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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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France

Philippe Cossalter and Jean-Bernard Auby
Full professor of French public law, Saarland University
Emeritus Public Law Professor, Sciences Po Paris

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I. Fundamental rights in the administrative context

1. Impact of the Covid crisis on fundamental rights and corresponding litigation

Like in many other countries, the Covid crisis has had unforeseen and remarkable implications for French public law. It has demonstrated the flexibility of French law in addressing the demands of the pandemic. In this discussion, we will not delve into the merits of the implemented measures. The Covid crisis has significantly amplified three of the structuring principles of French public law, pushing them to their limits: the administrative authority of the President of the Republic, the centralization of the State, and the delicate balance between the general interest and individual freedoms overseen by the Conseil d'Etat.

As widely acknowledged, the President of the French Republic holds significant powers. However, these powers are essentially of a political nature, both domestically (as the "arbiter" of institutions under Article 5 of the Constitution) and externally (national defence, foreign affairs). Over time, the President of the Republic has gradually acquired indirect administrative powers, overshadowing the Prime Minister and other ministers in their exercise. Although constitutionally prohibited from directly performing governmental functions, the President of the Republic does so indirectly through the appointment of the Prime Minister, other ministers and cabinet members. During the pandemic, for instance, the President of the Republic declared a state of 'war' against Covid. He convened a selected "Defence Council" and took critical decisions within this body, which neither the Constitution nor the law explicitly authorizes. This form of "hyper-presidentialisation" of the regime reached its pinnacle during this period.

Furthermore, the case law of the Conseil d'Etat has emphasized the highly centralized nature of the exercise of administrative police powers. Although mayors exert administrative police powers within their municipalities, these powers are superseded once the State asserts its jurisdiction. This rule of priority was particularly striking during the pandemic. In the early stages of the health crisis, the mandatory wearing of masks had not yet been enforced. The mayor of the municipality of Sceaux argued that the government should have mandated mask-wearing in public spaces and exercised its police powers accordingly. However, the Conseil d'Etat ruled that the exercise of police powers, as granted by the law on the health crisis, rested with the Prime Minister and the Health Minister, thereby depriving the mayor's authority in this matter.[1] The prioritization of more liberal measures over more restrictive ones was not motivated by the protection of individual freedoms, but rather by the preservation of State powers.

A third notable phenomenon has been the tendency of administrative courts to dismiss appeals challenging pandemic-related measures that restricted freedoms. While this trend is not exclusive to France, it has been particularly evident here. This strong pattern demonstrates the particular credit enjoyed by the public administration in the exercise of its powers as well as the criticized practice of sacrificing individual liberties in favor of broader public health and safety objectives.

1 Cossalter, P., « Port du masque et pouvoirs de police du maire : pour en finir avec la jurisprudence Films Lutetia », Note sous Conseil d'État Ord., 17 avril 2020, n° 440057, *Commune de Sceaux*, Revue générale du droit on line, 2020, numéro 51871. Available at : www.revuegeneraledudroit.eu/?p=51871.

2. Secularism (‘laïcité’)

The principle of the unity of the State is arguably the most central principle of French public law, permeating various aspects of the legal system. It finds expression in the highly centralized structure of the French state, which must accommodate the world’s most diverse territory, spanning five continents. Furthermore, the principle of the unity of the State is also embodied in the concept of “equality before the law”, wherein the law applies equally to all individuals, irrespective of whether it protects or punishes (Article 6 of the Declaration of the Rights of Man and the Citizen). The unity of the State is founded upon the unity of the nation and the unity of the French people. The consequent concerns for maintaining this unity prohibits the recognition of a distinct Corsican people within the broader French population (CC, decision n° 91-290 DC, 9th may 1991, Loi portant statut de la collectivité territoriale de Corse). This principle entails that the sole official language of the Republic is French, as has been the case since 10 August 1539 - Ordinance of Villers-Cotterêts.

The principle of secularism in France must be interpreted in the context of the principle of unity of the State, the nation and the French people.

The principle of freedom of conscience is enshrined in Article 10 of the Declaration of the Rights of Man and of the Citizen of 1789, which states that “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law”. Article 1 of the French Constitution states that “France is an indivisible, secular, democratic and social Republic. It ensures the equality before the law of all citizens, without distinction of origin, race or religion. It respects all beliefs”.

