



Listening
to citizens,
serving
the rule of law



2020 ANNUAL REPORT
OF THE **CONSEIL D'ÉTAT**

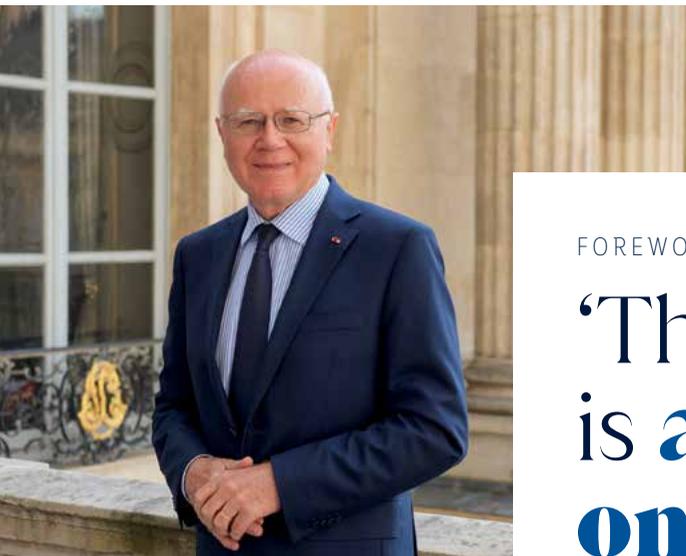
Its missions make the **Conseil d'État** one of the pillars of the rule of law. On the one hand, it settles disputes between citizens and the administrative authorities. On the other hand, it suggests improvements to the French government and Parliament to ensure laws and regulations are sound before they are voted on or come into force. It also manages the administrative court system, which consists of 42 administrative courts, eight administrative courts of appeal and the French National Court of Asylum.



Listening to citizens, serving the rule of law

| Annual report of the Conseil d'État 2020

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INTERVIEW

‘The Conseil d’État is an institution on the move’

2020 was a challenging year for the administrative courts as the health state of emergency took its toll. Bruno Lasserre, Vice-President of the Conseil d’État, looks back at the role played by the institution during the crisis and the future transformations it is involved in.

| How do you view this unprecedented year?

Bruno Lasserre: The Conseil d’État continued to fulfil its missions serving the rule of law. All its members and staff played their part and we adapted our ways of working. While remote working became common for many, judges continued to conduct hearings in person, with the help of security, reception and communications staff, who looked after the parties and the press.

All this meant we were able to deal swiftly with the exceptional number of urgent applications we received – in fact, over 900 urgent orders related to COVID-19 were issued in a year! All aspects of the management of the crisis were carefully examined. **The Conseil d’État became the key point of contact for citizens, businesses, trade unions, associations and individuals who wanted to challenge or test whether the government’s handling of the crisis was in line with the rule of law.** We also carried out urgent scrutiny of all proposed legislation and draft orders or decrees issued by the government as part of the country’s response to the constraints imposed by the pandemic. The Conseil d’État’s impartial view helped ensure that they were all legally sound and in line with fundamental rights and freedoms. Then, once the first lockdown was lifted, the Conseil d’État quickly returned to judging normal cases and examining draft legislation and regulations that were unrelated to the epidemic.

My assessment of this year is therefore that of a resilient institution that assumed its responsibilities; the Conseil d’État was there in the most difficult



In November 2020, professionals from the Conseil d'État and people with disabilities teamed up in 13 pairs for a day of discussions and learning about each other's lives.



moments while retaining its position as an independent and impartial judge, which does not play politics or science but listens carefully to the demands of citizens and forces the administration to be transparent and accountable.

The crisis has increased the visibility of the Conseil d'État in the public arena. Are citizens' views changing?

B. L.: The crisis has shown French people the role played by the Conseil d'État in defending their rights and freedoms. This is firstly due to the fact that for 20 years, it has had effective expedited procedures in place. In urgent applications for release, for example, judges must hand down their decision within 48 hours, and their powers are wide-ranging. **For the rule of law to function and be guaranteed, a judge must be able to tell the administration in almost real time. 'You can't do everything or prohibit everything just because the virus is circulating'.** Summary proceedings have brought the administrative court system closer to the tangible reality faced by applicants. It has found itself in the heart of the democratic arena.

But this renewed visibility is also due to the fact that the Conseil d'État deals with issues that affect the daily lives of French people. This is the case in normal times, since it judges disputes in areas such as town planning, the environment or taxation. It was even more true during the crisis, with decisions restoring the rights to demonstrate and meet in places of worship, the registration of asylum

applications in the Île-de-France region, and the possibility for litigants to visit their lawyers even after the curfew.

It is a good thing that citizens are beginning to see the role that the administrative courts play for them. **For the courts are only effective if people use them, and they can only be used if people know about them.**

Some major projects have been carried out during your term of office, in areas including digital technology and gender equality. Where do things stand today?

B. L.: The Conseil d'État is an institution on the move. It is constantly reforming to adapt to the society it serves, to better understand it and come up with the most appropriate solutions.

We have continued the digital transformation of the administrative courts that began two decades ago. Thanks to our shared networks and databases, which are accessible from anywhere, we are now fully capable of working remotely. We are also investing in the development of innovative tools based on artificial intelligence, which will further increase the efficiency of the work of judges and the quality of the decisions they hand down. **The Conseil d'État has recently made a commitment to the development of open data on court decisions to make them more accessible.** We are working on these projects while taking into account the

risks that digital technology poses for justice, because there is no question of robots replacing judges.

Equality between women and men, including people with disabilities and, more broadly, diversity and the fight against all forms of discrimination within the administrative courts, are objectives that are particularly close to my heart. Not only because an institution such as ours must be an example and a driving force in these struggles, but also because **we have much to gain internally by making our working community as diverse and inclusive as possible.** The actions we have taken to make progress on these issues have led to a double quality label: Equality and Diversity. We are certainly proud of our achievement, but it also encourages us to do even better. In 2020, we launched large-scale negotiations with all employee representatives to reach a collective agreement on workplace equality between men and women. The agreement includes an ambitious action plan that will be implemented in all administrative courts.

Has the health crisis helped the Conseil d'État to move forward?

B. L.: Yes, because it has forced us to draw on our resources and innovate. Apart from digital technology, I'm thinking about how we use oral submissions. I launched this project when I took up my duties as Vice-President, in agreement with Jean-Denis Combrexelle, who was then President of the Litigation Section. The idea is that judges should make more use of oral discussion with the parties to get closer to the truth of the case. Because sometimes writing is not enough — the judge must be able to question the parties directly to really understand what is going on.

The crisis has revealed what these oral discussions can bring to the court process. The hearings often lasted several hours — they helped the judge to better understand the functioning of a prison, a residential care home and an asylum department in a prefecture; or how booksellers, religious establishments or museums could organise themselves in practical terms to establish health protocols.

For the next stage, we have launched a pilot for the preparatory stages and how cases are judged in the lower courts. The judge can now organise a session before the hearing at which the parties, experts or other competent persons come to discuss the issues orally.

What challenges will the Conseil d'État and the administrative courts face in the years to come?

B. L.: The first is not new: it is the increase in litigation. Every year, the administrative courts receive more and

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The Conseil d'État is constantly reforming to adapt to the society it serves, to better understand and represent it.

more applications, which must be judged within a reasonable time frame and with unfailing rigour. We are constantly developing our working methods in order to meet this daily challenge and deliver justice quickly and to the appropriate standard.

Another challenge is continuing to open up to society so that we understand and can serve it better. This is the rationale for the many initiatives launched with the General Secretariat of the Conseil d'État to welcome more people to the Palais-Royal and make us better known to the outside world — from universities to the general public.

The Conseil d'État opened its doors for the Heritage Days on 19 and 20 September 2020.



This brings me to a third major challenge for the administrative courts: ensuring that they are understood by citizens. They must understand not only its decisions but also its role in the institutions. **The administrative judge is not a legislator, a politician or an expert, but an impartial arbiter who is responsible for ensuring that the public authorities respect the law.** To make ourselves more accessible, we have developed an ambitious communications strategy. We have changed the way we write our decisions to make them more accessible, and we are constantly improving our website. Describing clearly what we do and how we do it forces us to question our habits and traditions and change them when necessary.

A final challenge is the need for judges in the administrative courts to adjust to changes in how the public authorities now work. Here, I am thinking in particular of the administrative authorities' increasing use of soft law. The recommendations, opinions, warnings and frequently asked questions published on their websites are not decisions in the traditional sense, but influence the behaviour of citizens and sometimes infringe their rights and freedoms. Judges must be able to check them, which means updating their approach. They must also be able to monitor the long-term commitments that the State is increasingly required to make, particularly in the area of environmental protection. Grand announcements are no longer enough — judges must be able to check that they are implemented and hold decision-makers to account. The Grande-Synthe case in 2020 was the first example of monitoring the State's actions over a long period, which will need to be pinned down in the future.

More than ever, administrative judges are caught in a race against time – the short time frame of an urgent situation and the long time frame of the great challenges of tomorrow. Going forward, they must reflect on the nature of their office, the resources at their disposal and their place in our institutions.

Doesn't the recently adopted reform of the senior civil service present another challenge for the administrative courts?

B. L.: The reform sought by the President of the Republic will have a profound effect on the Conseil d'État. In particular, the grade of *auditeur* (first-level judge) and direct access on leaving the National Institute for Public Service (INSP), which will replace the National School of Administration (ENA), will be abolished. The role of *auditeur* will become a job that can be held by former students of the school or members of comparable bodies after at least two years' professional experience. Moreover, their promotion to *maître des requêtes* (master of petitions) will no longer be automatic but will be subject to the decision of a promotions committee made up of an equal number of members of the Conseil d'État and people from outside the institution. **This is a radical**

departure from the system set up in 1945, which has guaranteed us youth and excellence, but also diversity in recruitment and, in recent years at least, parity.

I therefore wonder about the reform, which touches on two essential values I have always stressed. The first is independence, which is the key to our legitimacy and means that our careers are not dependent on those whose decisions we judge. We will therefore be very vigilant about

how the promotions committee operates. The second is youth, because **our ability to welcome an annual cohort of young people who bring with them a fresh sense of a changing society has always been one of our greatest strengths.** The new system will not deprive us of these young people, but the obstacle course it creates must not discourage some, especially internal candidates and women. We will be following it closely.

