. On 31 December 2019, the Conseil d'État rejected the appeal by Nice Airport against the decisions of the ART, deeming that the regulator's decision was justified. It further clarified the elements to be taken into consideration, the calculation methods and the rules to be respected when setting fee rates in the absence of the signature of an economic regulation contract.

For further information

DECISION of the Conseil d'État, 2 / 7 CHR, 31 December 2019, Chambre syndicale du transport aérien et al., Nos. 424088, 424089, 427840, 429724, 430789 and 431344.
ArianeWeb: Nos. 424088, 424089, 427840, 429724, 430789 and 431344.

Digital technologies

The internet and the social media, which are tremendous accelerators for freedom of expression, communication and entrepreneurship, can also be used in conditions that violate certain fundamental freedoms, such as the right to respect for private and family life. The search for a balance between the different rights and freedoms is at the heart of the two opinions delivered on bills from Parliament, including the opinion on the bill relating to consumer freedom of choice in cyberspace. In delivering its decisions it delivered in December 2019 on the right to be forgotten, the Conseil d'État helped to formalise the first user guide for Google and the CNIL in this field.

A user's guide to the right to be forgotten

In delivering 13 decisions dated 6 December 2019, the Conseil d'État set the conditions for the right to dereferencing on the internet provided for by the General Data Protection Regulation (GDPR). This made the Conseil d'État the first French court to give Google and the French Data Protection Authority (CNIL) a user's guide to the right to be forgotten.

Many questions had hitherto remained unanswered on the enforcement of the right to be forgotten or the right to dereferencing: who has the right to be forgotten? Under what conditions can a private individual demand the dereferencing of the links bearing their name on search engines? Is this right "absolute"?

The right to be forgotten is not "absolute"

In a case brought by internet users who failed in an attempt to claim this right, the Conseil d'État answered these questions in the light of the judgment handed down by the Court of Justice of the European

Union on 24 September 2019 in response to a query raised by the Conseil d'État. In 13 decisions dated 6 December 2019, the Conseil d'État laid down the main principles: the judge rules taking into consideration the circumstances and the legislation applicable on the date on which they rule; the dereferencing of a link associating the name of a private individual with a webpage concerning their personal data is a right; the right to be forgotten is however not absolute, as a balance must be struck between the applicant's right to privacy and the public's right to information; and the trade-off between these two fundamental freedoms depends on the nature of the personal data.

Three categories of data identified

Accordingly, the Conseil d'État identified three categories of data. The first covers so-called "sensitive" data concerning a person's health, sexual orientation, political views and religious convictions, while the second relates to criminal proceedings or convictions. These two data categories require high protection, as interference in a data subject's private life is particularly serious. This is why a request for dereferencing can only be lawfully refused if access to the sensitive or penal data via a search based on the applicant's name is strictly necessary for informing the public. A third category of data groups together information which relates to private life without being sensitive, where a request for dereferencing may be refused when there is an overriding public interest in accessing the information in question.
In addition, the Conseil d'État explained that other elements had to be considering when assessing the seriousness of the invasion of privacy and hence the concrete scope of the right to be forgotten in a case to be examined by the entity solicited for the dereferencing, along with the social role of the person concerned (their fame, role and function in society), the conditions for accessing their information, but also the context in which these data were disclosed.

For further information

DECISIONS of the Conseil d'État, 10 / 9 CHR, 6 December 2019, Nos. 391000, 393769, 395335, 397755, 399999, 401258, 403868, 405464, 405910, 407776, 409212, 423326 and 429154.

ArianeWeb: Nos. 391000, 393769, 395335, 397755, 399999, 401258, 403868, 405464, 405910, 407776, 409212, 423326 and 429154.

As a reflection of both the importance of digital technologies in our societies and growing concerns about the consequences for our freedoms, two of the three bills examined by the Conseil d'État in 2019 related to the strengthening of the rights of citizens in cyberspace.

Cyberspace and the consumer

At the request of the Senate Commission for Economic Affairs, the President of the Senate submitted a bill to guarantee consumers' freedom of choice in cyberspace to the Conseil d'État for approval.

Recognising that freedom of choice is no longer effectively ensured owing to the monopoly acquired by the GAFAM (Google, Apple, Facebook, Amazon and Microsoft) digital giants, the text is designed to return power to consumers by promoting "agile and adapted regulation". To do so, three main principles are proposed: neutrality of terminals; interoperability of platforms; and efforts to combat predatory acquisitions that distort any possible competition. The Conseil d'État deemed justified the restriction provided for by the text on platforms' entrepreneurial freedom, in the light of the consumer protection goal, while drawing attention to the need to define the text's context more precisely.

With regard to the principle of platform interoperability, it noted, however, that there was a serious risk that the bill might be contrary to EU law. Interoperability, which would enable internet users to leave a platform while retaining their contacts and social links for communicating via another platform, runs counter to the protection of technical standards provided for under EU law. Although European legislators have already intervened to provide explicitly for an exception to the protection of technical standards for the legal protection of computer programs (in order to ensure software interoperability), they have not recognised this kind of goal for information society services.

Lastly, while approving of the choice to entrust monitoring of the new obligations relating to the regulation of communication services to the online public to the Communications Regulatory Authority (Arcep), the Conseil d'État called for a more specific definition of its scope of intervention.

For further information

Conseil d'État, General Assembly (Finance Section), 19 December 2019, **OPINION** on bill No. 48 to guarantee consumers' freedom of choice in cyberspace, No. 399120.
ConsiliaWeb: No. 399120.

Audiovisual communication and cultural sovereignty in the digital era

The bill on audiovisual communication and cultural sovereignty in the digital era on which the Conseil d'État delivered an opinion in November 2019 is designed to bolster the resources dedicated to copyright creation and protection, revamping regulation in the audiovisual sector and restructuring governance of the audiovisual sector.

This modernisation of the legal framework applicable to the audiovisual media was urgently needed. Over the past 20 years, the context has changed radically, with the development of new technologies, new actors and new utilisations, which had to be reflected by the Act of 30 September 1986 on freedom of communication.
Among the numerous measures provided for by the bill, the Conseil d'État particularly recommended clarifications on provisions relating to the contribution of online platforms, including foreign ones, to the protection of cinematographic and audiovisual works, with a view to ensuring compliance with the EU Audiovisual and Media Services Directive. It ensured the validity of the obligations provided for by the bill with regard to independent production and the production of original French-language audiovisual works. Concerning the merger of the CSA and Hadopi within a new structure with strengthened powers, the Regulatory Authority for Audiovisual and Digital Communication (ARCOM), the Conseil d'État approved the creation of this future regulator with authority over all content, regardless of the form of communication to the public. It proposed clarifications on this authority's intervention arrangements, particularly with regard to combating internet piracy and on ways of facilitating coordination with Arcep.

For further information

Conseil d'État, General Assembly (Home Affairs Section, Finance Section), 28 November 2019, **OPINION** on a bill on audiovisual communication and cultural sovereignty in the digital era, No. 398829. ConsiliaWeb: No. 398829.

Worth knowing

In conjunction with the examination of the bill, the Conseil d'État wished to underscore the growing difficulties for the regulation of digital technologies: the existence of several categories of actors and consumption models which were likely to conflict, European and national legal regulations with different purposes; and the absence of an overall view shared by States.

To remedy the problem, the Conseil d'État was favourable to a reworking, at the European level, of the ordinary law regime for the regulation of digital technologies. That would make it possible to establish, following the example of the GDPR for personal data protection, a clear territorial regime of territorial competence and innovative and effective regulations adapted to technological developments.

Decisions of the CSA, the French authority media regulator responsible for ensuring respect for the public's rights, the ethics of information and programmes and political pluralism, may be appealed to the Conseil d'État.

Freedom of expression and protection of rights

In 2017, France Télévisions aired a story adopting the point of view of one of the civil parties to an ongoing criminal trial, only a few hours after the party had been heard by the jury of the court and even before the outcome of the case was known.
For the CSA, the broadcast constituted a breach of the TV channel's obligation to "take a measured approach when referring to ongoing criminal proceedings and display greater vigilance when dealing with criminal proceedings", justifying a formal notice to the channel. For its part, France Télévisions evoked interference by the administrative authority with the freedom of expression of one of its journalists and subsequently contested the decision of the CSA before the Conseil d'État.
In a decision of 13 May 2019, the Conseil d'État rejected the application: the formal notice addressed to the CSA did not constitute a disproportionate restriction of journalists' freedom of expression, to the extent that the content of the story and the moment of its broadcasting justified such an intervention, to safeguard the protection of the reputation and rights of others and guarantee the impartiality of the judicial authority.

For further information

DECISION dof the Conseil d'État, 5 / 6 CHR, société France Télévisions, No. 421779.
ArianeWeb: No. 421779.

Editorial freedom and pluralistic expression of currents of thought and opinion

France 2 chose not to invite three representatives of political parties to a televised debate scheduled on 4 April 2019 on the upcoming European elections (26 May). Was this an attack on pluralism or an exercise of the channel's editorial freedom? The urgent applications judge at the Paris Administrative Tribunal, after receiving an appeal before the debate filed by the three political figures in question, ordered France 2 to either invite them to the 4 April debate or have them participate in a debate to be organised under similar conditions. Although France 2 therefore invited the three political figures to the 4 April debate, the channel simultaneously appealed the decision to the urgent applications judge at the Conseil d'État.