The principle of secularism can be approached from two perspectives: either as an unrestricted acceptance of the expression of religious affiliations within the secular legal framework of the State, or as the suppression of the expression of religious affiliations. The French approach to secularism leans towards safeguarding freedom of conscience and expression in every matter unrelated to the State and the notion of public service.

However, in matters involving the state, strict neutrality must be upheld, as established by the renowned 1905 law on the separation of Church and State. Article 1 of this law declares that “The Republic guarantees freedom of conscience. It guarantees the free exercise of religious worship, subject only to the restrictions set out below in the interests of public order”.[2] Neutrality entails that public servants must refrain from displaying their religious affiliation, while users of public services are allowed to express their religious preferences. However, there is an exception in the field of public education, encompassing all levels up to university: both teachers and students are required to adhere to neutrality.

In recent years, an intense legal debate has taken place to define both the scope and the limitations of secularism.

Regarding the content of secularism, while it entails the neutrality of public service employees and buildings, it does not necessarily imply the neutrality of users. However, significant developments have occurred in recent years concerning this aspect. In line with its established case law, the Conseil d’Etat allowed primary and secondary school pupils to wear religious symbols, as long as they did not constitute proselytism or dis-

2 Loi du 9 décembre 1905 concernant la séparation des Eglises et de l’Etat.

rupt the functioning of the public education service.[3] In 2003, former French President Jacques Chirac commissioned a report on the principle of secularism,[4] which subsequently influenced legislative changes. A law passed on 15 March 2004 prohibits the wearing of ostentatious religious symbols in schools.[5] This legislative shift marks a transition by French state and local authorities from an acceptance-based approach to a prohibition-based approach. The questions raised by secularism in the public space and in public services exceed the scope of this discussion. We will examine three emblematic cases. The first case that garnered significant media attention was that of the Baby Loup day nursery. Fatima, a nursery worker, was dismissed for wearing the Islamic veil while at work. After a series of twists and turns, the Court of Cassation ultimately upheld the employee's dismissal, concurring with Court of Appeal's reasoning. The Court of Appeal had considered that "the principle of freedom of conscience and religion for each staff member cannot hinder compliance with the principles of secularism and neutrality that apply to all activities" of the day nursery.[6] Most notably, this case involved a private nursery, rather than one operated by public entities.

In a more recent decision, the Conseil d'Etat ruled that the internal regulations of a municipal swimming pool that permitted the wearing of the Burkini (a full-body swimsuit) were unlawful. This decision is noteworthy as it applies the principle of secularism to users of a public service in fairly new terms. Essentially, the Conseil d'Etat argues that there should be common rules of conduct, and it is illegal to create exceptions to these

3 Conseil d'Etat, 2 Nov. 1992, n° 130394: « the principle of the secular nature of public education, [...] which is one of the elements of the secular nature of the State and the neutrality of all public services, requires that education be provided in compliance, on the one hand, with this neutrality by curricula and teachers and, on the other hand, with the freedom of conscience of pupils ; that, in accordance with the principles set out in the same texts and France's international commitments, it prohibits any discrimination in access to education based on the religious convictions or beliefs of pupils; [...] that the freedom thus recognised for pupils includes the right to express and manifest their religious beliefs within schools, with due respect for pluralism and the freedom of others, and without prejudice to teaching activities, the content of the curriculum and the obligation to attend classes; in schools, the wearing by pupils of signs by which they intend to manifest their religious affiliation is not in itself incompatible with the principle of secularity, insofar as it constitutes the exercise of freedom of expression and manifestation of religious beliefs, but [...] this freedom cannot allow pupils to display signs of religious affiliation which, by their nature, by the conditions in which they would be worn individually or collectively, or by their ostentatious or demanding nature, would constitute an act of pressure, provocation, proselytising or propaganda, would undermine the dignity or freedom of the pupil or other members of the educational community, would compromise their health or safety, would disrupt the progress of teaching activities and the educational role of teachers, or would disrupt order in the establishment or the normal functioning of the public service ».

4 Commission for reflection on the application of the principle of secularism in the Republic: report to the President of the Republic (Commission de réflexion sur l'application du principe de laïcité dans la République: rapport au Président de la République), 1st Dec. 2003. Available at: https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/034000725.pdf (Last consulted on 9 July 2023).

5 Loi n° 2004-228 du 15 mars 2004 *encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* created the art. L. 141-5-1 of the Code de l'éducation: « Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit ».