The reform is therefore a challenge. But it is also an opportunity. The Conseil d'État will have a lot of room for manoeuvre in terms of recruitment – from now on, we will be able to recruit based on our needs. The challenge now is to become a proactive recruiter in order to continue to attract excellent candidates who have a taste for the law but also for action, which is essential for carrying out our highly technical roles and continuing to refresh the administration. The best response is action — and we're already working on it. ●

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The Conseil d'État
has been present in
difficult times while
remaining in its place –
as an independent and
impartial judge, which
listens carefully to the
requests of citizens and
holds the administration
to account.



Serving the **rule** **of law**

The Conseil d'État has two distinct missions. On the one hand, it settles disputes between citizens and the administrative authorities. On the other hand, it suggests improvements to ensure that laws and regulations are sound before they are voted on or come into force. These missions make it one of the pillars of the rule of law.

10 The role of the **Conseil d'État**

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The role of the Conseil d'État

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Judging the administrative authorities

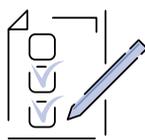
The Conseil d'État settles disputes between citizens and the administrative authorities. It ensures that the rights and freedoms of each individual are respected.

The Conseil d'État can...



Quash

a measure by a national or local administrative authority



Compel

the administration to implement particular measures



Order

the administration to provide compensation for the harm it has caused

When does it intervene?*



The appeal is against a **national administrative authority**



The Conseil d'État **decides on the case directly**



The appeal is against a **local administrative authority**



The Conseil d'État can intervene **after an administrative tribunal and an administrative court of appeal**



* Article 311-1 et seq. of the French Code of Administrative Justice

Providing legal opinions

The Conseil d'État examines all major government bills, ordinances and decrees.

It also examines bills put forward by parliamentarians at their request.

It does not comment on political choices in either case.

The Conseil d'État ensures that a law is...



Consistent

Compliant with the French Constitution, national law, European law, etc.



Comprehensible

Written clearly, in a way that everyone can understand

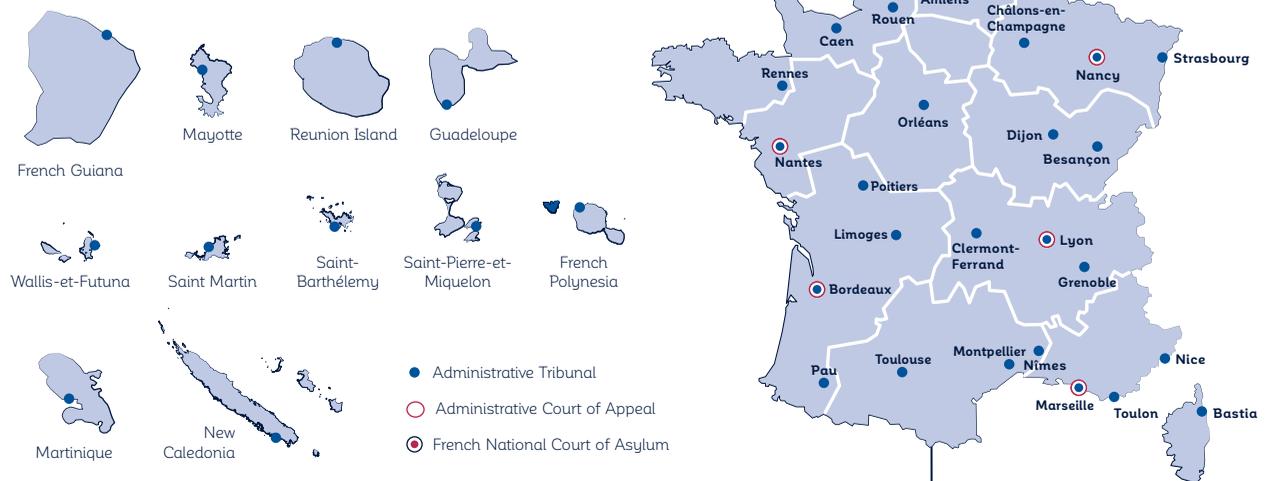


Applicable

Able to be implemented in everyday life

DID YOU KNOW?

The Conseil d'État is also responsible for managing the administrative courts. A total of 51 courts throughout France fall under its responsibility.



Judging the administrative authorities

If citizens believe that a public authority has implemented an illegal measure, they can turn to the Conseil d'État. As the supreme administrative court, it is there to ensure compliance with the law, particularly respect for individual freedoms.

From health to town planning, taxation, education and more. Every day, the public authorities take measures that affect the lives of French people. These measures can be taken by the national authorities – the government and independent administrative authorities – but also by local administrations: local authorities, prefectures and decentralised State services, hospitals, educational institutions, etc.

Any citizen, association or company can challenge these measures if they feel that their rights and freedoms are being infringed. Anyone can, for example, dispute a tax, a refusal to grant a building permit or to provide welfare support, a ban on demonstrations, etc.

The administrative justice system is there to decide on these disputes. It can quash a measure implemented by the administrative authority, compel it to take particular actions, or even order it to provide compensation to a person it has harmed.

The Conseil d'État: the supreme administrative court

The Conseil d'État is the highest administrative court in France. Its decisions are final and binding on the administration.



10,000 decisions are handed down by the Conseil d'État every year

→ If the disputed measures came from the government or an independent administrative authority, citizens can refer the matter directly to the Conseil d'État.

→ If the measure has been implemented by a local administration, citizens must first apply to the nearest administrative tribunal. If they want to challenge the court's decision, they can refer the matter to an administrative court of appeal and then to the Conseil d'État.

In the rare cases where an administrative authority fails to execute a decision, the Conseil d'État can impose financial penalties to force it to act quickly. ●

INSIGHT

Urgent judgements

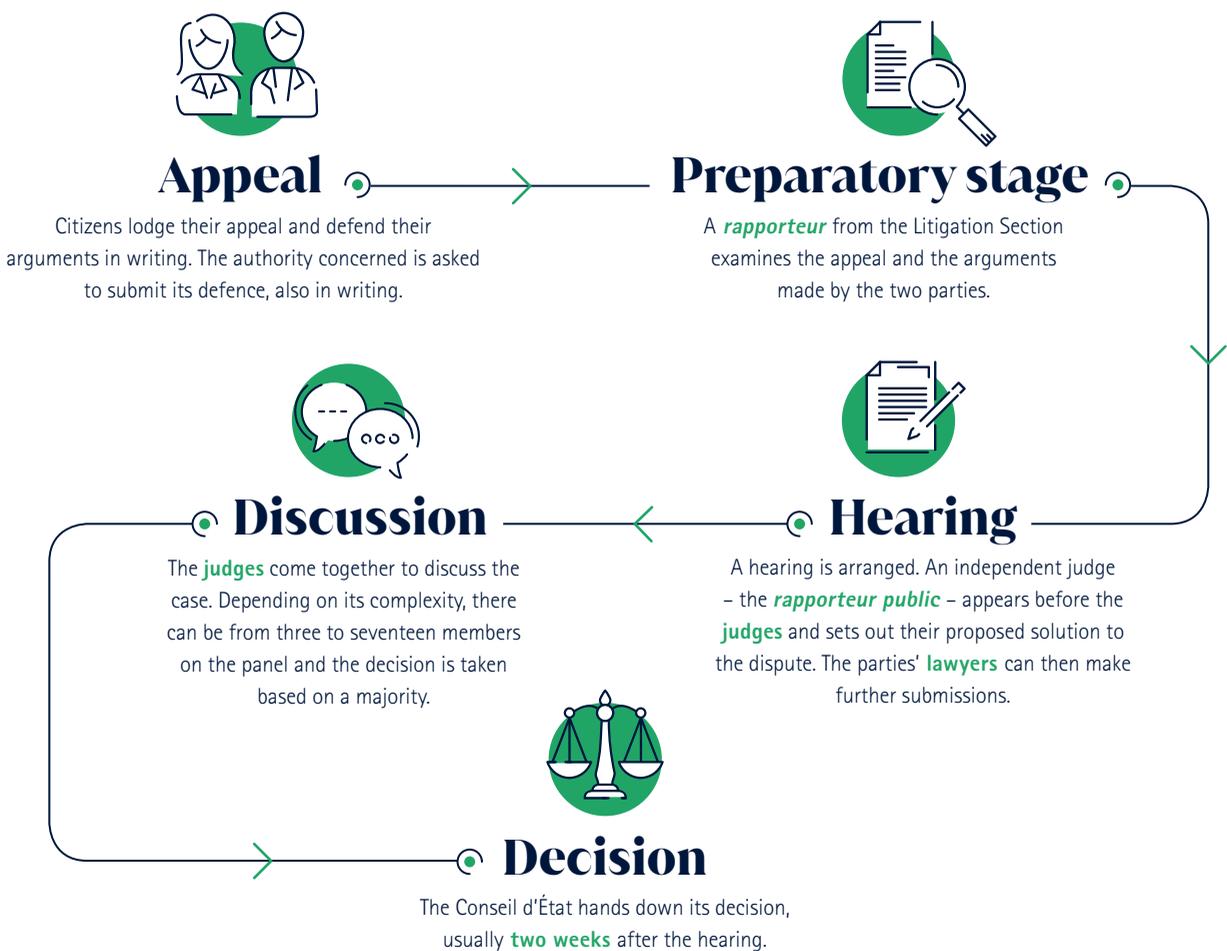
Some actions taken by an administrative authority can have immediate consequences. This is why all citizens are entitled to challenge them swiftly by filing an 'urgent' appeal with the administrative courts. This procedure allows them to request interim measures to protect their rights and freedoms. If a case is referred to the urgent applications judge at the Conseil d'État, they can hand down a decision within a few hours.

FIND OUT MORE

Discover the key decisions handed down by the Conseil d'État in 2020 on pages 38 to 88.

How does the Conseil d'État decide on **citizens' appeals**?

When the Conseil d'État hands down a decision, it verifies that the administration's actions are legal.



WHAT HAPPENS IN AN URGENT CASE?

If the Conseil d'État is asked to rule on an application for interim relief, the procedure is simplified.

- The case is usually handled from start to finish by a **single judge**.
- When necessary, the hearing takes place within **a few days** – the citizen and the administration concerned answer the judge's questions directly.
- The judge can take a decision **in a few hours**.



INTERVIEW

‘Judging is about being both a bulwark and a guide’

With **GAËLLE DUMORTIER**, administrative judge at the Conseil d'État

The administrative judge decides disputes between citizens and the administration. A demanding job where impartiality and collegiality are the key words. Gaëlle Dumortier, President of the First Chamber of the Litigation Section of the Conseil d'État, explains.

What is the most complex part of being an administrative judge?