The Conseil d'État recalled that France Télévisions, "whose editorial policy was free and independent, under the supervision of the CSA", was completely at liberty to "design and organise broadcasts participating in the democratic debate in keeping with equal treatment of the pluralistic expression of currents of thought and opinion". As the Conseil d'État ruled, outside an election period, such equal treatment did not impose "strict equality of treatment between all political figures". Accordingly, the urgent applications judge at the Conseil d'État considered that the channel "had not seriously and manifestly violated the principle of the pluralistic nature of the expression of currents of thought and opinion", also noting that the three candidates "could claim, in different respects, a certain political audience and would have access (…) to other political debates or broadcasts"

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 4 April 2019, société France Télévisions, Nos. 429370, 429373 and 429374.
ArianeWeb: Nos. 429370, 429373 and 429374.

Health

The implementation of the right to the protection of health, an objective with constitutional value, depends on action by the authorities and active regulation of the health sector. In 2019, the Conseil d'État examined the bill on the organisation and transformation of the health system, designed to allow the emergence of a health system that is better organised in the territories. It made sure that individual freedoms were properly linked to the imperative of public health within the framework of its judicial decisions and enriched thinking on the economic regulation of health during the Entretiens en droit social (Meetings on social law) of February 2019 held at its own initiative.

A health system in transformation

After receiving the bill on the organisation and transformation of the health system on 10 January 2019, the Conseil d'État delivered its opinion on 7 February on the reform of medical studies, broader access to health fields, the introduction of territorial health plans, etc.
The Conseil d'État closely examined the different points of this bill, which implements the "My Health 2022" reform.

The end of quantitative restrictions on entry (*numerus clausus*) in order to increase the number of doctors

Diversifying the profiles of future health professionals, ending a recruitment process marked by too many failures, and training more doctors – these are the ambitions of the bill whose flagship measures include an overhaul of the first

cycles of health studies and an end to the *numerus clausus* system, introduced in 1971, as from the start of the 2020 academic year. The old system will be replaced by a new method of regulation based on an annual assessment of universities' intake capacity taking into consideration the multi-year national goals for health professionals to be trained defined by the Ministries of Health and Higher Education for a five-year period. The Conseil d'État felt that this new mode of limiting intake capacity was not unconstitutional and did not contradict the principle of equal access to education, as objective criteria had been set for regulating the number of students.

The confidentiality of health data at the heart of reflections

The bill envisages a broad reform of the national health data system (SNDS) in terms of scope and conditions of access, with a view to developing scientific and medical knowledge and with regard to e-health. But does this facilitated access to health data offer all possible privacy safeguards?

For the Conseil d'État, the addition of clinical data – hitherto not present in the system – is consistent with the mission of the SNDS, and the planned broadened conditions of access respect the constitutional requirement whereby "violations of personal health data must be justified by the general interest objective of health protection and implemented appropriately", with such safeguards as "pseudonymisation".

For further information

Conseil d'État, General Assembly (Social Section), 7 February 2019, **OPINION** on a bill concerning the organisation and transformation of the health system, No. 396624.
ConsiliaWeb: No. 3966244.

Economic regulation of health

At the eighth edition of the Entretiens en droit social, in February 2019, the Conseil d'État invited health professionals and jurists – including Agnès Buzyn, the Minister of Solidarity and Health – to a day of reflection on the issues and modalities for regulations adapted to the sector

Health policy can only achieve its sometimes contradictory goals, such as the quality of care, its equitable distribution throughout the territory and expenditure control if there is active regulation of both establishments and the supply of medicines and medical devices. The forum provided an opportunity to delve deeper into such regulations by underscoring legislative and regulatory constraints and the many questions that judges must answer. The discussions addressed the role of the authorities in guaranteeing the long-term viability of the French health system, the efficiency of the various regulatory actors and the necessary linkage between the different regulatory tools: health card, sanitary authorisations, per-service pricing, and multiyear contracts of objectives and means. These are all vital questions when it comes to reconciling as best as possible health needs and social expectations with the requirements of economic regulation.

For further information

See the site of the Conseil d'État, eighth edition of the *Entretiens en droit social* (Social Law Interviews) of the Conseil d'État, forum held on 1 February 2019: "The economic regulation of health".

Although vaccination coverage is a fundamental tool of public health, mistrust of vaccines is growing. On 6 May 2019, the Conseil d'État delivered two decisions on this subject.

Broadening of the list of mandatory vaccinations

Is the increase from three to eleven mandatory vaccinations for children born after 1 January 2018 contrary to the right to physical integrity and the right to privacy? The restriction of the right to privacy is "justified", considered the Conseil d'État in the decision handed down following an appeal lodged by La Ligue nationale pour la liberté des vaccinations (National League for the Freedom of Vaccination) against a decree on mandatory vaccination. Given the seriousness of the illnesses concerned, the effectiveness of vaccines and the need to make them mandatory in order to achieve sufficiently high coverage levels for the population, the protection of public health justifies this kind of broadening of the number of mandatory vaccines.

Aluminium adjuvants in vaccines

Should the presence of aluminium adjuvants in mandatory vaccines be banned? No, ruled the Conseil d'État in response to the appeal filed by the Institut pour la protection de la santé naturelle (Institute for the Protection of Natural Health) (IPSN) and a group of 3,047 people. The Conseil d'État explained that no causal link had been established to date between aluminium and auto-immune diseases and autism, as recourse to such aluminium salts was conversely, in the present state of scientific knowledge, essential for the effectiveness of the vaccination itself. Deeming that there was a positive benefit-risk ratio for vaccines containing aluminium salts, the Conseil d'État considered that the refusal of the health authorities to withdraw them was lawful.

For further information

DECISION of the Conseil d'État, 1 / 4 CHR, 6 May 2019, Ligue nationale pour la liberté des vaccinations, No. 419242.

DECISION of the Conseil d'État, 1 / 4 CHR, 6 May 2019, Mr. B et al., No. 415694.

ArianeWeb: Nos. 19242 and 415694.

Work, employment and social protection

Changes in the world of work over the last 20 years have called into question the legal balance required for the trade-off between the protection of employees and the adaptation of companies to the requirements of economic development. In a symposium organised jointly with the Cour de Cassation, the Conseil d'État focused on the scope of innovations in the field of labour law. With regard to social protection, in a context marked by a high number of disputes, often at the initiative of vulnerable groups, in 2019 the Conseil d'État clarified and broadened the guarantees offered by the administrative courts.

WORK AND EMPLOYMENT

Towards new labour legislation?

It was on this topic that the Conseil d'État and the Cour de Cassation organised, on 19 April 2019, the fifth edition of their "Regards croisés" (Overlapping perspectives) events, a series of meetings that have brought the two institutions together since 2011 to deal with a theme that is cross-cutting to both orders of courts.

Labour law and related disputes, which are on the boundary of the powers of judges in the administrative and ordinary courts, have undergone major changes over the past 20 years. Technological and economic changes (the rising role of digital technologies, the growth of the gig economy, corporate social responsibility, globalization, etc.) have upset traditional balances as well as the national base of labour law.

Against this backdrop, which was analysed by the speakers, several findings and avenues for reflection emerged.

First finding: the increased powers granted to collective bargaining and contracts represent a real challenge and imply, on the one hand, a more intense dialogue and a clarification of the role of social partners, and on the other hand, for judges, a renewed focus on the right to information of these same partners.
Second finding: even though it has been revised thoroughly, the Labour Code is still based on an industrial model founded on the stability of situations, far from the service society characterised by strong mobility, which is sometimes chosen and sometimes endured.
On the basis of these findings, the debates sought to clarify the foundations of a renewed labour law, in search of a fair balance between what is economically possible and what is socially indispensable, giving preference to greater flexibility.

For further information

See the website of the Conseil d'État. *Regards croisés du Conseil d'État et de la Cour de Cassation* (Overlapping perspectives of the Conseil d'État and the Cour de Cassation), a symposium held on 19 April 2019: *"Vers un nouveau droit du travail?"* (Towards new labour legislation?).

Rights of employees

Is a clause on "Zero tolerance for drinking" in a company's internal regulations lawful?

In its decision of 8 July 2019, the Conseil d'État confirmed the possibility of including this type of prohibition in internal regulations, provided that it was established that such a measure was justified by the nature of the tasks to be performed and proportionate to the goal sought.
The labour inspectorate had called for the withdrawal from a company's internal regulations, of an annex stating that "employees occupying "high-risk security or safety posts" as defined by the annex were subject to "zero tolerance for drinking". The company had asked the Strasbourg Administrative Tribunal to quash the measure, but it had refused. It then appealed to the Nancy Administrative Court of Appeal, which had followed suit, considering that the internal regulation had to justify the need for such a measure.
The labour inspectorate had therefore filed an appeal with the Conseil d'État at last instance. The Conseil d'État quashed the decision of the Administrative Court of Appeal, considering that, although an employer had to justify bans concerning its employees, it was not necessarily obliged to do so in its internal regulations. A simple list of the posts concerned by the "zero tolerance for drinking" clause would suffice.

For further information

DECISION CE, 1 / 4 CHR, 8 July 2019, company Punch Powerglide Strasbourg, No. 420434. ArianeWeb: No. 420434.

Job protection plan

In a decision of 22 May 2019, the Conseil d'État provided clarifications on the validation of job protection plans.