6 C. Cass., Ass. Plén., 25 June 2014, n° 13-28.369, *Baby Loup*. Hunter-Henin, M., « Religion, Children And Employment: The Baby Loup Case », *International & Comparative Law Quarterly* 2015, vol. 64, issue 3, pp. 717-731, doi:10.1017/S0020589315000305.

rules that could be excessively specific.[7]

Furthermore, in another recent development, the Conseil d'Etat declared that the regulations of the French Football Federation, which prohibited female members from playing with a hijab, were legal.[8] According to the Conseil d'Etat, sports federations have the authority to adopt regulations that may limit the freedom of license-holders, who are not legally obligated to adhere to the principle of neutrality of the public service in expressing their opinions and beliefs. This limitation is justified if it is necessary for the proper functioning of the public service or for protecting the rights and freedoms of others, and if it is appropriate and proportionate to these objectives. After establishing this principle, the Conseil d'Etat concluded that the ban on "wearing signs or clothing ostensibly expressing a political, philosophical, religious or trade union affiliation", restricted solely to the time and place of football matches, was necessary to ensure the smooth running of matches, particularly by preventing any confrontation or clashes unrelated to the sport.

II. Administrative institutions and Agencies

In the field of institutional administrative law, three noteworthy events deserve mention and brief commentary: the first pertains to civil service, the second to local government, and the third to independent agencies.

1. Civil Service Reform 2021

Civil service is an inherently sensitive issue, involving political influence on the State, ethical considerations, and its relationship with general employment, among other factors. Consequently, in many countries, the civil service system undergoes repeated reforms, as an ongoing effort to find a proper balance.

This is true for France as well, as new legislation on Civil Service is regularly adopted, driven by the ambition of aligning with the evolving challenges of contemporary administration. Since 2010, no fewer than six legislative reforms have been enacted, including

7 CE, 21 June 2022, n° 464648, « The public entity managing a public service is required, when defining or redefining the rules for the organization and operation of that service, to ensure compliance with the neutrality of the service and in particular the equal treatment of users. If it is at its discretion, in order to satisfy the general interest in ensuring that the greatest possible number of users have effective access to the public service, to take account, over and above the legal and regulatory provisions that are binding on it, of certain specific characteristics of the public concerned, and if the principles of secularism and neutrality of the public service do not in themselves constitute an obstacle, to the fact that these specific features correspond to religious convictions, in principle it is not obliged to take such convictions into account, and users have no right to do so, since the provisions of Article 1 of the Constitution prohibit anyone from taking advantage of their religious beliefs to free themselves from the common rules governing relations between public authorities and private individuals. However, when taking into account the religious beliefs of certain users in the organization of a public service, the manager of that service may not make adaptations that would undermine public order or the proper operation of the service, in particular in that, by virtue of the fact that they represent a major departure from the general rules and have no real justification, they would make it more difficult for users who do not benefit from the derogation to comply with these rules or would result in a clear breach in the equal treatment of users, and would therefore breach the obligation of neutrality of the public service ».

8 CE, 29 June 2023, n° 458088.

two in 2021, which we will discuss in further detail: the "ordonnances" (delegated legislation) of March 3rd and June.

The primary objective of these reforms was a comprehensive overhaul of the top Civil Service, encompassing approximately 3000 individuals holding high-level administrative positions in state institutions, such as ministries, governmental agencies, and public companies.

These reforms were prompted by a growing conviction that the top Civil Service suffered from various shortcomings. These included a lack of social representativeness, an excessive attachment to a certain kind of traditional general culture, a lack of mobility, among other frequently criticized aspects.

The 2021 reform (*Ordonnance n° 2021-702, 2 June 2021 portant réforme de l'encadrement supérieur de la fonction publique de l'Etat*) sought to address two key elements: on the one hand, the recruitment and training of top civil servants, and on the other hand, the organization of their careers.

Regarding recruitment, efforts were made to increase social inclusivity in competitions by modifying the required knowledge test formats. The most significant change, however, was the abolition of the National School of Administration – the "*Ecole Nationale d'Administration*", or "*ENA*" – and its replacement with the National Institute of Public Service –"*Institut National du Service Public*".

This change generated considerable attention, as ENA alumni have exerted a great deal of influence within the state apparatus and also in the private sector, with many members transitioning from administration to private businesses at various stages of their careers.

The true impact of this reform remains to be seen, and it largely depends on the training people will receive at the new National Institute of Public Service.

The second aspect of the reform, concerning the organization of careers, primarily focuses on the structure of the top Civil Service.