Gaëlle Dumortier: The complexity of working as an administrative judge pertains first of all to the quantity of existing rules – the French Constitution, European law, French laws and regulations. The first step in judging any dispute is **understanding the legal framework that applies.**

This is not an easy task. The texts may be obscure or not organised hierarchically, or it may be necessary to establish how they relate to each other. They need to be deciphered, so to speak.

Another difficulty is understanding all the issues involved in a case. **All that administrative judges know about a dispute is what the parties tell them.** They find themselves in a situation rather like the one in Plato's allegory of the cave – they have to work out what is real from the shadows they see on the walls.

They know that the parties only tell them what they want them to hear. They also know that sometimes, they may even have a common interest in holding certain things back. Judges are no fools, but they cannot know what is being hidden from them, whether it matters and if so, to what extent. That means they have to dig deeper to get information – almost like a detective.

Finally, the judge's job is delicate because it means **finding a balanced solution to a dispute.** If the administration is in the wrong, what are the consequences? It all depends on the case. In most cases, the administration's decision is quashed. In other cases, the judge may point out that there was an error, but the decision need not be quashed, because it had no practical effect. Between these two scenarios, the judge sometimes finds that there are grounds to quash the decision but only in the future, since it would be disproportionate to re-examine past situations.

The judge's responsibility is all the more crucial since decisions handed down by the Conseil d'État can set a precedent, i.e. they lay the foundations for judging future disputes. A judge must always anticipate what impact their judgment might have in the future.

The preparatory stage of examining a case relies heavily on the written word. But oral evidence is very important in summary proceedings. What is its added value?

G. D.: In traditional, i.e. non-urgent cases, each party sets out its view of the dispute and what it expects from the judge in what is known as a 'statement of case'. These written exchanges last as long as necessary for judges to gather all the information they need to decide on the dispute. In summary proceedings, this stage can be shortened considerably in order to arrive at an interim solution quickly.

The hearing then plays a decisive role: it enables the parties to provide their insights in person

and allows judges to identify the issues in the case by comparing their points of view directly. Sometimes, the solution to the case emerges at this point. You realise that by targeting your questions and digging into things that seem obscure, you can identify sticking points that you feel were not clearly identified by the parties.

What do you like most about your job?

G. D.: I like the idea of being both a bulwark and a guide, of ensuring that the administration applies laws and regulations in a way that is in the public interest and, in so doing, of guiding it in its work by explaining how it should do it – or how it should have done. I also like **the fact of being completely impartial and independent.** Being able, in good conscience and without any pressure from anyone, to judge what seems to me to be the truth, what seems to me to have to be judged. It is a heavy responsibility, and we can only exercise it if we are conscious of that, by exercising the powers given to us in a way that requires us to use our intellect and willingness to work hard to the full.

Collegiality is another element that I find very motivating.

It runs through every aspect of our work. Although we are all free and independent people, we talk to each other all the time. We build solutions together, with the other judges, never in isolation.

It is sometimes said that judges in the administrative courts favour the administrative authorities more often than they do citizens. What do you think?

G. D.: Statistically, that's correct. But I think that's good news – it means that the administration is doing its job properly. In a state governed by the rule of law, it is



What I like about this job is the fact that I am completely impartial and independent. The fact that I am able, in good conscience and without any pressure from anyone, to judge what seems to me to be the truth, what seems to me to have to be judged.

rather reassuring to see that the administration is acting within the law. Of course, it does not mean that, when they open a case, administrative judges have an *a priori* favourable attitude towards one of the parties. Judges are always neutral and impartial.

In reality, **if there is inequality, it tends to be to the detriment of the administration.** That's the party whose actions are being questioned. It's the administration that risks being found to have acted unlawfully or having its actions quashed, particularly since the judge knows it so well. ●

 **INSIGHT**

A power to compel the administration to act

When the Conseil d'État orders the administration to act or amend its action, it checks to ensure its order has been carried out. And if the administration fails to act, it can force it to do so. The Conseil d'État can instigate enforcement proceedings either on its own initiative or at the request of the applicant. The Reports and Studies Section, which is responsible for monitoring, prepares the case and questions the administration. If it finds that the decision has not been implemented in practice, it sends a report to the Litigation Section. The latter then opens a new adversarial investigation, followed by a hearing and a further decision. The Conseil d'État can impose financial penalties, which in some cases are very high, to force the administration to act quickly (see pages 58-59).

Providing legal opinions

From laws to ordinances and decrees – the rules that allow us to live in society are constantly evolving. The role of the Conseil d'État is to prevent them from being too complex, inconsistent or inapplicable in everyday life.

In addition to its role as a judge (see page 10), the Conseil d'État acts as a legal advisor to the French government, the National Assembly and the Senate. In accordance with the French Constitution, all major government bills, ordinances and decrees are submitted to it for an opinion. The Presidents of the National Assembly and the Senate can also consult it for their bills.

The Conseil d'État has the same responsibility in all cases: **to guarantee the legal certainty of the texts submitted to it.** It works to ensure that future laws and regulations are not inconsistent, complex, changed too frequently, or inapplicable in everyday life, in order to protect citizens. The Conseil d'État does not comment on the political choices of the government or parliamentarians.

Ensuring that the law is consistent, comprehensible and applicable

A whole series of questions guide the Conseil d'État in its examination of the text: Does it comply with higher standards (such as the French Constitution, international treaties and European Union law)? Can it be easily understood by citizens and is it applicable in everyday life? Is it necessary, or do existing laws and regulations serve the same purpose?

For government bills, **the Conseil d'État also examines the impact study** that accompanies the text and which will inform parliamentarians at the time of the vote. It checks whether the study is robust and anticipates the economic, financial, social and environmental consequences of the law once it is implemented.

Following a joint examination, the Conseil d'État gives its 'opinion' on the text submitted to it. This opinion is advisory. It draws the attention of the government or parliamentarians to sensitive issues and suggests concrete proposals to resolve them. Its recommendations are followed in the majority of cases.



over 1,200
advisory opinions are
delivered by the Conseil
d'État every year

Examining novel legal issues

At the same time, the Conseil d'État regularly examines legal questions posed by the administration. **The government can turn to the institution at any time to ask for its opinion on a novel or complex point of law.** Does the existing legal framework allow for an effective response to society's new needs? To what extent could it be adjusted?

The Conseil d'État can also answer specific questions submitted by the administrative authorities of certain French overseas territories. ●

FIND OUT MORE

Discover the key opinions delivered by the Conseil d'État in 2020 on pages 38 to 88.

How does the Conseil d'État examine **government and legislative bills**?

Members of the Conseil d'État jointly analyse the draft texts and propose concrete solutions to improve them. The aim is to ensure that each text is legally sound and secure before it is debated by Parliament.



Referral

Depending on the subject matter, the government or legislative bill is assigned to one of the five **advisory sections** of the Conseil d'État. Each has its own area of expertise:

- Home Affairs Section
- Finance Section
- Public Works Section
- Social Section
- Administration Section



Examination

Within the section, a **rapporteur** examines the case. They hear submissions from the representatives of the administrative authorities affected by a government bill or the parliamentarians that introduced a bill. They then produce an initial analysis.



Administrative Section

This initial analysis is discussed by the **entire section**. The aim is to compare points of view, enrich the **rapporteur's** analysis and adopt the Conseil d'État's response.



General Assembly

The most sensitive cases (constitutional amendments, particularly complex texts, etc.) are examined by members of the Conseil d'État from **all the advisory sections**.



Opinion

The opinion is adopted: it discusses the sensitive points of the bill and puts forward practical solutions. In the case of a government bill, a **new draft** of the text is also proposed, as with decrees and ordinances. The opinion is then published by the government or Parliament.

WHAT HAPPENS NEXT?

- ➊ Based on the opinion of the Conseil d'État, the government or the parliamentarian adopts the **final version** of the bill concerned.
- ➋ Deputies and Senators debate, amend and **vote on** the text.
- ➌ If the law adopted is challenged, it can be referred to the **Conseil constitutionnel** to check whether it complies with the Constitution.
- ➍ The President of the Republic **enacts the law**.



INTERVIEW

‘A clear law is a **guarantee of security** for all’

With **DELPHINE HEDARY**, *rapporteure* at the Conseil d'État

The *rapporteur* is a key player when a draft text is examined by the Conseil d'État. Its role is to ensure that the government's plans are legally sound and workable in real life. An interview with Delphine Hedary, *rapporteure* in the Public Works Section.

What is the most complex part of being a *rapporteur*?

Delphine Hedary: The first difficulty we face when we receive a draft text is to **understand the legal environment** to which it will be added. The legal rules that govern our society are numerous and rich in detail, from French laws and regulations to the Constitution, European law and more – and alongside the legal complexity, some subjects are highly technical. It is not uncommon for the *rapporteur* to have to **decipher sophisticated operational issues**, which are far removed from their legal training – for example, how our gas or electricity distribution system works.

Another difficulty is the time frame within which we have to work. The government often asks us to **deliver an opinion within very tight deadlines**, for example, so that a bill can be tabled in Cabinet on a particular date. Sometimes, it

also changes its position after it has referred the text to the Conseil d'État for an opinion; it then sends us a corrected version, which can include substantial changes. All of this means we have to be very responsive.

Each draft text reflects a political desire. How do you deal with that?

D. H.: The Conseil d'État does not rule on the political appropriateness of the texts submitted to it. Its role is to be a neutral, impartial, 'technical' legal advisor, I would say, in the proper sense of the word. This includes checking whether the draft text actually meets its authors' objectives.

Talking things through is therefore essential. When examining a government bill or decree, the *rapporteur* hears from the representatives of the administrative authorities that have drawn up the text – the 'government commissioners' – and engages in dialogue with

them. **The aim is to determine the government's intentions as clearly as possible so that we can then see whether the text addresses them in the best possible way** and whether any improvements can be made. The work in the advisory sections is therefore carried out in close cooperation with the ministries so that we can propose the most appropriate legal solutions for achieving their objectives.

What criteria guide you when examining a text?

D. H.: The *rapporteur's* work is guided by several key points. The first is to **check that the text complies with the legal rules that sit above it in the hierarchy**, in particular the French Constitution and the European treaties. We also have to ensure that the draft **is consistent with existing rules on the same level**, which are going to remain in place, and that it doesn't create a legal void by removing some of them inappropriately.

The *rapporteur* also has practical questions to examine. It's important to ensure that any new procedures introduced are not unnecessarily complex or difficult to implement.