In case of redundancy for economic reasons, the employer must put in place a job protection plan (PSE), a legal mechanism introduced in 2002. The PSE is designed to limit the number of redundancies by providing, as need be, for jobs to be reclassified or adapted. It must be validated or have its content certified by the Regional Directorate for Companies, Competition, Consumption, Work and Employment (DIRECCTE).
After receiving an application by the employees of an airline company to quash the validation of a PSE by the DIRECCTE, the Conseil d'État rejected the application and provided various clarifications on the administrative mechanism for the validation of a PSE, particularly with regard to the verification of the competence of the authority certifying or validating the PSE, the grounds for the decision to validate the PSE, the condition of information and referral to the Economic and Social Committee for a decision on the content of the PSE and the planned operations.

For further information

DECISION of the Conseil d'État, 4 / 1 CHR, 22 May 2019, Works Council of the company British Airways France, No. 420780. ArianeWeb: 420780.

SOCIAL PROTECTION

Key developments for social disputes

In making a decision on several disputes relating to benefits, allowances or entitlements granted in the form of aid or social action, in 2019 the Conseil d'État unified its case law concerning social disputes and increased the powers of the administrative courts in the interests of litigants.

In the past, the powers of judges in the administrative courts depended on the social benefit sought. In some cases, such as disputes concerning the earned income supplement (RSA), in their decision, an administrative judge could go as far as revising the administrative decision by acknowledging a litigant's right to receive the benefit sought. In other cases, as with the majority of disputes involving job seekers, the administrative judge could only annul the decision of the administration and refer the litigant back to the said administration for a re-examination of their request.

In four decisions delivered on 17 May 2019, the Conseil d'État unified the handling of social conflicts (disputes concerning services, allowances or entitlements attributed as social aid or action, housing or workers made redundant) by broadening the case law that already applied to the RSA: the administrative judge can henceforth, in all cases, modify the administrative decision and the ability to set all or part of the benefit requested themselves. The procedure thus offers more guarantees for litigants, because the judge can now restore, as need be, their rights and not merely rule on the lawfulness of the administration's refusal, taking into consideration any defects (insufficient justification, procedural errors, etc.). This, in turn, enhances the effectiveness of administrative justice for disputes that often affect the disadvantaged, who are far from the administration and courts and unfamiliar with rules on judicial proceedings. However, depending on the technical nature of a dispute, the judge may leave it up to the administration to calculate the amount or composition of the social benefit sought, as they do not always have the necessary tools to do so.

Enhancement of social benefits

In its advisory function, the Conseil d'État was asked to examine an article in the bill for financing social security in 2020, which provided for an exceptional differentiated reduction in social benefits.

The planned revaluation for 2020, limited to 0.3%, does not correspond to the calculation methods laid down in the Social Security Code based on inflation, making it possible to match the increase in prices to an increase in social benefits (the expected inflation rate for 2019 was 1%). However, old age and disability pensions of less than 2,000 euros are excluded from this reduced revaluation. The Conseil d'État considered that the violation of the principle of equality for the benefit of the smallest pensions was acceptable, owing to its exceptional nature, time-bound application and goal of preserving retirees' purchasing power while enlisting the wealthiest retirees' support for efforts to control social spending. In December 2019, the Conseil constitutionnel validated this differentiated revaluation.

For further information

DECISION of the Conseil d'État, 1 CH, 17 May 2019, Ms V., No. 423001.

DECISION of the Conseil d'État, 1 CH, 17 May 2019, *Département* of Oise, No. 419903.

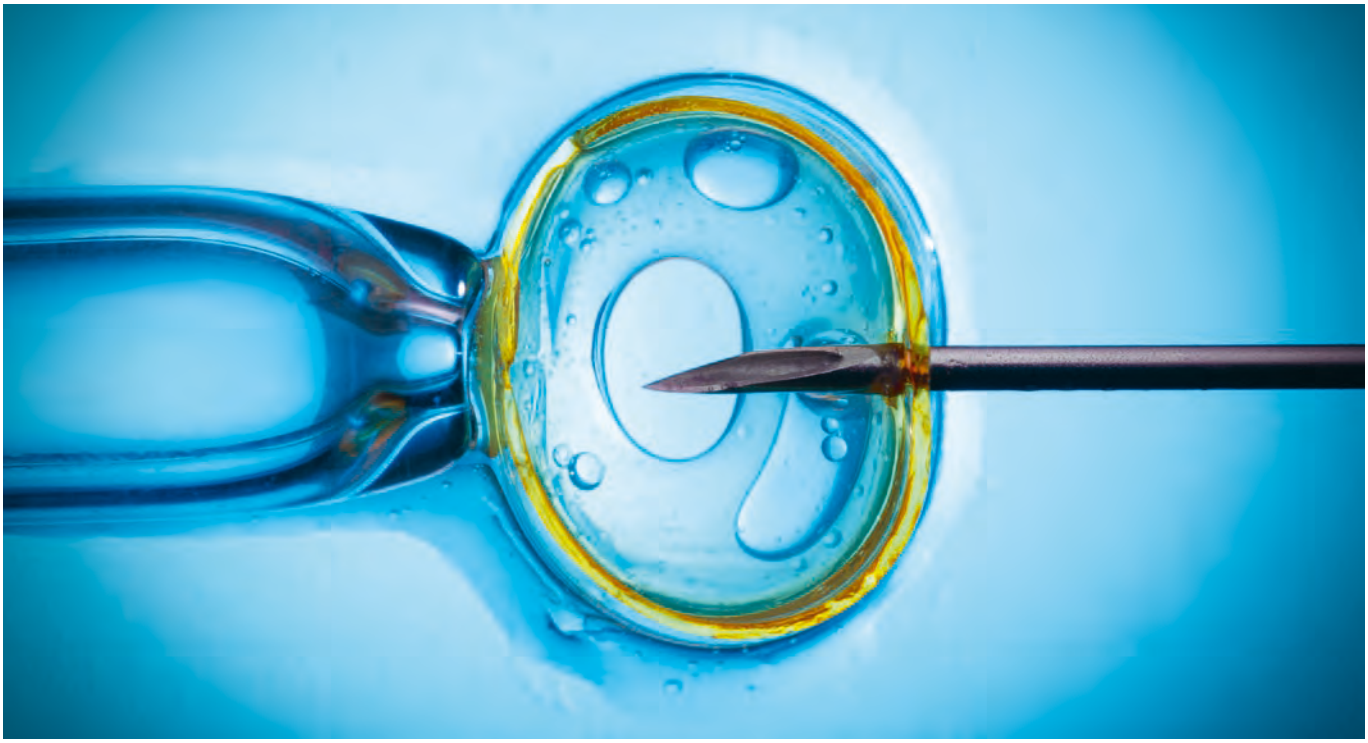
DECISION of the Conseil d'État, 1 CH, 17 May 2019, Mr. C., No. 415040.

DECISION of the Conseil d'État, 1 CH, 17 May 2019, Mr. Z. No. 422873.

ArianeWeb: Nos. 423001, 415040, 419903 and 422873.

Bioethics

"*Révision de la loi de bioéthique: quelles options pour demain?*" (Revision of the Bioethics Law: What options for tomorrow?) asked the Conseil d'État in the study conducted at the request of the Prime Minister in 2018. The clarification and legal framing efforts undertaken informed the 2019 revision of the Bioethics Law. This legal text, while taking due account of the many developments (advances in science and medicine, rise of new societal aspirations and competition from foreign models in a context of high mobility of people), reaffirms the specificity of the French model of bioethics centred on the principle of human dignity, a principle that permeates the stands taken by the Conseil d'État in both its advisory functions and its role as judge.



Bill on bioethics

After the submission on 13 June 2019 of the bill on bioethics, the Conseil d'État delivered an opinion on the bill, validating the gist of the Government's text, on 18 July.
In an unprecedented development, the Government proposed two versions for two of the most sensitive provisions in the bill.

Consequently, the Conseil d'État was called for the first time to give its opinion on two versions, for two articles, one on retracing the origins of children born from donor gametes or embryos, and the other on establishing the parentage of children conceived via medically assisted procreation (MAP) using a third-party donor.
As a result of the opening up of MAP to all women, in response to the question of whether a new procedure for establishing parentage via an

advance declaration before a notary should concern only female same-sex couples or all MAP beneficiaries, the Conseil d'État advocated the former solution. It considered that the choice did not contravene the principle of equality to the extent that, on the one hand, female same-sex couples and heterosexual couples were not placed in the same situation with regard to procreation and, on the other hand, that the solution preserved for heterosexual couples the freedom of choice as to whether or not to inform the child of the mode of conception. The Conseil d'État considered that approach would better promote the interests involved and acceptance of the reform would be easier.

With regard to the article relating to the right of a child born from donated gametes or embryos to retrace their origins, the Conseil d'État recommended the adoption of the version making the child's access to the donor's identity conditional on the latter's consent when the child made the request as an adult. The Conseil d'État felt that this solution was geared to "a fairer balance of the interests involved".

For further information

General Assembly (Social Section, Home Affairs Section), 18 July 2019, **OPINION** on a bill on bioethics, No. 397993. ConsiliaWeb: No. 397993.

See the website of the Conseil d'État. Study published on 11 July 2018: *"Révision de la loi bioéthique: quelles options pour demain?"* (Revision of the Bioethics Law: What options for tomorrow?)