Traditionally, the French civil service has been divided into various "bodies" ("*corps*"), with each body comprising civil servants subject to the same legal framework and assigned a certain set of specialized functions. Historically, public employees would spend their entire careers within the same "*corps*".

Until recently, there were over 1.000 such "*corps*" solely within the state administration, along with similar structures in local government and hospitals.

This situation faced regular criticism due to the high degree of rigidity it imposed on human resources management in the State.

Reduction efforts were made, but, as of 2021, the top Civil Service still consisted of approximately 20 "*corps*". This organization increasingly hindered the corresponding levels of responsibility in conducting public affairs, demanding flexibility, adaptability, and the ability to synthesize.

The 2021 reform consolidated most of top civil servants in a single "*corps*", the administrators of the State ("*administrateurs de l'Etat*"). The members of the Council of State ("*Conseil d'Etat*") and of the Court of Accountings ("*Cour des Comptes*") were exempted from this structure due to their combination of judicial and administrative functions.

2. Local Government. State of the local autonomies system."3DS" Act

A series of reforms implemented in the 1980s, particularly thanks to the law of 2 March 1982, shaped the current structure of the French territorial system. Since then, the

system has undergone frequent adjustments, but these changes have not fundamentally transformed it. This observation remains applicable to the period since 2010.

1°. The reforms of the 1980s primarily aimed to enhance the autonomy of local institutions, which also benefited from the transfer of many competences previously held by the state. Application of the law in local autonomies was strengthened, as the adjudications of illegal actions committed by local authorities has been entrusted to administrative courts exclusively, whereas it was previously shared with state administrative bodies. Significant competences were transferred from the state to local governments: in particular, urban planning, which saw substantial decentralization to municipalities ("*communes*"), while social action was largely decentralized to provinces ("*départements*"). These transfers of competences were accompanied by financial compensation, including tax transfers.

These changes caused a shift in the traditionally centralized French territorial system. However, they did not result in a complete transformation. Although local institutions gained new functions and increased autonomy, there is still no field of public action entirely under the control of local institutions. When issues arise to a certain degree of gravity, the State can and often does intervene. The State still retains primary powers across many domains, either through legislation – local institutions in France, in fact, lack legislative powers, except for two overseas territories to a limited extent – or through governmental instruments and procedures.

2°. Since the 1980s, the territorial system has undergone numerous legislative changes, but the fundamental elements established during that period have remained largely unchanged.

The most significant transformation during this period has been the development of inter-municipality. A distinctive feature of the French territorial administration is the large number of basic local entities, with more than 35,000 municipalities ("*communes*") existing today! To overcome the drawbacks of this fragmentation, inter-municipal cooperation was continuously strengthened. A law enacted in 1999 greatly encouraged this endeavor, and today the entire national territory is covered by inter-municipal entities ("*intercommunalités*"), that possess significant competences, particularly in the field of urban planning and the management of basic public services such as water distribution and sanitation.

Since 2010, no less than 6 parliamentary statutes have amended the territorial system. The key changes introduced have included the reduction of the number of regions ("*regions*") to 13 (excluding the overseas regions) and the establishment of a special status for major cities, known as metropolitan cities ("métropoles", currently numbering 22).

The most recent piece of reform legislation is the 21 February 2022 Act. While it does not revolutionize the system, it demonstrates a willingness to allow for some degree of differentiation in terms of statuses and powers. This is a remarkable departure from the French tradition, that strongly favors territorial uniformity in the name of the principle of equality.

3. Independent agencies. The ongoing debate on their relationship with political and the powers. 2017 Act

It was not until 1978 that French law embraced the concept of national administrative authorities that would be exempt from the hierarchical power of the government. The term

"independent administrative authority" ("*autorité administrative indépendante*") was first used to describe the body responsible for safeguarding citizens' privacy and personal data against the advancements of digitalization ("*Commission Nationale Informatique et Libertés*").

Since then, a considerable number of these independent administrative authorities have been established, primarily in two directions. Some have been created to protect citizens' rights in specific fields. However, there is one authority, known as the "*Défenseur des Droits*", that assumes a broader ombudsman function across various domains. Other authorities are responsible for sector-specific regulations, such as finance, telecommunications, and so on.

Another distinction within this category of authorities is the presence of "*autorités publiques indépendantes*" that have been granted legal personality. This enables them to be held liable for damages resulting from their unlawful decisions, rather than the State itself.