Finally, the *rapporteur* is responsible for **guaranteeing the clarity and intelligibility of the text in terms of how it is drafted**. Authors who are caught up in the technicality of the subject can sometimes struggle to write simply. Especially since the sources of law are now so diverse, our legal environment is inherently complex. This is a far cry from the days of the Napoleonic Code when each article had a subject, a verb and a complement. However, **a law, a decree or an ordinance must be understandable by anyone who is proficient in French**. 'No one shall be deemed ignorant of the law' also means that the law must be accessible to everyone, without necessarily having studied law in depth.

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'No one shall be deemed ignorant of the law', which also means that the law must be accessible to everyone, without necessarily having studied law in depth.

Why is the clarity of the law important in a state governed by the rule of law?

D. H.: A clear law is a **guarantee of legal certainty, effective public action and equal treatment**.

If a law or decree is unclear, the administrative authorities and local elected officials who have to apply it risk treating citizens unequally. But the law is supposed to be the same for everyone. For their part, citizens may not know exactly what their rights are and how to exercise them in respect of the administration.

by not clearly telling them what to do, but also for citizens. Imagine a public contract for the construction of a school that was awarded without complying with the rules because they were not clear enough. If there were a dispute, the performance of the contract would be significantly delayed. **There is a public interest in having clear legal rules**. By seeking clarity, the *rapporteur* and, more generally, the Conseil d'État are working to make public action more effective, improve respect for democratic guarantees and make our daily lives as simple as possible ●

From a pragmatic point of view, a poorly drafted text also has the disadvantage of wasting time once it has entered into force. It is an obstacle for those who have to implement it

INSIGHT

Fundamental reflections on public action

As a judge and legal adviser, the Conseil d'État has a unique perspective on public action. This position allows it to reflect in depth on changes in our society and develop proposed courses of action for the administration. Each year, on its own initiative or at the request of the Prime Minister, the Conseil d'État conducts studies on long-term issues, including citizenship, access to sport, states of emergency (see pages 44-45), the evaluation of public policies (see page 75), the revision of bioethics laws, local pilots or the consideration of risk in public decision-making. As a forum for debate, the Conseil d'État organises symposia and lectures throughout the year and gives the floor to experts from the administration, the academic world and the private sector.





The Conseil d'État **rises to** **the challenge**

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Overview

2020

A look back at the intense activities of the Conseil d'État and administrative courts in 2020, in figures and key dates.

The Conseil d'État comments on one of the government's key projects: the **pension reform bill**.
FIND OUT MORE p. 83



The Conseil d'État and the administrative justice system are awarded the **Equality and Diversity labels** for four years.



The Conseil d'État examines **two bills establishing a health state of emergency** in the face of COVID-19.
FIND OUT MORE p. 41



22 March
An application for a total lockdown of the population is examined.
FIND OUT MORE p. 42

28 March
The judge rules on requests for masks, tests and prescriptions for hydroxychloroquine.
FIND OUT MORE p. 55

18 May
The judge clarifies the arrangements for gatherings in places of worship during the health crisis.
FIND OUT MORE p. 72

13 June
The Conseil d'État reverses the general and absolute ban on demonstrations.
FIND OUT MORE p. 42

At the Conseil d'État



1,162
opinions delivered

9,671
cases judged



including **1,208 in urgent (summary) proceedings**, i.e. six times more than the previous year, judged at first instance

COVID-19

202 opinions delivered on draft texts related to the COVID-19, including **112 delivered within five days**

840 decisions handed down by the urgent applications judge on measures relating to COVID-19

Opinion 9 December



The Conseil d'État comments on the government's **bill** aimed at strengthening respect for the principles of the Republic and responding to the phenomenon of communities withdrawing into themselves.

FIND OUT MORE p. 46, 66 and 73

Decisions 19 November



The Conseil d'État responds to an appeal by the municipality of **Grande-Synthe**, commenting for the first time on the State's fulfilment of its commitments on reducing greenhouse gas emissions.

FIND OUT MORE p. 60

Decisions 15 October



The urgent applications judge suspends the provisions of the decree of 29 August 2020, which had restricted **COVID-19 vulnerability criteria**, allowing employees to take advantage of short-time working.

FIND OUT MORE p. 83

Ideas 9 October

The Conseil d'État publishes its study *Simplifying litigation involving foreigners, in the interest of all*.

FIND OUT MORE p. 81

Ideas 3 September

The Conseil d'État publishes its annual study, *Conducting and sharing the evaluation of public policies*.

FIND OUT MORE p. 75

Decisions 10 July



The Conseil d'État responds to an appeal by the association Les Amis de la Terre by **imposing a historic coercive fine on the government** to guarantee a reduction in air pollution.

FIND OUT MORE p. 58

Decisions 19 June



The Conseil d'État rules in favour of **Google** against a sanction imposed by the CNIL.

FIND OUT MORE p. 52

In the administrative courts



30,706
cases judged
in the Administrative
Courts of Appeal



200,394
cases judged
in the administrative
courts



42,025
cases judged
in the French National
Court of Asylum

Responding to requests from everyone

No one will deny it – 2020 was a challenge. In the face of numerous urgent requests in a time of crisis, the Conseil d'État has been there throughout to defend the public interest and guarantee the rule of law. Meet the men and women who turned to the Conseil d'État during this unprecedented year.



The Litigation Chamber continued to meet throughout the year to hear particularly complex or sensitive cases.



The 17th of March 2020 66 million French people are ordered to stay at home for the first lockdown. The government announces a state of emergency and takes a series of measures restricting freedoms. France is locked down and everything seems to be running in slow motion.

But at the Conseil d'État, activity continues unabated. 'From mid-March to mid-May, we had the impression

that the only court still open in France was the Conseil d'État', says lawyer Louis Boré. In reality, the other courts continued to function but, thanks to its responsibility for summary proceedings, which was particularly pertinent in the circumstances, the Conseil d'État was front and centre.'

Justice: an essential need

This period of unprecedented threat to health calls for extreme measures, including infringements of the

fundamental rights and freedoms guaranteed by the administrative justice system (see page 29). By remaining open and accessible from March onwards, **the Conseil d'État shows the authorities and all citizens that justice and regulation of the State's activities are essential needs.** 'When there is a serious and manifestly illegal infringement of a fundamental freedom, we have to deal with it now, not in one or two years' time', explains Louis Boré. For him, the capacity of the administrative court system to deal with cases as urgent (summary) proceedings has been decisive – even in the most difficult circumstances, the institution has always been there to accomplish its mission and watch over citizens' rights and fundamental freedoms. And while the infringements of freedom of movement, freedom of enterprise or freedom of worship seemed massive, 'everyone rushed to the Conseil d'État to ask it to exercise its scrutiny'. In 2020, the Conseil d'État judged six times more urgent cases at first instance than in 2019.

Developing the legal framework for managing a crisis

The responsiveness of the Conseil d'État during this unprecedented year did not stop there, however. In its advisory role, **it has played its part as legal advisor to the government and parliamentarians in full**, both in developing the legal frameworks for managing the health crisis and in advancing on long-term projects for our democracy.

The teams led by Anthony Requin, Director General of Agence France Trésor, have called on the Conseil d'État to examine a draft ordinance aimed at organising the financing of crisis management in an emergency. In his view, the Conseil d'État's commitment to serving the public and the administration during this challenging period was remarkable. 'Hospital staff was in the news, but there are other places where public service has been exemplary, and the Conseil d'État is one of them'.

The support provided by the Conseil d'État to his team in the preparation of the draft ordinance and decree was, in his view, unparalleled. 'The rapporteur helped us to draft a text which, while remaining faithful to our objectives, respects the legal framework and constitutional principles. **This guarantee of compliance with standards provided by the examination of the text plays an important preventive role:** by constructing a legally robust text, it is less likely that it will subsequently be censured or is poorly adapted to reality. →



PERSONAL VIEW

LOUIS BORÉ

lawyer and former President of the Bar Association at the Conseil d'État and the Cour de cassation

'The Conseil d'État is always faced with conflicting demands'

The first urgent decision handed down at the very beginning of the health state of emergency on the request for a total lockdown set the tone for the management of this period by the Conseil d'État. The decision was handed down at the end of a hearing held on a Sunday by a panel of judges. I believe that in so ruling, the Conseil d'État sent a very strong message to the legal community, to lawyers and to public opinion. **That message was that the Conseil d'État's courtroom remained open and that it intended to continue to rule on cases, even during the state of emergency, and to remain accessible.** And let's not forget that this first request asked the Conseil d'État not to relax constraints and restore freedoms, but tighten them by introducing a lockdown based on the Chinese model. This example shows that the Conseil d'État is always faced with conflicting demands. Sometimes it is asked to impose restrictions and sometimes to relax them. It must make its judgment, in good conscience, depending on the specific circumstances of each case. It's easy to criticise, but the art of judging is difficult.



Even the most difficult circumstances, the institution has always been there to accomplish its mission.

Pursuing long-term projects

In addition to draft texts related to the health crisis, **in 2020 the Conseil d'État was also required to continue its normal activity of examining government and legislative bills on various substantive subjects**, from pension reform to research programming for 2021-2030, including the restitution of African cultural heritage and the prevention of domestic violence.

At the request of parliamentarians, the Conseil d'État examined a bill aimed at introducing security measures for perpetrators of terrorist offences after they have served their sentences (see pages 46-47). It was 'an area

of law whose complexity justified the referral', according to the Deputy and President of the Law Committee who initiated the bill, Yael Braun-Pivet: 'We felt it was extremely important to have a well-founded legal opinion on this subject, and that the Conseil d'État could inform the debate in Parliament'. Following discussions between the Deputies, the *rapporteur* and the section, the text was debated, according to the normal procedure, in the General Assembly. 'I was very impressed by the plenary meeting', she says. 'There was a genuine high-level discussion on the legislative and constitutional aspects of the text'. For her, 'The sophistication of the analysis and the soundness of the reasoning demonstrated by the Conseil d'État are essential elements for our rule of law'. ●



PERSONAL VIEW

ANTHONY REQUIN

Director General of Agence France Trésor (AFT)

*'The **rapporteur's perspective** and ability to take a step back are **irreplaceable**'*

While we do have a legal culture within the administration, the *rapporteur* at the Conseil d'État is irreplaceable, particularly because of the perspective they bring to the text they are asked to review, which they examine in light of the legal issues raised. The wording we had used in our draft enabling legislation and then in the ordinance was sometimes too broad and could therefore have presented a risk in legal terms. **There were a number of traps that we were able to avoid thanks to the thinking of the *rapporteur* and the section, in particular by retaining a moderate infringement of property rights.** Furthermore, the Conseil d'État checked the relationship between our draft ordinance and the draft implementing decree to ensure that they were internally consistent. It does not comment on the appropriateness of the political decision since that role belongs to the executive, but it does help us to limit the legal risks. This kind of quality control is of utmost importance.