In the face of the new practices that are emerging, regional health agencies, hospital centres and the medical profession are on the front line when it comes to taking and applying difficult decisions relating to both the conditions in which it is possible to give life and to the end of life. The year 2019 was marked by several emblematic contentious decisions.

Medically assisted procreation: What age limit for men?

In a decision delivered in April 2019 in response to a couple wishing to resort to medically assisted procreation where the husband was a sexagenarian, the Conseil d'État deemed lawful the age limit set at 59 years of age for men wishing to make use of this procreation technique. Although the law stipulates that the couple "must of reproductive age", it did not set an age limit, whereas the Biomedicine Agency (ABM) referred to an age limit of 59 years in principle.

Ruling for the first time on this question, the Conseil d'État considered that the condition relating to reproductive age, which had a twofold biological and social dimension, was justified by considerations relating to the interests of the child, the effectiveness of the techniques employed and the limits within which national solidarity should cover the medical treatment of infertility. It then ruled that, given the broad consensus within the scientific and medical community, the ABM had lawfully set the reproductive age at completion of the 59th year of age in principle.

For further information

DECISION of the Conseil d'État, 10 / 9 CHR, 17 April 2019, Mr. and Ms C. – Biomedicine Agency, No. 420468.
ArianeWeb: No. 420468.

End of life: the case of Vincent Lambert

TThe Conseil d'État upheld as lawful the decision to discontinue the treatment of Vincent Lambert, a quadriplegic in a vegetative state since an accident in 2008. It considered, in a decision delivered on 24 April 2019 after receiving an application from Mr Lambert's family members, that the collegial decision-making procedure for the termination of care followed by the University Hospital of Reims was not vitiated by any irregularity, confirming the decision it had rendered in the case in 2014, following a first decision to terminate care taken by the University Hospital and contested by the same members of Mr Lambert's family.

The urgent applications judge considered, in the light of the medical and non-medical elements brought to his knowledge and in the absence of advance directives regarding the end-of-life wishes of Vincent Lambert, that the conditions required by the law to enable the physician responsible for the patient to take a decision to halt treatment having no other effect than artificial life support were met, and that the continuation of such treatment would thus reflect "unreasonable obstinacy".

For further information

Ordinance of the urgent applications judge at the Conseil d'État, 24 April 2019, Mr. G... L et al., No. 428117.
ArianeWeb: No. 428117.

Consent, an essential notion

"Accouchement sous X" (anonymous childbirth) lets the biological mother remain anonymous. This option may, however, clash with the child's desire to retrace their origins. In a decision delivered on 16 October 2019, the Conseil d'État considered that the refusal to reveal to a person the identity of the woman who delivered them, where said woman had expressed a desire to keep her identity secret during childbirth and had reiterated that desire at the time of the request for the lifting of secrecy, was not contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular the articles of that instrument which protect respect for privacy and family life. This preserved the balance between respect for anonymity that was guaranteed for the mother and the child's legitimate request to know their origins, to whom other elements relating to their birth could be communicated.

For further information

DECISION of the Conseil d'État, 2 / 7 CHR, 16 October 2019, Ms C, No. 420230.
ArianeWeb: No. 420230.

Education

After examining in 2018 the bill on a School of Trust (law enacted in July 2019), the Conseil d'État was asked to examine several draft decrees in 2019, specifying the arrangements for the enforcement of the Act. Lowering the compulsory school age from 6 to 3 posed, in particular, the question of the necessary territorial equality with regard to the intake of new pupils and the conditions for supervising teaching within the framework of home schooling.

Compulsory schooling from the age of 3 years

After receiving the bill for a School of Trust in October 2018, the Conseil d'État considered that lowering the compulsory school age from 6 to 3 and lengthening compulsory schooling from ten to thirteen years would help ensure equal access and the right to education. In 2019, four decrees were submitted to the Conseil d'État, specifying the mechanisms for implementing compulsory schooling starting at the age of 3, as from the beginning of the 2019 school year.

Supervision of home schooling

According to a right recognised by the law, some parents may choose for their children alternative educational methods to the ones proposed by the public school system, including schooling at home instead of in school. In such cases, lawmakers have provided for checks by the administration and, as need be, sanctions, while respecting the privacy of families and the inviolability of

the home, with a view to guaranteeing the effectiveness of children's right to schooling and preventing and punishing the establishment of de facto schools. Consequently, when parents refuse, a second time, to make their child available for the prescribed checks, or where the results of such checks reveal insufficient progress for the child, they may be ordered to enrol the child in a public or private educational institution.

The Conseil d'État examined the bill on the arrangements for such checks and their content. In particular, it made sure that these arrangements, which included the possibility of unannounced checks, could under no circumstances lead to access to the home without the consent of these concerned or in their absence. The equilibrium of the mechanism also derived from the obligation for the administration to inform the people responsible for the child at the different stages of the procedure and give them an opportunity to express their point of view.

The State's contribution to new expenditure by the communes

The implementation of compulsory schooling from the age of 3 has financial implications for local authorities, with extra costs arising, in particular, from the obligation to finance private nurseries under contract to take in children subject to the compulsory schooling requirement. In a decision of 25 July 2019, the Conseil constitutionnel deemed constitutional the compensation scheme provided for by the State to allocate to the communes the resources required by this lowering of the compulsory schooling age.

The Conseil d'État examined the draft decree spelling out of the arrangements for the State's financial support and defined the rules governing the compensation allocated by the State in support of this broadening of compulsory jurisdiction. What is involved is a contribution to local authorities which, for the 2019-2020 school year (the school year for the entry into force of the extension of compulsory schooling) and owing to this broadening of jurisdiction alone, recorded an increase in their compulsory expenditure compared with the 2018-2019 school year. This measure is consistent with respect for equality between local authorities and the constitutional principle of the free administration of such authorities.

For further information

Conseil d'État, Administrative Section, 29 July 2019 and 11 December 2019, **OPINION** on four draft decrees adopted for the application of Act No. 2019-791 of 26 July 2019 for a School of Trust, Nos. 398088, 398110, 398139 and 399206. ArianeWeb: Nos. 398088, 398110, 398139 and 399206.

Decree No. 2019-823 of 2 August 2019 on the supervision of schooling provided at home or in private non-contractual teaching establishments and sanctions for non-compliance with obligations relating to the monitoring of enrolment and attendance in private teaching establishments.

Decree No. 2019-1555 of 30 December 2019 on the arrangements for allocating resources to communes in conjunction with the lowering of the compulsory schooling age.

Sport

As a vector of emancipation and integration, both a therapeutic tool and a media focus, a sphere of investment and also a source of revenue and jobs, sport stands at the junction of public policies on health, education, citizenship and social cohesion but also land-use planning. In 2019, the Conseil d'État opted to dedicate its annual study to public sport policy in France. The Olympic and Paralympic Games that will be held in Paris in 2024 provide an excellent opportunity to place this "comprehensive, multidimensional social fact" in perspective.

What public policy for sport?

What role does sport play today in our society? How should new sporting activity be overseen? How should the economy of sport be regulated? These are all questions which the Conseil d'État answers in its 2019 annual study: *"Le sport, quelle politique publique?"* (What public policy for sport?). In the study, it makes 21 proposals designed to contribute to an ambitious and determined public sport policy which relies on the dynamics of the future Olympic and Paralympic Paris Games in 2024.

As a reflection of contemporary economic and social changes, sport raises a series of sensitive issues for French society: living together, securalism, the ageing of the population, disability, gender equality, etc. Consequently, it is up to the authorities to define an ambitious public sport policy, in close cooperation with the associations that structure the sporting movement.

Towards a new governance model

From the development of individual practices to the growing role of local authorities and the persistence of social and territorial inequalities in access to sport: in its annual study, the Conseil d'État sets out a number of observations that question the French model of sport. Today, it sees a need to redefine governance in this area in order to better mainstream the central goal of the democratisation of sport.

Unlike in other countries, in France the State retains great power to provide guidance. This has led, in recent years, to governance torn between this predominance of the State and the aspirations of the other actors, public and private, to be better heard and more involved in defining sport policy. The creation of the new National Agency for Sport is intended to meet these aspirations.

Furthermore, the annual study underscores the growing importance of the economic and financial stakes involved in sport. Although sport represents a dynamic economy and a key source of job creation, tensions linked to the increasing role of the media and the commoditisation of sporting activity jeopardise the financial equilibrium and principle of solidarity of the sporting model. For the Conseil d'État, public policy must therefore seek to consolidate the economic equilibria that help ensure that sport serves the progress of society as a whole.

The study also endeavours to analyse the excesses that affect certain sporting activities (violence, inequalities, doping) and reinforce the need to gear public policy towards education, citizenship, security, transparency and health.

Twenty-one proposals, three priority levers

The Conseil d'État presents 21 proposals aimed at defining the details of a new French model of sport, based on more modern governance and an emphasis on societal issues. It identifies three priority levers in this respect:

- Bringing together the public and associations: although it is for the State to define the strategy for sports policy, implementation is also incumbent upon the other partners (local authorities, federations and business circles) within the framework of the National Agency for Sport, on the basis of an agreement on objectives.
- Democratising access to sport: the study stresses the need to ensure equal access to sporting activities, for women and men, at all stages of life, anywhere in the national territory, with a guarantee of high-quality sport supervision, safe practices and the development of employment in sport.
- Regulating the sport economy: the principle of solidarity between professional and amateur sport could evolve towards an enlargement of the share of broadcasting rights for professional sport levied to finance amateur sport and towards increased revenue from the so-called "Buffet" tax. The goal is better distribution of funding and more effective regulation. Public financial support should be primarily focused on the less high-profile disciplines that lack professional supervision.