Since the 2010s, concerns have been raised, notably in several parliamentary reports, regarding what has been described as the excessive and disorganized proliferation of independent authorities. In response, a statute was enacted on 20 January 2017, which, firstly, established a common status for these authorities, whereas previously each independent authority had its own distinct status. Secondly, it explicitly limited the recognized entities belonging to this category to 26, as designated in the law.

III. Administrative procedure/Decision-making processes

1. First Administrative Procedure Code

The rules of administrative procedure in France were primarily developed by the Council of State, which explains why the codification of the French administrative procedure occurred relatively late. However, it became increasingly problematic that such important rules were not clearly presented to citizens, relying instead on the often intricate knowledge of a vast body of case law.

The first partial codification of administrative procedure took place through the law of 12 April 2000. Nevertheless, it was necessary to supplement it with the case law of the Council of State in order to fully comprehend the system of administrative procedure.

In 2015, the Code of Relations between the Public and the Administration (Code des relations entre le public et l'administration) was adopted. This code repealed and replaced previous laws and codified administrative case law.

Since its enactment in 2016, administrative procedure has become clearer and more accessible. This codification has also provided a framework, albeit still imperfect, for the principles of digital administration law.

However, the most notable development in this code is the definition of the administrative act. Traditionally, the administrative act, as a legal act, had to produce legal effects. In France, the term "acte décisoire" (the act must carry a decision) was used to illustrate this necessity. Under the current framework, administrative acts no longer need to be decisions: it is sufficient that they have significant effects on third parties, even without altering the state of the law. This reflects the notable emergence of "soft law", in France as in other jurisdictions.

2. Soft law

The emergence of soft law is not a new phenomenon and is not unique to France. In

France, the institutional history of soft law began in 2013, marking its tenth anniversary. The Conseil d'Etat, in its annual study for 2013 (Conseil d'Etat, Etude annuelle, Le droit souple, 2013), presented its reflections on the subject and subsequently adopted several policy decisions. In its first policy decision in 2016, the Conseil d'Etat recognized that recommendations issued by economic regulation authorities, even if they do not affect any legal situation, can have effects on third parties and be subject to judicial review. For instance, when a banking regulator advises against investing in a financial product (CE, 21 mars 2016, *Société Fairvesta International GMBH et autres,* n° 368082). The Council of State further expanded its case law to include the opinions of the High Authority for the Transparency of Public Life, which can affect the reputation of a member of Parliament (CE, 19 July 2019, Madame L., n° 426389).

In 2000, the Council of State issued a landmark ruling intended to cover all cases of administrative acts that do not change the state of the law but have a significant effect and can therefore be subject to judicial review (Conseil d'État, 12 June 2020, GISTI, n° 418142). In this decision, the Council of State establishes the following principle: «Documents of general scope emanating from public authorities, whether formal or informal, such as circulars, instructions, recommendations, notes, presentations or interpretations of positive law, may be subject to judicial review when they are likely to have significant effects on the rights or situations of individuals other than the agents responsible for implementing them. Such effects may include, in particular, documents of a mandatory nature or those that act as guidelines».

In a more recent decision, the Council of State provides a clear example of the principles it established. Even a simple FAQ posted on the website of the Ministry of the Economy and Finance can be challenged, as long as the content of this FAQ (such as – in this particular case – an opinion on the granting of financial aid following the Covid-19 pandemic) can have significant effects (*des effets notables*) on its recipients (Conseil d'État, 3th February 2023, n° 451052).

The evolution of the concept of administrative act is not merely theoretical: it also affects the jurisdiction of the administrative judge to review such acts. French administrative law revolves around mechanisms of judicial review by the Conseil d'Etat. The shift in the approach to the concept of administrative acts allows for the modernization of administrative litigation.

IV. Judicial review

Historically, French administrative law has its roots in the separation of administrative courts from ordinary courts. The first of these was the '*Conseil d'Etat'*, followed by the '*tribunaux administratifs'*, which led to the development of a dual court system. In modern times, the addition of administrative courts of appeal – '*cours administratives d'appel'* – and various specialized administrative tribunals has expanded the administrative adjudication system beyond the '*Conseil d'Etat'* and the '*tribunaux administratifs'*.

Procedural rules governing proceedings before administrative courts are distinct and different from those governing civil and criminal jurisdictions. In the past, these rules were established by the administrative judges themselves. Nowadays, most procedural rules originate from statutory law and have been consolidated in a code, the '*code de justice administrative'*.