PERSONAL VIEW

Yael BRAUN-PIVET

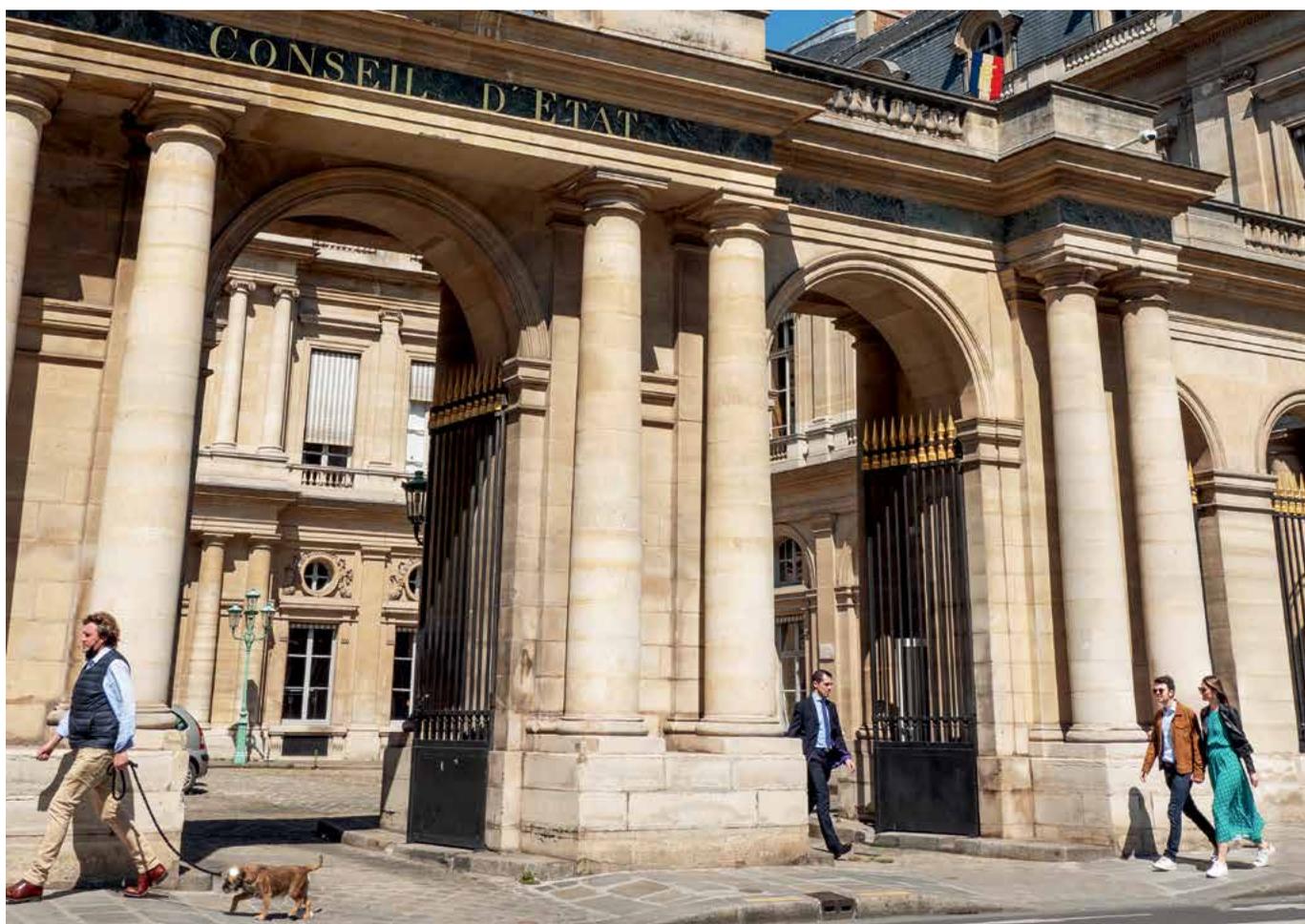
Deputy and chair of the Law Committee

*'A model of **dialogue** and mutual **listening**'*

Our discussions with the section and the *rapporteur* at the Conseil d'État were very extensive, both in writing and during the face-to-face sessions. In fact, I found them to be a model of their kind – no subject is avoided and the questions are very precise and detailed. The *rapporteur* and the section got to the heart of the matter and raised all the issues, including the thomiest ones. We felt that the members gave a lot of time and attention to our arguments, even in a complicated and particularly busy period with COVID-19. **With the General Assembly of the Conseil d'État, we were able to exchange ideas and benefit from the members' wealth of experience, the soundness of their reasoning, their concern for the public interest and their respect for our rights and freedoms.** The ability to engage in dialogue and listen on both sides made the referral of the case a success. In fact, it's a pity that still too few parliamentarians refer matters to the Conseil d'État since the kind of advice it can offer is very useful in exercising our role as legislators.

A pillar of the rule of law, month after month

How did the Conseil d'État organise itself to respond urgently to so many requests on so many different subjects? What difficulties did it have to overcome to remain a pillar of the rule of law, month after month? Some key players in this unprecedented year share their views.



↑ Throughout the health crisis, the Conseil d'État kept its doors open, welcoming numerous applicants, lawyers and journalists to its public hearings.

The Conseil d'État was able to maintain its normal level of activity in 2020 while absorbing an additional workload related to the crisis. Its objective is to remain, in all circumstances, a pillar of the rule of law for citizens and the administration alike.

Coping with an unprecedented workload

For the Social Section, which had to deal with 40% more cases in 2020, including nine times as many draft ordinances and three times as many bills as in the previous year, the challenge was not only the volume to be dealt with but also the urgency with which it had to respond. 'In 2019', explains Conseil d'État member Lionel Collet, 'we had an average of 30% of files reviewed in a fortnight. In 2020, it was 60%. A whole organisation had to be put in place to be able to respond to these requests. **In all the advisory sections, most texts were examined in a week, when the usual time for examining them is between four and six weeks.**



BEHIND THE SCENES

SYLVIE HUBAC

President of the Home Affairs Section

'We have been careful to reconcile sometimes conflicting interests'

The government had only two tools at its disposal to manage the situation: a framework known as the threat to health, under which the Minister of Health can use certain special powers, and the theory of exceptional circumstances, which allows the Prime Minister to act outside the normal remit. Neither of these measures, however, were sufficient to deal with a crisis such as COVID-19. The government referred a bill to address this to us on 16 March. We examined the text on 18 March. The votes in the National Assembly and the Senate took place between 19 and 22 March, and the law was published in the *Official Gazette* on 23 March. It had three main components. The first was the postponement of the second round of municipal elections, which was due to take place on 22 March, to June – an unprecedented step. The second was the creation of the health state of emergency. The third was a series of authorisations granted to the French government by Parliament to legislate in its place by ordinance. **For each of these measures, we were careful to reconcile sometimes conflicting interests and to maintain the balance between protecting health and respect for citizens' rights and freedoms.** The Act of 23 March 2020 was historic – it was the legal entry point to the crisis. Everything that was done later stemmed from it.

'In the Litigation Section', explains the former President of the first chamber, Pascale Fombeur, 'we thought that there would be rather fewer substantive applications, given the health crisis'. In fact, the Conseil d'État found itself, on the contrary, facing an unprecedented workload. 'If we look at the cases that will have to be heard over the year as a whole, we have had almost as many appeals as usual, in addition to all the urgent applications that have been made because of the health crisis', she says.

Advisory and litigation task forces

Everyone showed exemplary commitment, and special organisational arrangements were introduced to manage the influx of cases while continuing to produce high-quality work. 'Given the sensitivity of the issues at stake, summary proceedings were divided between the Presidents of the Chambers and three additional judges. There were about 15 of us combined in a task force, selected for our experience in the various areas of litigation', explains Pascale Fombeur. For the then President of the section, Jean-Denis Combexelle, 'this organisation was extremely efficient and was able to judge all the urgent cases very quickly.'

In the advisory sections, remote working was implemented within 24 to 48 hours.



↑ Despite the turmoil in 2020, the Conseil d'État was able to welcome several ninth-grade students from a secondary school in a priority education network (REP) to raise their awareness of what its people do and its responsibilities.

A task force of deputy presidents conducted an initial examination of the texts before discussing them in a group session by videoconference. 'This was an initial sorting', explains Sylvie Hubac, chair of the Home Affairs Section, 'which enabled us to identify difficulties, redirect the rapporteur's work if necessary, and ensure that the text was as compliant with the law as possible'.

Verifying the necessity and proportionality of infringements of rights

Throughout the crisis, the main issue for the Conseil d'État has been to verify that the infringements of fundamental rights and freedoms decided on to manage the health situation were necessary and proportionate.

'Each time, we have had to find the right balance when we examined the government's texts', explains Sylvie Hubac. **Were the infringements of freedoms justified and necessary? Were they appropriate? Did they not go too far?** 'This is the balance we have sought to achieve each time, sometimes inviting the government to review the content of the text'. A similar difficulty arose in handling disputes. Jean-Denis Combrexelle recalls that, while the problem was not new, it became →



BEHIND THE SCENES

JEAN-DENIS COMBREXELLE

former President of the Litigation Section

'The judge is there to guarantee respect for the **law** and **civil liberties**'

Everyone was somewhat disoriented by the crisis. Many decisions were made that limited freedoms, from freedom of movement to freedom of enterprise, freedom to do business or simply to go to a show... For our democracy to continue to function properly, it was extremely important for citizens to understand that there was a judge who was there to assess the validity of the decisions being made. And that the judge was not only there to examine their applications in immense detail but was also able to hand down decisions extremely quickly, without compromising the quality and accuracy of their analyses. Nonetheless, there has been some misunderstanding of the role of the Conseil d'État. Judges are there to guarantee respect for the law and civil liberties. They are not there to substitute for the government nor to set out an alternative public policy. **By fulfilling its mission as a judge without interruption, the Conseil d'État has been essential to the proper functioning of democracy during the period of the health crisis.**

particularly tricky in this context. *'We were not in a binary situation but in one where the judge had to reconcile conflicting freedoms. On the one hand, there was a very strong constitutional requirement, the protection of public health, and on the other, there was freedom of enterprise, freedom of movement, freedom of worship, and so on. Reconciling these competing demands was extremely difficult.'*

Maintaining dialogue and collegiality, even remotely

These challenges seem to have been met based on the usual high standards. *'We have approached our work with the same independence, the same rigour and the same high standards that we normally apply',* says Sylvie Hubac. **For Lionel Collet, respect for collegiality in all circumstances explains why such a high standard has been maintained.** *'In many cases, we worked remotely and these discussions helped ensure that texts were as legally sound as possible.'*

In litigation, in-person hearings were maintained for all cases that presented specific difficulties. **Some were held on Sundays and public holidays, while others were exceptionally long,** such as the hearing on the monitoring of the health situation in prisons, which lasted six hours. All of them enabled *'the administration, the applicants and the lawyers to engage in a genuine discussion with the urgent applications judge'*, explains Jean-Denis Combrexelle. For him, this type of dialogue is essential for making decisions that are as fair and realistic as possible in an emergency situation. *'In many sensitive cases, holding a hearing made it possible to move things in a direction that achieved a degree of convergence between the administration and the applicants'*. Regardless of the final decision, he is convinced that the discussions that have taken place will have *'major consequences in the future'*.