For further information

See the website of the Conseil d'État.
Study published in October 2019:
"Le sport: quelle politique publique?"
(What public policy for sport?).

The Conseil d'État delivered a favourable opinion on the creation of the National Agency for Sport (ANS)

In its opinion of 13 June 2019, the Conseil d'État considered that the creation of the ANS was appropriate to the Government's objective of "bringing about changes in the French model of sport". It recalled the role that the State had to retain for defining strategy with regard to developing top sporting performance and giving the greatest number of people access to sporting activity, with the ANS being tasked with implementation.

For further information

Conseil d'État, General Assembly, 6 June 2019, **OPINION** on a bill relating to the ratification of Ordinance No. 2019-207 of 20 March 2019 on reserved lanes and traffic policing at the Olympic and Paralympic Games of 2024, No. 397803. ConsiliaWeb: No. 397803.

Sport is a litmus test for social issues that lets you as it were study trends in the contemporary world under a microscope contemporain.

Isabelle QUEVAL
Philosopher

A cycle of 6 lectures

70
people interviewed in conjunction with this 2019 study conducted by the Report and Studies Section (association, economic and institutional actors, policy-makers, academics, experts, top athletes, journalists, sports doctors, etc.)

For several years, the National Authority for Health has recognised appropriate physical activity as a validated drug-free therapy.
Since 2017, doctors have been invited to prescribe it in accordance with the so-called "law on prescription sport". Nevertheless, many questions remain with regard to the training required to prescribe sport and the implementation of this new form of care as well as coverage and hence equal access thereto, and there is a need to move up a gear. Sport for health offers a real opportunity. Backing efforts to structure this sector would make it possible to create a pool of jobs with high economic and social added value that cannot be offshored and would significantly improve the health of the French and hence the health of the health insurance system. The key to helping people achieve autonomy and an appropriate level of physical activity is assistance, not decrees.

Stéphane DIAGANA,
World athletics champion, sporting speaker for corporate events

For people with disabilities, sport is every bit as essential as work or education. We need to enhance coherence and gather everyone around the table to go beyond awareness-building and physical accessibility. The issues at stake with disabled sport are much broader.

Marie-Amélie Le Fur
President of the French Sports and Paralympic Committee

Frédéric PACOUD
Deputy advocate-reporter
for the Report and Studies Section

What are the new sporting activities? How and why should we make sport more accessible to all? What role can major sports figures play within a framework of renewed governance for the French model of sport? Frédéric Pacoud, the deputy advocate-reporter (rapporteur general adjoint) for the Report and Studies Section responsible for the study on sport, revisits the issues identified by the 2019 annual study of the Conseil d'État.

The notion of the democratisation of sport is central to the 2019 annual study. What are the issues at stake with this democratisation and what answers do you propose to provide?

There are a great many issues at stake, but I would single out gender equality, health, education and professional integration.

With regard to gender equality for example, one of the findings is that women remain further from sporting activity than men, due to the organisation of daily life but also to education. We stress the need for sports teaching that is as mixed as possible from a very early age and which leaves more room for considerations relating to well-being.

Teaching sport also means helping the French understand the benefits sport can have for health, all throughout life. This public health challenge is daunting: a sedentary lifestyle has harmful effects on the young and the elderly. There is a need to mobilise all actors to disseminate more widely knowledge of the impact of sport on health, particularly with regard to prevention, and train professionals. But we must also make sporting activities accessible to the greatest possible number of people and assist them, whatever territory they are in. On this point, volunteers who use sport as a vector of education, integration and citizenship play an essential role that must be promoted and supervised.

The Conseil d'État is inviting us to reflect on a new model of sport. What are the limits of our present model?

Our model, which is inherited from Gaullism, is still very much centred on high-level sport, hence performance. This model has clearly proved its worth, but it is no longer in sync with the exponential development of the individual practice of sport.

Today, physical activity is practised "when you want, where you want and how you want", in other words, primarily outside the framework of sports federations. From the point of view of health and safety, the authorities cannot ignore this trend. We sense a need to encourage sports federations to better meet the individual objectives of sports practitioners, who may be more interested in well-being than competing.

What is the role of the local authorities in this new paradigm?

Today, it is clearly the local authorities that are financing sporting activity, in the amount of 12 billion euros per year as against 400 million for the State. However, the local authorities are not the ones that decide the rules and direction of public sports policy, which is in the hands of the State and the federations. It is crucial to let them play a larger role in the governance of sport, in accordance with a clear principle of subsidiarity. As they know their territories, the local authorities are the best placed to define a local or regional sports project.

The organisation of the new National Agency for Sport, which brings together the State, the sporting movement, the local authorities and economic actors nationwide while rebalancing their individual roles, must be implemented at the local level through territorial sports conferences. Nonetheless, the State must remain responsible for defining the strategy and embodying the sports policy, which also helps raise France's international profile.

For better international integration of French anti-doping

At the international level, anti-doping efforts are based on the World Anti-Doping Code, the enforcement of which is supervised by the World Anti-Doping Agency (WADA). Aligning French legislation with this code has proved complex because it requires recognition of the competence of the Court of Arbitration for Sport, the supreme body for sports justice, which meets in Lausanne, to rule on the case of French athletes participating in international competitions.

After receiving a bill ratifying the ordinance on the necessary measures for finalising the transposition of the principles of the World Anti-Doping Code into French law, the Conseil d'État delivered a favourable opinion on the recognition of this competence. The ordinance recognises exclusive competence for this international jurisdiction for hearing appeals by international athletes sanctioned for doping by the French Anti-Doping Agency (AFLD).

With a view to ensuring the constitutionality of this measure as regards respect for the rights of persons and the principles of proportionality and the individualisation of sanctions, the Conseil d'État deemed it necessary to amend four articles of the Sports Code (articles L. 239-9-1, L. 232-21 and L. 232-23 and L. 232-23-6).

For further information

Conseil d'État, Home Affairs Section, 26 February 2019, **OPINION** on a bill ratifying Ordinance No. 2018-1178 of 19 December 2018 on the necessary measures in the field of law for finalising the transposition of the principles of the World Anti-Doping Code into domestic legislation and amending the Sports Code, No. 397069. ConsiliaWeb: No. 397069.

Regulation of athletes' salaries is not unconstitutional

The company Montpellier Hérault Rugby Club asked the Conseil d'État to quash the refusal of the Steering Committee of the National Rugby League to abrogate various League regulations relating to the control of clubs, discipline, ethics and sporting fairness.

Article L. 131-16 of the Sports Code lets federations set the conditions for participations in the competitions they organise. In this connection, it provides for the possibility that the federations set the maximum amount of remuneration paid to athletes by each sporting company or association (the so-called "salary cap"). The company Montpellier Hérault Rugby Club claimed that the principle of salary caps was contrary to the freedom of entrepreneurship, freedom of association and freedom to contract. The Conseil d'État recalled that lawmakers had the option of placing limitations justified by the general interest on freedom of entrepreneurship and freedom to contract, provided that this did not entail restrictions that were disproportionate in the light of the objective pursued. It noted that these provisions were designed to guarantee the sporting fairness of championships, the stability and the sound financial status of sporting companies or associations, and hence pursued an objective of general interest. Finally, it considered that the possibility of setting salary caps did not constitute a disproportionate restriction of freedom to contract or freedom of entrepreneurship, and that it was for the administrative judge to monitor federations' effective implementation of such a ceiling, particularly with regard to the level of cap chosen.

For further information

DECISION of the Conseil d'État, 2 / 7 CHR, 11 December 2019, Société Montpellier Hérault rugby club, No. 434826. ArianeWeb: No. 434826.

A motivated working community

2019 marked the 220th anniversary of the Conseil d'État, one of the Republic's oldest institutions. How has the administrative court system evolved to take up the challenges of the contemporary world and meet the needs of a society on the move?

A strong, shared professional culture

Deontology, unity and collegiality – these practices, which are closely linked to independence and impartiality, underpin the basis of the identity of administrative justice. They are shared by a work community that is motivated to meet the quality and security requirements of decisions and opinions. More than a working methodology or a centuries-old tradition, these practices form a living culture serving the rule of law and the general interest.

Deontology: embodying the ethical requirement

Independence, dignity, impartiality, integrity and probity are among a judge's primary duties. These deontological requirements are deeply rooted in the individual consciousness of each member of the administrative court system.

At a time when society is demanding greater transparency of public action, the way in which these requirements are applied to the exercise of court functions must be shared, explained and made accessible to citizens.
This is the purpose of the Charter of Deontology, established in 2011, and the College of Deontology of the Administrative Jurisdiction introduced by the Conseil d'État and established by law in 2016.
Even though deontological principles are well known and shared by the members of the administrative court system, their application in certain situations sometimes gives rise to questions as to the right conduct. The deontological mechanism introduced, which is based on a charter and a college, has a twofold objective: first, offering members of the court system a collective, shared framework for clarification of deontological principles and best practices; and second, meeting the needs of a society that requires more tangible proof in the independence and impartiality of justice.
Since its establishment, the College of Deontology has delivered 46 opinions, including six in 2019, and four recommendations, including one in 2019. These form a corpus of reference made available to all and help to reinforce the exemplarity of the administrative court system.