In recent years, the law governing contentious administrative procedure has under-

gone significant changes. The most notable developments include the following points (we will leave aside here what concerns the litigation related to administrative contracts, which will be discussed separately: see VI).

1. Access to courts: trend towards reduction?

1°. Traditionally, access to the French administrative courts has been very open, particularly in terms of the acts that may be challenged, standing requirements, and time limits for bringing proceedings. While this openness largely remains, there has been a discernible trend towards certain restrictions in recent years.

a) The range of administrative acts that can be challenged before the administrative courts remains extensive. In fact, it has even been recently expanded to include certain soft law acts that would traditionally have been exempt from litigation (as discussed above, in section III). The main limitation lies in the concept of *'actes de gouvernement'*, which refers to highly political decisions – such as dissolving the National Assembly or negotiating a treaty. Contentious appeals against these *'actes de gouvernement'* are not possible. While the number of such acts is relatively small, new scenarios may occasionally arise in case law (for example, a decision related to the export of war material to a foreign State: *Conseil d'Etat, 27 January 2023, Association Action des chrétiens pour l'abolition de la torture*).

b) Since the beginning of the last century, the rules on standing have been especially generous. It is worth highlighting that, unlike in some other administrative law systems, it is possible to challenge an administrative act without having to prove that the act infringes upon one's rights. It is sufficient to demonstrate that it affects one's 'interests'. By the same token, collective actions, especially those initiated by associations, have traditionally been quite accessible.

However, in the field of town planning litigation restrictive trends have emerged in recent years.

In an effort to reduce the number of appeals against planning permissions, the legislature has intervened – notably in 2013 – by imposing various limitations on standing. It has imposed certain restrictions on individual appeals, such as requiring the appellant to specify the precise impact that the construction, which is subject to the challenged planning permission, would have on his/her personal situation (*'code de l'urbanisme'*, article L.600-1-3).

Similarly, appeals filed by associations now require that the challenging association had already been in existence for at least one year before the granting of the planning permission (*'code de l'urbanisme'*, article L.600-1-1).

c) A similar restrictive trend has recently emerged regarding the time limit for initiating actions before administrative courts. Traditionally, the rule was that an appeal against an administrative act had to be filed within two months from the date on which the contested decision was made publicly available, as required by law. Consequently, if the act had not been adequately published, there was no time limit for challenging it. The 'Conseil d'Etat' amended these rules by recognizing, in a judgment in 2016 (*13 juillet 2016, Czabaj*), that the appeal must be filed within a 'reason-

able' time limit in any case. Although not explicitly defined, this 'reasonable' time limit generally seems to be one year.

2°. In contrast to the aforementioned restrictive trends, there have been some developments aimed at facilitating appeals, particularly in the context of class actions that may impact a large number of people.

In 2016, a law was enacted to allow for two types of class actions. The first type applies when the administration has taken the same illegal negative individual decision against a significant number of people: it is called '*action en reconnaissance de droits'* (*code de justice administrative, article L.77-12-1*).

The second type applies when the administration causes harm to a large number of people: it is known as '*action de groupe'* (*code de justice administrative, article L.77-10-*1).

2. Emergency procedures fostering

Emergency procedures before the administrative courts underwent significant reforms through the Act of 30 June 2000, and are now more frequently utilized.

Two of these procedures deserve special mention.

The first is the *'référé-suspension'*, which allows for obtaining a court order to suspend the execution of an administrative decision if that decision is likely to be unlawful and if its immediate enforcement could create an irreparable situation.

This procedure is commonly employed in various fields, such as disputes involving planning permissions.

The second procedure, called *'référé-liberté'*, can be invoked in cases of particular urgency where an administrative decision has infringed upon a fundamental right. In such cases, the judge renders a ruling within 48 hours and has the authority to order the administration to undertake all necessary measures to cease the violation.

This mechanism implies that the judge acknowledges the existence of a fundamental right at stake. Case law has emerged on this matter, including recent rulings that recognize the character of fundamental freedoms, such as the right of every individual to receive the most appropriate care for their health condition (*Conseil d'Etat, 14 February 2014, Ms Lambert)* and the right to live in a balanced environment that respects health (*Conseil d'Etat, 20 september 2022*).

3. Administrative judges' powers in legality review

Although the concepts and methods used by the administrative courts to determine the legality of administrative acts have remained relatively stable for decades, there have been regular developments on specific points, driven by the legislature or by the courts themselves. Here are a few recent examples of these evolutions.