Judging COVID-19 cases on their merits and beyond

In order to avoid a gap developing between COVID-19 cases judged in summary proceedings and those judged on their merits, according to a nine-judge collegiate procedure that requires more time, Pascale Fombeur *'chose not to wait to investigate the substantive cases that were beginning to arrive on issues linked to the health crisis'*, but to deal with them as quickly as possible. This initiative made it possible to try cases dealing, for example, with the tightening of the vulnerability criteria for access to short-time working before the end of 2020 (see page 83). In several cases, *'summary proceedings took place in March, April or May. But we were able to hear the cases on their merits before December, so that we could make a final decision'*, she explains.

Apart from COVID-19, 2020 was marked by other memorable cases, particularly in the environmental field. For Jean-Denis Combrexelle, the decision on the application by the municipality of Grande-Synthe (see pages 60-61) is *'an extremely important decision, from the point of view of both environmental law and, more generally, of administrative litigation'*. **In 2020, the Conseil d'État also imposed a penalty payment of a historic amount to force the State to respect its commitments to fight air pollution** (see pages 58-59). *'Both these cases show that, alongside COVID-19, the institution worked very hard on all the so-called normal cases'*, concludes Jean-Denis Combrexelle. ●

BY THE WAY...

What is a freedom or a fundamental right?

Freedoms and fundamental rights are guaranteed by the preamble to the 1958 Constitution and are derived from three main sources: the 1789 Declaration of the Rights of Man and the Citizen, the 1946 Constitution and the Charter for the Environment. They can increase in number as case law develops. A decision handed down by the Conseil d'État in 2020, for example, recognises the freedom of artistic creation as a fundamental freedom.

There are four types:

- **rights inherent to human beings**, such as equality, safety, property or resistance to oppression;
- **rights that are aspects or consequences of the above**, such as universal suffrage, gender equality or freedom of expression or worship;
- **social and economic rights**, such as employment, health protection or free public education;
- **'third generation' rights**, such as the right to live in a balanced environment that shows respect for health and people.



A lawyer and an applicant talk before the start of an urgent hearing in December 2020.

FOCUS

The Conseil d'État's future projects

Oral submissions: the guarantee of justice that reflects reality

Dialogue is at the heart of urgent hearings. It allows for accurate, pragmatic justice in an emergency, removing all ambiguities by directly questioning the parties and taking full account of the practical issues at stake in disputes. With this in mind, the Conseil d'État is considering new ways of integrating an oral dimension into the traditional litigation process, which is based on written submissions. In 2020, it initiated a small revolution by trialling the use of oral proceedings in cases judged on their merits for the first time. These new, freer and more spontaneous forms of adversarial debate are held before the final hearing, which until now has been the only externally visible part of the proceedings.

Digital technology at the service of justice and citizens

Over the past ten years, the Conseil d'État has taken a digital turn. The Télérecours and Télérecours citoyen platforms make it possible to file an application online and then to be informed of the progress of the case by e-mail. Almost nine out of ten applications are filed in this way. The Conseil d'État has also dematerialised a large part of its activity internally for greater efficiency. Applications are managed digitally, from registration to the investigation of the case and the notification of decisions. In 2020, the use of digital technology made it possible to tackle the crisis by continuing court activities without any interruption or slowdown. Remote working was implemented from the first day of the lockdown, and video hearings were offered to applicants who could not or did not wish to travel.

An open institution

Recognised by a double label awarded by AFNOR for its actions in favour of equality and diversity, the Conseil d'État continues to open up to all audiences and particularly to young people, who are the citizens of tomorrow. Even during the crisis, this commitment has not wavered. After hosting four trainees from an 'equal opportunities' class preparing for administrative examinations and five ninth-grade students from the Utrillo secondary school in the 18th arrondissement in Paris (REP), the institution signed a partnership with three associations: L'Envol, Ambition Campus and La Ligue de l'enseignement. The aim is to make young students from modest backgrounds aware of the Conseil d'État's responsibilities and what its members do. About 100 students between the ages of 15 and 18 will take part in the programme, with about 40 of them starting in 2021. The immersive experience can be extended by an internship for those with a particular interest.

Our work in pictures

The Conseil d'État remained open throughout 2020, continuing to work, welcoming the public and opening its doors to young people. A look back at an eventful year.



↑ **11 June 2020.** The first face-to-face General Assembly since the end of the first lockdown; members of the Conseil d'État discuss the proposed law introducing security measures for terrorist offenders at the end of their sentence (see pages 46-47).



↑ **16 October 2020.** The Litigation Assembly meets to hear a case concerning changes in policy by the tax authorities (see pages 86-87).



↑ Members of the public and journalists wait in the lobby before a hearing on the collection and use of personal data (see page 52).



↑ Top – **14 October 2020**. Inaugural lecture of the 2020-2021 series on states of emergency (see pages 44-45). Monique Canto-Sperber, Bernard Cazeneuve, Martine de Boisdeffre and François Molins speak alongside Bruno Lasserre.

Bottom – **28 February 2020**. Third lecture in the series on public policy evaluation (see pages 74-75). Franck Montaugé, Patrick Bernasconi and Michèle Pappalardo take part in the first roundtable of the day. The theme: promoting complementarity between public policy evaluation actors.



↑ **December 2020.** As part of its actions to promote diversity, the Conseil d'État hosts five ninth-grade students from the Maurice Utrillo secondary school in Paris (REP).



↑ **10 June 2020.** The *rapporteure publique* reads out her opinion on one of the ten cases dealt with that day in the Litigation Chamber.





The Conseil d'État involved in everyday life

From mask-wearing to lockdown arrangements, drone surveillance, air pollution and relegating football teams... the Conseil d'État handed down opinions and decisions in 2020 affecting every aspect of our day-to-day lives, from civil liberties to leisure activities.

- 40 Preserving **civil liberties**
- 46 Framing the fight against **terrorism**
- 48 Protecting our **personal data**
- 54 Safeguarding **public health**
- 58 Promoting **sustainable development**
- 66 Looking after **education, culture and leisure**
- 72 Reconciling the neutrality of the State and **freedom of worship**
- 74 Better management of **public policies**
- 80 Guaranteeing the **rights of foreigners**
- 82 Defending our **social rights**
- 86 **Economy and taxation**: clarifying the rules

Preserving civil liberties

From freedom of movement to freedom of assembly and freedom to demonstrate, the COVID-19 pandemic forced the authorities to take exceptional measures to protect our health, often to the detriment of other fundamental freedoms. In this situation, the Conseil d'État plays a more important role than ever in reconciling those freedoms.



↑ **March 2020, Paris.** Rally in Paris against the measures taken by the government under the health state of emergency. The Conseil d'État ruled on eight bills relating to the state of emergency in 2020.

Defining the framework for the **health state of emergency**

How can we protect our freedoms when the health emergency imposes multiple restrictions? The Conseil d'État considered eight bills on this topic in 2020. As an emergency measure, it made sure that the restrictions imposed on our fundamental freedoms were necessary, appropriate and proportionate.

A health state of emergency is declared

In March, it examined the bill defining and implementing a health state of emergency for the first time. Among other adjustments, it suggested making a clear distinction between situations of 'health disaster' and 'health threat'. Only the former would justify declaring a health state of emergency and would give the Prime Minister the possibility of implementing the most restrictive measures. The aim was to establish a legal mechanism that was proportionate to the degree of actual risk. Regardless of the situation, however, the requirement is the same: **if protecting our health means encroaching on our freedoms, the measures must always be appropriate to the risks incurred and the circumstances of time and place.**

Such measures are inherently temporary and must be suspended as soon as they are no longer absolutely necessary. On this basis, the Conseil d'État held that most of the arrangements envisaged were appropriate, from the postponement of the second round of municipal elections to the business support package and the extension of various administrative deadlines.

Reassessing restrictions on freedoms

The end of lockdown in May was based on three key areas: protecting, testing and isolating. While the situation was gradually becoming less urgent, numerous uncertainties remained. The Conseil d'État examined two bills aimed at extending and supplementing the exceptional measures taken during the state of emergency. While it accepted the extension of the programme, **it called on the government to review all measures adopted since March** to ensure that they were

still necessary as part of a gradual return to normality and recommended that several provisions be clarified, including those relating to quarantine. This recommendation also applies to legislation by ordinance, which was the preferred route during the crisis in order to act more swiftly.

Preparing for the end of the state of emergency

A bill on arrangements for the end of the state of emergency on 11 July was examined in June. The Conseil d'État found that the arrangements set out in the bill would allow a 'cautious, gradual

and controlled' end to the state of emergency, in line with the recommendations of the scientific advisory committee. It objected, **however, to the law applying until 1 April 2021, on the grounds that it was too early to know whether it would still be needed. 30 October 2020 was felt to be a more realistic time frame.** In September, however, the resurgence of the epidemic became clear: the Conseil d'État considered that the extension of the exit regime until 1 April was now justified.

“

[Emergency measures must] be strictly proportionate to the health risks involved and appropriate to the circumstances of time and place. They must end as soon as they are no longer required.

Opinion of 10 June 2020

The health state of emergency was finally renewed in September in light of the worsening situation.