"Adapting deontology to new situations and realities is one of the imperatives to which we must respond.

Daniel LABETOULLE
President of the College of Deontology

What are the needs addressed by the Charter and College of Deontology of the administrative court system?
For a long time, "deontology" was designed and practised by judges as an individual matter, a bit like morals. When a judge asked themselves – "Can I do this or not? Should I recuse myself from this case or not?" – they looked primarily or exclusively to themselves for the answer, with the feeling that they were mainly accountable to themselves. Today, society, and a fortiori the community of litigants, is more critical and demanding with regard to public action, as a result of which deontology has now moved well beyond the sphere of individual conscience. Even though it is inherent to their mission, a judge's personal deontology can no longer be purely implicit. This is the need met by the charter and college of deontology.

What type of question does the college face and how does it respond?
The questions addressed to us come first of all from judges, but may also come from heads of jurisdictions and members of the Conseil d'État. They most often concern very concrete situations that could lead to a possible conflict of interests and hence an obligation to exercise reserve or stand down for the judge (*obligation*

de réserve ou de déport). They may be linked, for example, to the compatibility of political, association or trade union activities exercised in addition to their role in court. We have also had cases of judges who have become lawyers, and judges asked to examine cases linked to the activities they exercised previously. Many questions also relate to family situations that can call the judge's impartiality into question: "My husband is a lawyer, what attitude should I adopt when cases in which he is involved come before the court?", etc.
Whereas the general drift of an answer to a request for an opinion is rapidly clear, the formulation of its scope and the nuances it requires necessitate meticulous preparation. Comparisons of different perspectives, exchanges of views, and debate within the college are extremely precious. The opinions, which are published, have a case law dimension: answers to some enlighten all members of a jurisdiction. However, it must be understood that the College of Deontology is not designed to replace judges in their examination of conscience but rather to enlighten them. It is, above all, an information and advisory body made available to them; it must not have any management, oversight or disciplinary powers.

Since its establishment in 2011, the Charter has been regularly updated. Why is this?
Adapting deontology to new situations and realities is one of the imperatives to which we must respond. Social media offer a significant example in this respect.
Can judges express themselves without special precautions on social media? The answer is no, as the very broad dissemination and unlimited archiving of these media may be prejudicial to the discretion and impartiality that the citizen is entitled to expect from the judge, and therefore call for great vigilance. Without calling into question the principle of freedom of expression,
we deemed it necessary to introduce into the Charter an article relating to the proper use of social media. Deontological best practices are not immutable and must deal with the consequences of society's changing needs. Yet the essential principles remain: in addition, they are part of a long tradition. ■

Unity: guaranteeing the consistency of judicial decisions

Over 4,000 people – administrative staff and registry officers, judges and members of the Conseil d'État – work in the 52 administrative courts scattered across the country. Strong structural and organic links safeguard the unity of administrative justice.

The administrative tribunals, which in 1953 replaced the interdepartmental prefectural councils created in 1926, and the administrative courts of appeal, created in 1987, ensure that the administrative court system is present nationwide (today with 42 administrative tribunals and eight administrative courts of appeal). It is up to the Conseil d'État, in its dual capacity as a supreme court and manager of the administrative court system, to safeguard the unity and consistency of the system as a whole. The aim is to guarantee citizens, in their disputes with public authorities, that comparable situations will be dealt with in the same way.
"Unity and its corollary, the homogeneity of administrative case law throughout the country, address the considerations of equality and security for litigants," explains David Moreau, Deputy Secretary General of the Conseil d'État responsible for the management of the administrative courts and digital technologies. But how can this unity be achieved?" It is based on structural ties and is reflected by the constant concern for proximity, the sharing of methods of work and the circulation of information (particularly where many cases raise identical questions of law)."

In addition, the Conseil d'État is the main source of case law for the courts, through the decisions it delivers at last instance or, in some areas, at first instance. "It may even receive a request for an opinion from the administrative courts when they are facing a question of law that is new or features a serious and recurrent difficulty. In such cases, the Conseil d'État delivers an *avis contentieux* (opinion in the context of the litigation in progress) which is not legally binding but which judges follow in practice on the merits, given that it constitutes a stand taken by the supreme judge of our order of courts," adds David Moreau, who concludes "as we can see, this type of relationship fosters the unity and consistency of law while guaranteeing the independence of each member of the court system, who rules on each case according to their conscience."

"Unity and its corollary, the homogeneity of administrative case law throughout the country, address considerations of equality and security for litigants.

David MOREAU
Deputy Secretary General of the Conseil d'État responsible for the management of the administrative courts and digital technologies

Catherine FISCHER-HIRTZ
President of the Amiens Administrative Tribunal

How is the principle of unity of the administrative court system reflected in the field?

First of all, by a strong feeling of belonging to a judicial community that has been able to organise itself and adapt in response to an ever-growing demand for justice. In practice, unity translates into the use of common tools enabling members to work faster and more effectively (such as the Télérecours and Télérecours Citoyens apps, and pooling of legal research tools) but also the dissemination of case law, the uploading of information on the websites of the Conseil d'État and the courts, which are regularly consulted, or the formation of working groups tasked with helping to design new tools or reflect on changes in working methods. The pooling and cross-fertilisation of ideas are essential for maintaining and developing the institution while preserving its unity.

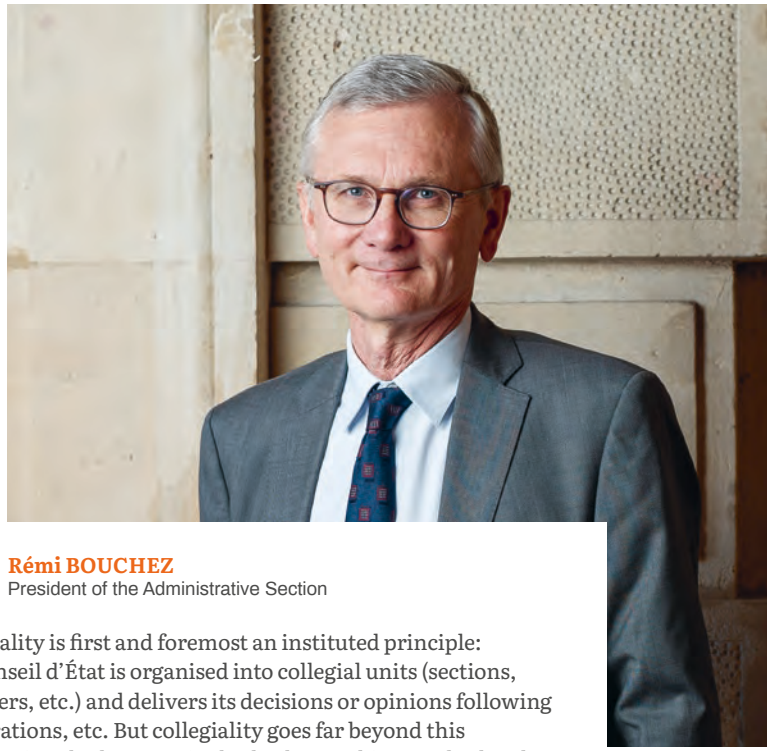
Unity is also built at meetings in the field, which provide an opportunity to strengthen ties between the court and the delegation of the Conseil d'État and to exchange views with judges and registry officers on the daily exercise of their duties, while enabling them to share their concerns or proposals. In addition, it can be seen in the exchanges that occur between an administrative court of appeal and the administrative tribunals within its jurisdiction.
But unity is also a reality to which the administrative court system gives life daily, thanks to its attachment to the exercise of genuine collegial work which ensures that no judge feels alone as they exercise their profession.

How can the unity of the court system be reconciled with the independence of judges?

Unity does not exclude independence or vice versa. In the performance of their duties, administrative judges interpret the law in all independence and impartiality, and their decisions must be free of any form of pressure. Nonetheless, an administrative judge is not a "free electron".
They are the guarantor of respect for the law, which must apply in a homogeneous and consistent fashion throughout the country in order to guarantee the rights of litigants and the proper functioning of administrative justice in all circumstances. The independence and impartiality of the judge in the performance of their duties are also measured by their ability to respect two-tier proceedings in the name of the principle of legal certainty, which is essential to ensure that our fellow citizens have full confidence in administrative justice and its functioning. ■

Collegiality: betting on collective intelligence

At all levels of their jurisdictional or advisory activities, members of the administrative jurisdiction feed on the collective work input. An institutionalised rule, "collegiality" is also a state of mind and a means of shared reflection. Even though it plays a key role in the culture of the jurisdiction, it is suited to the growing demand for effective, rapid trials.



Rémi BOUCHEZ
President of the Administrative Section

Collegiality is first and foremost an instituted principle: the Conseil d'État is organised into collegial units (sections, chambers, etc.) and delivers its decisions or opinions following deliberations, etc. But collegiality goes far beyond this organisational schema. It is also both a working method and a state of mind which drives us in our advisory and jurisdictional activity, both during and prior to final deliberations. When we deliver a decision or opinion, we work in a collective, shared and often cross-cutting fashion. For example, with the advisory formations, several sections may unite to sit together, a member of one section may contribute to the work of another section, and the most important or most difficult cases give rise to two successive deliberations, first within the competent section then in the general assembly.