Typically, the judge assesses the legality of an act based on the circumstances at the time it was issued. However, recent case law acknowledges that, in certain cases, the judge must take into account the time at which he/she decides on the case. This approach applies, for instance, when the court annuls a refusal decision and orders the administration to make a positive decision (Conseil d'Etat, 7 february 2020, Confédération paysanne: case concerning the Prime Minister's refusal to take precautionary measures to deal with the risks associated with the use of certain agricultural products).

Ordinarily, when the administrative judge identifies a ground for declaring the illegal-

ity of the act at hand, he/she annuls the act solely based on that reason and does not rule on the other arguments presented by the applicant. However, in town planning litigation, a legislative provision dating back to 2000 requires the judge to address all the legal arguments raised by the claimant (code de l'urbanisme, article L.600-4-1). Furthermore, a 2018 judgment (Conseil d'Etat, 21 december 2018, Société Eden) has allowed the applicant, who presents both a formal or procedural argument and a substantive argument, to prioritize them and thereby limit the judge's discretion.

In the past, case law tended to consider that any irregularity, even formal or procedural, affecting the contested act would likely result in its annulment. However, this trend has been reversed, in particular since a 2011 judgment that established the principle that a "vice affecting the conduct of an administrative procedure... is likely to taint the resulting decision with illegality...if it was likely to influence the decision or deprive interested parties of a guarantee" (Conseil d'Etat, 23 december 2011, Danthony).

More recently, case law has also recognized that procedural and formal illegalities cannot be invoked in the indirect challenge of a regulatory act (Conseil d'Etat, 18 mai 2018, Fédération des finances et affaires économiques de la CFDT).

4. Climate litigation

Several judicial challenges have been introduced against the French State due to the insufficient measures taken to address the climate emergency. The main case unfolds as follows.

In 2020, the Council of State determined that greenhouse gas emissions reduction targets set by the law were binding. In response to a legal action initiated by the municipality of Grande-Synthe in 2018, the Council of State granted the State a three-month period to demonstrate that it is implementing sufficient measures to achieve its goal of reducing emissions by 40% by 2030 (*Conseil d'Etat, 19 november 2020, Commune de Grande-Synthe*).

A few months later, on July 1, 2021, the Council of State ordered the State to take "all useful measures" to realign France with the right climate trajectory (*Conseil d'Etat, 1st July 2021, Commune de Grande-Synthe*).

On February 3, 2021, the Administrative Tribunal of Paris recognized the responsibility of the French State in the climate crisis, deeming its failure to comply with the commitments to reduce greenhouse gas emissions illegal and holding it accountable for ecological damage. On October 14, 2021, the same Tribunal ordered the French State to take "all useful measures" to repair the ecological damage caused by the unlawful exceedance of carbon budgets between 2015 and 2018, with a deadline of December 31, 2022.

On June 14, 2023, the same plaintiffs requested the Paris administrative court to impose a financial penalty of 1.1 billion euros on the State to compel action.

Meanwhile, the Council of State has issued an injunction to the Prime Minister, requiring the implementation of all necessary measures to achieve greenhouse gas reduction objectives and to provide, by June 30, 2024, all the elements justifying the adoption of these measures (*Conseil d'Etat, 10 mai 2023, Commune de Grande-Synthe).*

Unfortunately, this ongoing legal soap opera is likely to continue for some time.

V. Public liability

1. Reduction of the scope of the "faute lourde" requirement

Firstly, it should be underlined that French administrative law has always had a distinct system of liability for public authorities – separate from civil liability law – which is applied by the administrative courts.

This special regime does not apply to all disputes concerning the liability of public authorities, but it covers most of them. It is only set aside in situations where, by way of exception, the public authority is subject to ordinary law.

The system of administrative liability has several unique features. First of all, while the liability of public bodies typically requires proof of fault, there are circumstances in which liability can be incurred without fault ('*responsabilité sans faute*').

Conversely, there are cases in which the administration can only be held liable if it can be shown to have committed gross negligence ('*faute lourde*'). However, in modern times, there are fewer and fewer of these cases. Case law has abandoned the requirement of gross negligence in various fields, such as sanitary matters (*Conseil d'Etat, 10 april 1992, M. and. Ms V.*), taxation (*Conseil d'Etat, 21 march 2011, Krupa*), police (*Conseil d'Etat, 16 november 2020, Ms Karatepe)*. It remains applicable only to administrative control activities (*Conseil d'Etat, 29 march 1946, Caisse d'assurances de Meurthe-et-Moselle*), and in exceptional cases where the State may be held liable due to the behavior of administrative courts (*Conseil d'Etat, 29 december 1978, Darmon*).