Creating a sustainable regime for future health crises

Acting in an emergency does not obviate the need to think in the longer term. The French government therefore prepared a bill establishing a permanent regime for managing health emergencies, which was examined by the Conseil d'État in December. The aim was to learn from the crisis and build a relevant legal framework for future crises, however unpredictable and diverse they may be. While the Conseil d'État welcomed the approach, it insisted on one point: **the text would have to be fine-tuned after the crisis to incorporate everything it had taught us.** ●



FIND OUT MORE

OPINION of 17 March 2020, 'Draft emergency Framework Act to address the COVID-19 epidemic'

OPINION of 18 March 2020, 'Draft emergency Framework Act to address the COVID-19 epidemic'

OPINION of 4 May 2020, 'Bill extending the health state of emergency and supplementing its provisions'

OPINION of 11 May 2020, 'Bill on various urgent provisions'

OPINION of 10 June 2020, 'Bill organising the end of the health state of emergency'

OPINION of 18 September 2020, 'Bill extending the transitional regime instituted at the end of the health state of emergency'

OPINION of 21 October 2020, 'Bill authorising the extension of the health state of emergency and providing for various measures to manage the health crisis'

OPINION of 21 December 2020, 'Bill instituting a permanent health emergency management regime'

Our **daily lives** in the face of the epidemic



d'État: it would be too difficult to implement and counterproductive because home deliveries of supplies could not be organised throughout the country. Moreover, key workers were continuing to work outside their homes, which justified maintaining certain services, such as public transport. In fact, it found that several measures taken by the French government were too ambiguous and asked it, for example, to clarify exemptions on travel, such as for health reasons or short journeys. The operation of open markets also had to be changed to avoid large gatherings.

Yes to mandatory mask-wearing in towns and cities, where it was justified

In September, mask-wearing in urban environments was not yet mandatory everywhere. The prefect of Bas-Rhin imposed it in 13 communes, while the prefect of the Rhône did the same in Lyon and Villeurbanne. The Conseil d'État, in response to an application by individuals and an association, did not lift the obligation in large cities, on the basis that the **virus circulated more quickly in such densely populated areas and mask-wearing helped to protect the population**. It also held that it was clearer to define relatively large areas with obligatory mask-wearing rather than creating multiple zones with different rules.

However, it was only legitimate to demarcate broad areas if they combined several high-risk zones. Imposing mask-wearing across the whole of small communes was therefore not justifiable if only the town centre was sufficiently densely populated for the virus to spread. ●

From limited travel to mask-wearing, the COVID-19 epidemic turned our lives upside down. Over the months, the Conseil d'État has made sure that the emergency measures imposed were justified.

No to total lockdown

In March, the Syndicat des jeunes médecins (Young Doctors' Union) called for an even stricter lockdown than the one already in place. **Impossible, said the Conseil**

FIND OUT MORE

DECISION no. 439674, 'Application for a total lockdown of the population'

DECISION no. 443750, 'Mandatory mask-wearing in Strasbourg and in 12 municipalities in Bas-Rhin'

DECISION no. 443751, 'Mandatory mask-wearing in Lyon and Villeurbanne'

IN BRIEF

Defending the **freedom to demonstrate**

The ban on gatherings of more than ten people in public spaces was set out in a decree issued to slow down the circulation of the virus. Following the first lockdown, several associations and unions demanded that an exception be made for demonstrations, especially since the health situation was improving. **Since the freedom to demonstrate is a fundamental freedom, the Conseil d'État suspended the ban**. Based on the recommendations of the High Council for Public Health, it set two conditions: compliance with protective measures, and a maximum of 5,000 people per gathering. The Prime Minister amended

the decree accordingly and demonstrations of more than 10 people could then take place, but only with the permission of the prefect. **This condition was deemed excessive by the Conseil d'État, which again suspended the decree**. It recalled that under normal circumstances, a simple declaration was required – this authorisation system would reverse the logic, with a ban becoming the rule. Along with the German administrative court, the Conseil d'État was one of the few courts in Europe to uphold the freedom to demonstrate. In the UK and Spain, this right was muted. ●

FIND OUT MORE

DECISIONS n^{os} 440846, 440856, 441015, 'Public demonstration'

DECISIONS n^{os} 441257, 441263, 441384, 'Obligation to obtain authorisation before organising a demonstration'



↑ **January 2021, Bordeaux.** High school students and teachers demonstrate in the midst of the health crisis. Following the first lockdown in 2020, the Conseil d'État defended the freedom to demonstrate provided that the demonstrators complied with protective measures and numbers remained below the maximum permitted.

IN BRIEF

Ensuring **fair trials** in the midst of a health crisis

How can the right to a fair trial be maintained during a health crisis? Under the state of emergency, the government adapted several rules of criminal procedure to ensure that trials could continue. Associations, bar associations and magistrates' unions challenged certain provisions before the Conseil d'État. Among them was the possibility of imposing videoconferencing on defendants tried by the assize and criminal courts. **For the Conseil d'État, the physical presence of the accused and the civil parties**

is fundamental in a criminal trial, given the seriousness of the penalties incurred and the role played by the personal conviction of the judges and jurors. The use of videoconferencing without the consent of the accused, during the closing arguments of the public prosecutor and the pleadings of the lawyers, seriously undermines the rights of the defence and the right to a fair trial. It therefore suspended the measure – a decision that would be extended to all criminal courts in early 2021. ●

FIND OUT MORE

DECISIONS n^{os} 446712, 446724, 446728, 446736, 446816, 'Possibility of using videoconferencing during hearings in the assize and criminal courts'

Thinking about the **states of emergency** of today and tomorrow



The 'States of Emergency' lecture series was launched on 14 October 2020 and broadcast live on the Internet so that the public could follow it remotely, despite the health situation. It is now available to replay in its entirety on the Conseil d'État website.



Whether they were instituted to fight terrorism or to deal with the COVID-19 epidemic, states of emergency have become increasingly important in the lives of French people over the past several years. In view of the questions they raise, the Conseil d'État decided to devote its annual lecture series to them, followed by the publication of a study. It is an opportunity for collective reflection on these times when our institutional and social balances are being disrupted.

The rule of law and the challenge of the emergency

What is the definition of a state of emergency? This is a legal mechanism that makes it possible, by expanding the powers granted to the executive, to **derogate from the ordinary law to prevent public disorder (1955 Act) or, henceforth, a health disaster (2020 Act)**.

It only applies to democratic regimes. By definition, an authoritarian regime does not need to resort to a system of exceptions to deal with a crisis. However, the state of emergency raises questions: What threats justify such an exception and to what extent? What are the advantages and disadvantages of crisis legality? How can the actions of the State be controlled in these circumstances?

In Western democracies, the nature of such a regime is to be temporary and proportionate to the threat.

Whatever the nature of the danger, a state of emergency is never a 'lawless' regime. Its strength lies in the limits it sets for itself, monitored by the Conseil constitutionnel, the Conseil d'État and the judiciary, which act as guardians of freedoms to maintain the rule of law. At the Conseil d'État, the principle of proportionality, which guides judges in their assessment of the legality of administrative measures and runs through all decisions handed down in times of crisis, was one of the guiding threads of the 2020 health state of emergency.

2015 to 2020: from counterterrorism to health management

There is not one state of emergency, but several, depending on the nature of the threat concerned. **In 2015, when a state of emergency was declared to combat terrorism, it raised questions as to the pertinence of a temporary measure to deal with a long-term threat.** In fact, it proved very difficult to exit the scheme, as it was renewed six times.

In 2020, the issues at stake were not the same since it was a question of fighting a virus, where every individual could be both a victim and a vector of transmission. The measures applied were particularly intrusive, affecting every aspect of economic and social life and both the private and public spheres. **The restrictions on freedoms were massive and affected fundamental freedoms,** such as freedom of movement, enterprise, demonstration and assembly. Moreover, as the threat evolved from week to week, the government had to adjust the restrictions continuously – sometimes tightening and sometimes easing them.

An effective tool, to be used with care

The state of emergency is a useful, and sometimes indispensable, tool for mobilising the population against a threat. However, a balance must always be maintained so that an exceptional regime does not damage the basis of our democracies. By multiplying and renewing these measures in recent years, we have tended to make the exception the norm. There is also a risk of maintaining a sense of permanent danger in the collective imagination and citizens becoming accustomed to increasing infringements of their freedoms, which they would then see as the price they had to pay to feel protected.

A reappraisal is therefore necessary. **Is the state of emergency the most appropriate tool for fighting crises?** If so, which kinds of crisis? What developments should be promoted in normal times to better anticipate them?

Reflecting upon exiting states of emergency

A better anticipation of risks is all the more important given that a state of emergency must be temporary – the longer it lasts, the more irrelevant and commonplace it becomes. **How can you exit a state of emergency when often, the threat still exists?** Exiting a state of emergency is a risky and difficult political decision, insofar as it was established to deal with an often unpredictable and evolving threat. Is it therefore inevitable that some of the measures of the state of emergency are incorporated into ordinary law?

As both an adviser and a judge, the Conseil d'État is at the centre of all these issues. With this series of lectures, it intends to learn lessons from our collective experience. In the study that will follow in the autumn of 2021, it will provide an in-depth analysis of states of emergency, their legitimacy and their effectiveness, extended by a series of proposals for improving the legal framework of the mechanism, to preserve its effectiveness for future crises, while avoiding the risks associated with it. ●

FIND OUT MORE
ANNUAL LECTURE SERIES
'States of Emergency'



**A
WORD
FROM**

BRUNO LASSERRE

Vice-President of the Conseil d'État

Is there a need for exceptional regimes?

States of exception are certainly nothing new. The great states governed by the rule of law all have legal provisions, in one form or another, which make it possible to derogate from ordinary law to overcome particularly serious threats. These exceptional regimes have nonetheless given rise to intense controversy about the relationship between law and politics, and the paradox of a law that organises its own erasure continues to pose formidable theoretical questions for jurists. It is also true that the terrorist and health crises, although different in nature, share the violence with which they have manifested themselves. **We had to act quickly and resolutely. But was it absolutely necessary to depart from the normal legal framework by declaring a state of emergency?**

This is not a rhetorical question. Asking it does not mean I have the answer, and I am fully aware of the immense difficulties faced by politicians in such situations. But the rule of law suffers if we turn to exceptional regimes too often. Rights and freedoms are weakened as a result, even if it can always be argued, as Montesquieu does, that it is for a just cause since citizens lose *'their liberty for a time only to keep it forever'*. Above all, **what remains of the legitimacy of the State if every crisis shows both its inability to deal with it under a normal framework and its inability to anticipate its occurrence?** Will we be able to judge as exceptional – and therefore justifying a crisis regime – the climatic disasters whose question is no longer if, but when they will happen?

Framing the fight against terrorism

The risk of terrorism has weighed on our daily lives for several years, threatening our lives and our democracy. How can it be prevented and countered effectively? The Conseil d'État seeks the right balance between security and fundamental freedoms.