Collegiality in the Conseil d'État is an effort to listen actively and understand the other's viewpoint with respect, responsibility and equality for each member of the bench but also, in the pre-trial examination of cases, a search for opinions and contributions from colleagues.

We believe in this collective intelligence, which feeds on the variety of ages, expertise, career paths and knowledge which are the great treasure of the Conseil d'État. Thus, our common culture leads us to choose the work of all over the satisfaction of seeing our personal position prevail. And very often, viewpoints evolve in the course of debate. Of course, this collegiality exists in many institutions, but in the Conseil d'État, it is special insofar as it is both intense and geared to a single, shared goal: the search for the best possible judicial solution. ■

Carine SOULAY
Assessor in the 4th chamber of the Litigation Section

Collegiality is a cardinal principle in the organisation and functioning of administrative justice, enshrined in Article L.3 of the Code of Administrative Justice. For the litigant, it is the guarantee and driver of an impartial, high-quality decision. Owing to the exponential growth in the number of cases handled by the administrative court system, it has proved necessary to rethink the framework and practice of collegiality in order to provide the efficiency that the citizen is entitled to expect. One example is the possibility of adjusting the membership of benches depending on the difficulty of cases and their timeline, particularly with accelerated procedures. Thus, benches in the Conseil d'État are composed of three to 17 judges, with the exception of urgent applications judges who, given the urgent nature of the disputes in disputes, generally rule on their own.

This adaptation of collegiality has considerably improved the functioning of administrative justice and enhanced the legitimacy of the judge: the litigant knows that their case will be heard within a reasonable timeline, in just proportion to its difficulty. Nonetheless, collegiality remains even when we are deliberating in small teams or a judge is ruling on their own, because the issues raised by disputes will lead or have already led to exchanges of views and shared reflections. Collegiality, which makes it possible to benefit fully from the human wealth of the administrative court system, is also reflected by a collective intelligence that fully nourishes reflection at every stage of the preparation of the judicial decision. ■

An institution reflecting society

Equality, diversity, youth. The administrative court system feeds on the diversity of profiles, viewpoints, eminent figures, the cross-fertilisation of cultures, career paths and generations of which it is composed. This wealth is indispensable for the quality of the decisions of the courts and the accomplishment of their mission: defending democratic values in the interest of all.

Equality and diversity

After being audited by AFNOR in autumn 2019, in 2020 the administrative court system obtained the "diversity" and "gender equality" labels for the body of its actions undertaken since 2017 to combat all forms of discrimination. Whereas the emphasis on these questions is crucial in all parts of society, it is even more important for the Conseil d'État, a historic actor in the field of respect for equal rights.

The purpose of these two labels is to evaluate respect for equal opportunity, the prevention of discrimination and the promotion of diversity and professional equality in the management of human resources. "Ensuring that public decisions are taken on legal criteria is at the very foundation of our work and the case law of the Conseil d'État," recalls Catherine Bobo, Deputy Secretary General of the Conseil d'État and Delegate for Diversity. "Consequently, we have a duty to be exemplary, both as a public service and as an employer." Even though the Conseil d'État is slightly more egalitarian that the rest of the public service as a whole, there is still room for progress, particularly as far as professional responsibilities are concerned. Forty-five percent of judges are women. However, they only chair 38% of the administrative courts of appeal and the administrative tribunals.

Values common to "the agenda for all"

What is the point of labelling approaches? "Placing these issues on the agenda encourages everyone to feel concerned and provides a framework and meaning for focusing energies," emphasises Catherine Bobo. Gender, disability and also family situations, health status and parenthood are some of the areas of work identified and implemented through a programme of concrete prevention, training and awareness-raising activities that 17 "diversity representatives" disseminate and drive locally. Because this dynamic is also intended to pay a unifying role for jurisdictions: "The aim is to move forward together around common values."

Multiple initiatives

Since 2017, there has been a sharp increase in the number of initiatives. One such initiative was the creation, three years ago, of a pool of candidates for posts of heads of court, making it possible today to promote parity of appointments. In 2018, internal training on equality and diversity issues was made compulsory for all new hires. In 2019, the organisation of events afforded an occasion to place rarely tackled questions like homophobia and transphobia on the agenda: a lecture-debate on medically assisted procreation at the Caen Administrative Tribunal, an intervention by an association fighting homophobia at work, "l'autre cercle", at the Marseille Administrative

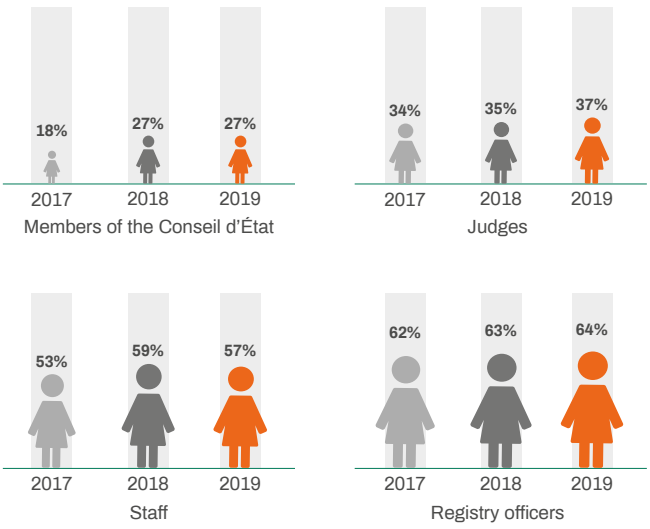
Catherine Bobo, Deputy Secretary General of the Conseil d'État and Delegate for Diversity, with a few members of the "diversity network" of the administrative jurisdiction.

Tribunal, the "Rainbow" quiz designed by the Council of Europe and disseminated via the website of the Conseil d'État, etc.

All these measures help to deconstruct stereotypes and anticipate risks of discrimination. They are starting to bear fruit: "We have put in place indicators and are closely monitoring statistics. With regard to gender equality in particular, we have put things right, so that women are promoted in proportion to their share of staff," explains Catherine Bobo. But the awarding of labels[1] – for a four-year period – is obviously not an end in itself. "It is an acknowledgement, but it changes nothing in the work we have started and plan to continue as part of a continuous improvement approach." On the programme for 2020: preparing a professional equality charter or making the administrative court system more accessible to young people from disadvantaged backgrounds.

1. In February and March 2020.

Percentage of women in the highest hierarchical level



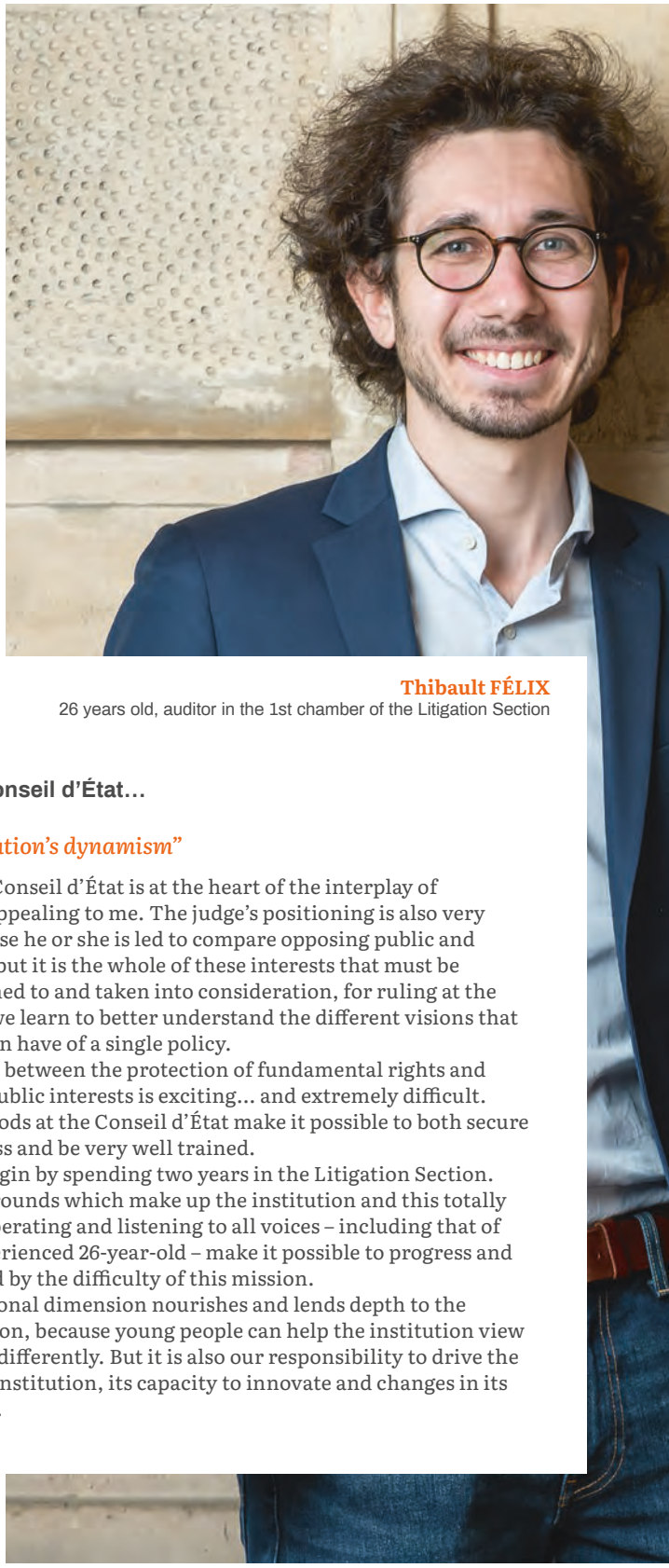
Investing in youth

Twenty percent of all members of the Conseil d'État are under 40 and, each year, auditor posts are offered to students graduating from the National School of Administration (ENA). Younger people, combined with demanding training, are a strong component of the Conseil d'État's legal excellence. They also offer the guarantee of the generational diversity that is key to the Council's desire for innovation and its ability to assist with the transformations of a changing world.