2. Liability of the State for infringement of EU law

Another notable feature of French public liability law is that, for a long time, administrative courts have recognized that any illegality in an administrative decision, whether a purely formal or procedural one, would constitute a fault and then could give rise to administrative liability. However, establishing a causal link between formal or procedural illegality and the claimed damage has often been challenging.

Furthermore, it has been established in case law that any infringement of European law by the administration could make it liable.

This principle was affirmed after the ECJ ruled that any violation of EU law should be a basis for holding public authorities liable (*ECJ, 19 november 1991, Francovitch – 5 march 1996, Brasserie du Pêcheur*). Subsequently, cases emerged in which litigants argued that statutory law infringing EU law was the source of their claimed damages.

While liability based on parliamentary law was not unprecedented in case-law, it typically pertained to a different scenario – one involving a statute that imposed a significant burden on a particular individual or a small group of people (*Conseil d'Etat, 14 January 1938, Compagnie La Fleurette*).

In 2007 (case of *Gardedieu, 8 février 2007*), the *Conseil d'Etat* acknowledged that the State could be held liable for damages resulting from a piece of statutory law not in accordance with EU law. However, the recognition of such infringement of EU law as a fault was initially met with some reluctance. It was only in subsequent case law that it became clearer that administrative courts treated such infringements as faults. This distinction is important considering the significance of fault liability rules in determining compensable damages.

Additionally, in 2008, the Conseil d'Etat ruled that the State's liability could also arise from a clear departure from an EU law norm conferring rights on individuals in a judgment issued by an administrative court (*18 juin 2008, Gestas*).

3. Liability of the State for infringement of the Constitution by parliamentary law

Until recently, the notion of State liability for laws that did not conform to the Constitution was completely excluded. This was consistent with the specific organization of constitutional review, which was exercised in a priori manner, assuming that no law in violation of the Constitution would come into effect.

However, in 2009, a mechanism for a posteriori review of the constitutionality of laws was established: the '*question prioritaire de constitutionnalité*'.

Under this procedure, when a statute is declared unconstitutional, it means that it has been in force for a certain period and may have caused damage.

In light of this, in 2019, the Conseil d'Etat ruled that the State could be held liable when an unconstitutional law had resulted in damages (*24 december 2019, Société Paris Clichy*).

It should be noted that this liability is contingent upon the law being declared unconstitutional by the Constitutional Court through the '*question prioritaire de constitutionnalité*' procedure.

VI. Public contracts

It is widely known that EU law on public procurement has drawn significant inspiration by French law. The clear distinction between public contracts and concessions aligns well with the reality of French contractual practice. However, for a long time, French law suffered from a lack of clarity in this area. This lack of clarity stemmed from the accumulation of specific texts relating to public contracts (Code des marchés publics), State concessions, concessions by local authorities (art. L. 1411-1 of the Code général des collectivités territoriales), and contracts and concessions awarded by private entities qualified as bodies governed by public law under Community law.

This complexity was mainly the result of adding Community law to an already well-developed legislative and regulatory framework, supplemented by extensive case law from the Conseil d'Etat.

Recognizing the need for systematic organization, the legislative and regulatory framework required consolidation into a single code. This need for codification arose from a twofold program. Firstly, codification efforts began in France in the late 1980s leading to the codification of various areas of public law previously guided by case law and sector-specific texts, such as relations between the public and the administration, public entity ownership, and administrative procedure.

The "Public Procurement Code" was the latest major code lacking in French public law.

Secondly, the complexity of existing texts required the codification of public procurement law.

This codification took place in two stages. The first stage occurred in 2015 and 2016, with two texts governing public contracts[9] and two texts providing a framework for con-

9 Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics; décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics.

cessions.[10]

These initial texts served as an intermediate step towards the second stage, culminating in the adoption of the Public Procurement Code on 26 November 2018.[11]

The Code did not merely consolidate existing law but introduced specific changes to certain rules and principles while strictly adhering to EU law.

The preliminary part of the new code offers valuable insights into the main principles of administrative contract law established by the Conseil d'Etat since the twentieth century, particularly Article L. 6. These principles include unforeseeability (3°), unilateral modification (4°) and unilateral termination (5°).

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