The majority of Conseil d'État members are recruited by competitive examination or by external appointment. Every year, four to six positions of auditor are made available to the graduates of the ENA, generally chosen from among the best of their class. Trained for three years in the methods of highly technical judicial proceedings, the collegiality of reflection and the quality of the dialogue required for examining the cases submitted to the Conseil d'État, auditors become masters of petitions (maître des requêtes) then members of the Conseil d'État, on the basis of seniority.

Even though legal excellence is not limited to the auditors alone – a large share of members of the Conseil d'État recruited from the outside or in special service are eminent lawyers (judges in the administrative or ordinary courts, academics, etc.) – the latter represent a vital force used to judicial proceedings and give the Conseil d'État a fresh perspective which stimulates its capacity to innovate. Intergenerational dialogue makes the court better able to grasp the new societal issues at stake linked, for example, to digital technologies, bioethics or the environment.

But auditors are also one of the fundamental elements of the huge diversity of profiles which sets the Conseil d'État apart. Thus, collegial benches mix together persons of all ages and a variety of work experiences: a guarantee of the quality of the decisions of justice and the proper functioning of the institution and its ability to challenge itself and remain in contact with the reality of a changing world.



Thibault FÉLIX
26 years old, auditor in the 1st chamber of the Litigation Section

Choosing the Conseil d'État…

"Drive the institution's dynamism"

The fact that the Conseil d'État is at the heart of the interplay of institutions was appealing to me. The judge's positioning is also very interesting, because he or she is led to compare opposing public and private interests, but it is the whole of these interests that must be understood, listened to and taken into consideration, for ruling at the end. In this way, we learn to better understand the different visions that all social actors can have of a single policy.

Striking a balance between the protection of fundamental rights and often legitimate public interests is exciting… and extremely difficult. Yet working methods at the Conseil d'État make it possible to both secure the judging process and be very well trained.

Young auditors begin by spending two years in the Litigation Section. The varied backgrounds which make up the institution and this totally collegial way of operating and listening to all voices – including that of a relatively inexperienced 26-year-old – make it possible to progress and not be intimidated by the difficulty of this mission.

The intergenerational dimension nourishes and lends depth to the collective discussion, because young people can help the institution view certain questions differently. But it is also our responsibility to drive the dynamism of the institution, its capacity to innovate and changes in its working methods.

Yaël TREILLE
34 years old, auditor in the 4th chamber of the Litigation Section
(entered the Conseil d'État in January 2019)

Choosing the Conseil d'État…

"One of the rare professional circles that values youth so highly"

Why did I choose the Conseil d'État? Several factors were decisive: I wanted to acquire a completely new and eminently technical skill that was above all useful for the exercise of all public policies. The law is not an end in itself; it is a tool in the service of effective public action that respects public and individual freedoms.
Working at the Conseil d'État gives me the impression of being at the heart of public action and belonging to an institution that serves the general interest on a daily ongoing basis.
As young auditors, we are both rapidly given responsibilities and well supported, thanks in particular to the mentoring system. I was immediately struck by the modern nature of the working methods based on the freedom and responsibility of each of us, excellent availability and equal treatment. I believe that it is also one of the rare professional circles that values youth so highly. This is a tradition, but it also makes it possible to take a fresh look at the cases handled in order to grasp all of their facets. In my view, however, it is not so much age in itself that is important as it is the diversity of perspectives, and youth is but one of the components of this diversity.

Functioning that adapts to contemporary challenges

Over the decades, against the backdrop of a steady increase in the number of disputes, administrative justice has managed to make changes to its methods and practices for responding effectively to the needs of litigants, meeting its timelines for delivering judgments, and proposing solutions designed to manage the protection of public freedoms under accelerated procedures. Faced with new challenges, the Litigation Section prepared a "Project 2019-2023", to set the course of the changes to come in the service of all litigants. An interview with its President, Jean-Denis Combrexelle, follows.

Jean-Denis COMBREXELLE
President of the Litigation Section

What findings guided your reflection on the development of judicial proceedings in your plan for 2019-2023?

There is a need to measure the progress made. Thanks to the efforts of all, whether it be in the administrative tribunals and the administrative courts of appeal or in the Conseil d'État, our timelines for delivering judgments have become reasonable. Moreover, with the help of summary proceedings, administrative judges have demonstrated that they were capable of not only handling expedited procedures but also using them to effectively strengthen the protection of public freedoms. Finally, from a case law perspective, administrative judges have radically innovated with regard to their office and its powers in all areas of administrative action by integrating the upheavals due to the importance of international and European legislation and constitutional norms with the priority issue of constitutionality. Ever since the courts were created at the initiative of Marceau Long, the administrative court system has undergone profound and beneficial changes with an intensity that few institutions have experienced. This did not happen of its own accord. Of course, reducing the timeline for delivering judgments was made possible by an increase in the number of judges and officers, but also an increase in productivity and the incorporation of a high dose of IT and digital technologies into working methods. If everyone recognises Télérecours as a success, this is due in particular to the work of the registry officers. If we have managed to draft our decisions in direct, clearer and more intelligible wording, it is thanks to the capacity for change and the determination of the members of the administrative courts. We must never forget that behind far-reaching changes, there are first and foremost women and men who, in their daily work, implement these changes. We can be proud of the progress made.

Just like companies in the private sector, administrations undergo far-reaching changes. Administrative judges must change along with the administrations they oversee. Thus, to encourage private operators to make changes to their behaviour, departments must waste less time writing good old circulars that are long and often difficult to understand. Labels, websites and indexes are going to flourish which, combined with "naming and shaming", will be formidably effective. How will judges oversee these soft law mechanisms?

Likewise, artificial intelligence is becoming a reality for administrative action. Algorithms may be inadequate or even discriminatory, sometimes even without the knowledge of the departments which initiated them. What will judges do? How will they detect discrimination when it is due to a piece of software?

Moreover, as the Conseil d'État demonstrates in its reports and studies, in an increasingly complex and

diverse society there is a need to experiment, get stakeholders on board, listen and dialogue. Processes are becoming more and more sophisticated and involve a host of actors.
The administration changes, and so do applicants. Whether they like it or not, administrative judges are becoming arbiters for environmental, prison and immigration policy, for States' policy towards the GAFA, bioethics, health, etc.

What major challenge will the Litigation Section have to tackle in coming years?

In my view, it will be necessary to meet a growing need for public services – the health crisis that we are undergoing is a perfect example of this – and a need for justice. The administrative judge is at the heart of these two growing needs. We must be prepared. In this perspective, not everything necessarily arises from spectacular case law or decisions. This is a collective challenge that involves both the members and the officers of the administrative jurisdiction and our "fellow travellers" who are of course lawyers but also academics and more broadly the world of law.

How is this project designed to enhance the efficiency and adaptation of the section?

One of the levers for action is improving "governance". This term may appear out of step when applied to the Litigation Section. Yet even though the Section is first and foremost a court where deliberation and a search for high-quality decisions are required, it is also a unit that must deal with questions relating to organisation, human resources, the management of thousands of files, software, etc. The quality of our judicial decisions depends in part on the proper material organisation of the department. Next, relations between the Conseil d'État, the administrative courts of appeal and the administrative tribunals are a priority. We still have room for progress with regard to training and common information, exchanges of views on our operating modes, relations between members and registry officers, and so on. As far as working methods are concerned, increasing digitisation in the management of files at all stages of the investigation and trial with the first uses of artificial intelligence are another priority. The development of oral proceedings is another main thrust. Finally, we must accentuate our opening up, to academia of course but also to civil society actors in order to nourish our reflections on future changes, including with regard to case law.

How do you see the Litigation Section in 15 years?

Setting the timeline at 15 years isn't a bad idea, because it is neither too near – it leaves enough room for freedom and imagination – nor too far, because it obliges us to take today's reality into consideration. It is not necessarily the job of the President of the Litigation Section to imagine the section in 15 years. He may of course have intuitions and desires, which I have just shared. But we need fresh perspectives, the perspectives of young members, but others as well. We also need the perspectives of experienced members who have had various responsibilities on the outside, sometimes well removed from judicial proceedings. It is up to them to come up with this vision of the future, and I have asked some of them to start thinking about the "future development of the Palais". This is just the beginning. We must continue along these lines. My only certainty is that the Litigation Section in 15 years will be a place with a rich past, where members and officers will be looking steadfastly to the challenges of the future. From bioethics to economic regulation, from the environment to the construction of a new law of professional relations, from the need for individualisation to the extraterritoriality of the major groups, from the demand for public structures to the constant contestation of their legitimacy sometimes invoked by the same persons, the challenges are immense and the court system will have to demonstrate its capacity to not only settle them but above all to find relevant solutions.

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