Striking a balance between security and fundamental freedoms

The terrorist threat is constantly taking on new forms, so our legal response must evolve on a regular basis. Does that necessarily mean adding new measures to the existing ones? The Conseil d'État commented on this several times in 2020. As well as ensuring that our fundamental rights are respected, it questioned how useful these texts really are in guaranteeing our security.

from running a religious association for 10 years.

It also held that the expansion of the Terrorist Offenders Index (FIJAIT) was a proportionate and necessary measure for the prevention of public order offences. From now on, anyone who commits an offence of provoking or defending terrorist acts will be listed on the index, as

will anyone who participates in extracting, reproducing or transmitting data provoking acts of terrorism.

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Terrorism is one of the most serious threats to democratic societies.

Opinion of the Conseil d'État of 11 June 2020

Preventing recidivism by restricting freedoms?

French MPs asked the Conseil d'État for its opinion on a parliamentary bill based on the

same logic of prevention. It aims to introduce new security measures for perpetrators of terrorist acts who have served their sentences. In its advisory opinion, the Conseil d'État acknowledged that these measures may be useful in combating recidivism but wondered whether they were



FIND OUT MORE

OPINION of 9 December 2020, 'Bill to strengthen respect for the principles of the Republic'

OPINION of 11 June 2020, 'Bill introducing security measures against perpetrators of terrorist offences at the end of their sentence'

Improving existing mechanisms

Where they improve existing mechanisms, new counter-terrorism provisions make sense.

In an advisory opinion issued in December, the Conseil d'État approved measures included in the bill to ensure respect for the principles of the Republic. **These include banning people who have committed terrorism-related offences from places of worship and preventing them**



October 2020, Toulouse. A tribute to Samuel Paty in front of the illuminated place du Capitole. In November, the Conseil d'État upheld the closure of the Grand Mosque in Pantin, which was responsible for posting a call for punishment of the history teacher on its Facebook page.

compliant with the French Constitution and the European Convention on Human Rights. Were these infringements of freedoms necessary, appropriate and proportionate? In order to reduce the risk of unconstitutionality as much as possible, the Conseil d'État proposed several changes: the danger presented by certain individuals must be assessed more effectively, a judge must be able to stop the infringements at any time, and the duration of security

measures, initially renewable for 10 or 20 years, must also be reduced – to five years, for example – so as not to interfere with freedoms beyond what is necessary. A few months later, the Conseil constitutionnel, having been asked to examine the law adopted by Parliament, ruled that the improvements made following the opinion of the Conseil d'État were not sufficient to ensure compliance with the Constitution. ●

IN BRIEF

Sanctioning speech that incites terrorism

Because terrorism is rooted in speech that incites hatred, violence or discrimination, the public authorities seek to prevent and even punish the risks involved. It was in this spirit that the Conseil d'État confirmed the dissolution of the Barakacity association and the closure of the Grand Mosque in Pantin for six months, in two decisions handed down in November 2020. The president of the Barakacity association had called for 'retribution' on several people, including the victims of the *Charlie Hebdo* attack. These hateful messages were posted on social media, *via* his personal or the association's account, without the violent

comments they generated being moderated or issued with a warning. The Grand Mosque in Pantin, for its part, had published a video on its Facebook page demanding the removal of teacher Samuel Paty for teaching a lesson on freedom of expression by showing caricatures of the prophet of Islam. The mosque had also become a meeting point for the radical Islamist movement in the Paris region, led by a fundamentalist imam. Its leaders would only be able to apply for reopening on the condition that long-term measures be implemented to prevent such serious abuses. ●

FIND OUT MORE

- DECISION** no. 446303, 'Application for suspension of the closure of the Grand Mosque in Pantin'
- DECISIONS** n^{os} 445774, 445984, 'Application for suspension of the dissolution of the Barakacity association'

Protecting our **personal** data

From our names to our e-mail and IP addresses, medical history, phone numbers and more, private companies and administrative authorities collect and process our personal data without our even thinking about it. The Conseil d'État makes sure that they do it in a way that respects our rights and is continuing to clarify a legal framework that is still in its infancy.

The use of drones must be regulated

Small, silent and easily handled from the ground, drones could one day be monitoring us on a daily basis. However, the Conseil d'État emphasised on three occasions in 2020 that their use for public safety or civil security purposes posed a threat to our right to privacy.

The health emergency does not justify everything

March 2020. Twenty-four hours after the first lockdown began, the Paris Prefecture of Police decided to deploy drones in the capital. The aim was to make it easier to detect banned public gatherings. **This was a pragmatic initiative, but one that was contrary to the right to privacy.** In May, the Conseil d'État ordered its immediate suspension in response to an urgent application filed by the Ligue des droits de l'homme and La Quadrature du Net.

The decision applied immediately throughout the country.

Arguing in favour of their use, the Paris Prefecture of Police stressed, in particular, that its drones flew at an altitude of more than 80 metres, preventing any identification of the persons under surveillance. This was viewed as a necessary but not sufficient condition. In its decision, the Conseil d'État noted that the cameras on board the drones were able to zoom in, thus allowing the collection of identifying information.

“

It will be up to the law to define the reasons for the use of airborne cameras.

Opinion of 20 October 2020

Drones capture our personal data

Would the blurring of images therefore be a solution? It all depends on the case, the Conseil d'État ruled in December in a further decision. After the first case, the Paris Prefecture of Police had continued to use drones, in particular to monitor public demonstrations. The only



FIND OUT MORE

OPINION of 20 October 2020, 'Use of airborne image capture devices by public authorities'

DECISIONS n^{os} 440442, 440445, 446155, 'Drone Surveillance'



↑ **April 2020, Paris.** The Prefecture of Police launches a project to monitor compliance with the lockdown using drones.

difference was that before being sent to the prefecture, the images of the people filmed were processed using automatic blurring software. The Conseil d'État, in response to a further urgent application by La Quadrature du Net, noted that the images were not blurred as soon as they were captured but only at a later stage. Accordingly, it held that they should be treated as personal data, protected by the French Data Protection Act of 1978.

What was the underlying principle of these decisions? **Images of people captured by drones should be regarded as personal data by default.** As the law stands, drones cannot be used for public safety or civil security missions. This is the position defended by the Conseil d'État in its advisory opinion of 20 October 2020, in response to a question from the French government. ●

IN BRIEF

Electronic bracelets to prevent domestic violence

It is a key measure of the 2020 Grenelle debates on domestic violence. From now on, the movements of violent spouses and ex-spouses can be monitored using electronic bracelets to keep perpetrators away. The aim is to protect survivors from recidivism. But does the system of permanent dual geolocation used by the device not represent an excessive infringement of the rights and freedoms of the people concerned? The Conseil d'État ensured that this was not the case when it examined the government's draft decree

before it was issued. In its advisory opinion, it emphasised that the collection and processing of data was based on the consent of each party. It requested several adjustments from the government in order to reduce the risk of invasion of privacy inherent in the system. These included historical data remaining accessible for only three years, instead of six, the need for a judge to decide on any use of the bracelet for less than six months, and the creation of an appeals process. The decree, issued in 2020, takes these recommendations into account. ●



FIND OUT MORE

DECREE no. 2020-1161 of 23 September 2020 on the implementation of a mobile electronic device to keep perpetrators of domestic violence away

Protecting our lives... and our **privacy**



→
Personal data informs public health policy. But its use may infringe the right to privacy.

It advances research and guides public policy. However, those who collect and process our health data cannot ignore the right to privacy. In 2020, the Conseil d'État ensured that the use of this data does not infringe our rights and freedoms.

TousAntiCovid respects our anonymity

More than 12 million people have installed the TousAntiCovid app on their smartphones. The successor to StopCovid, the app lets you know if you have been in the vicinity of people who have tested positive for COVID-19. Similarly, if someone is infected, it can be used to inform the people they have been in contact with. Is this a threat to our right to privacy? For the Conseil d'État, which ruled on the application in May 2020, consent and anonymity are at the heart of the matter.

In an advisory opinion issued prior to the launch of the app by a government decree, it emphasised that downloading and using StopCovid were free and voluntary. Moreover, people who had been tested or picked up as contact cases were not identified, and the app complied with the GDPR (*see opposite*). However, the Conseil d'État recognised that this innovation could raise **new issues of respect for freedoms and the right to privacy**

in the future, as well as risks of discrimination. It warned the government of the need to adapt the legal framework without delay in order to anticipate them.

Health Data Hub: our data will not end up in the US

The Conseil d'État also called for vigilance around Health Data Hub. Launched in 2019, this is a public platform that collects health data to advance research. However, the data is stored by the American giant, Microsoft. Is it likely to be accessed in the United States? The Conseil d'État, responding to several associations and

trade unions in October 2020, indicated that the risk was low. First, our pseudonymised data is stored in the European area and is therefore protected under the GDPR. Secondly, the contract signed between Health Data Hub and Microsoft prohibits any data sharing with the United States.

“
The right to privacy is a fundamental freedom.”

Decision of 13 October 2020

In its decision, however, the Conseil d'État acknowledged that **the US authorities could, in the future, ask Microsoft for access to certain information**, in accordance with US law, in the context of intelligence programmes. Faced with this legal ambiguity, it asked Health Data Hub and Microsoft to work under the aegis of the CNIL, pending the adoption of a permanent solution, such as a change of web host. ●

FIND OUT MORE

OPINION of 26 May 2020, 'Draft decree on the data processing app called "StopCovid"'

DECISION no. 444937, 'Health Data Hub and personal data protection'

The thermal imaging cameras in question



Do local administrative authorities have the right to take our temperature for the purpose of combating COVID-19? What can they do with the health data they collect in this way? For the Conseil d'État, the answer is clear: **this information cannot be collected and processed without consent**. In June, the Ligue des droits de l'homme applied to the urgent applications judge to request the suspension of devices deployed by the municipality of Lisses (Essonne). A fixed thermal camera was placed at the entrance to a municipal building and portable thermal cameras were installed in schools.

Protecting our health data starts in childhood

In the decision handed down on 26 June, the judge held that the municipality could maintain the camera in the municipal building provided no personal data was processed. Since temperature checking was optional, no one who refused could be denied entry to the premises, no temperature could be recorded, and no member of staff could access the results. The situation is quite different in schools, where the collection of health data is mandatory and an abnormal result forces students and staff to leave the premises. The Conseil d'État found that this system did not meet the requirements of the GDPR on individual consent and that it infringed the right to privacy and freedom of movement. **This decision put an end to the use of cameras in schools in Lisses.** ●



FIND OUT MORE

DECISION no. 441065, 'Thermal cameras in Lisses'

IN BRIEF

The limits of our right to be forgotten (dereferencing)

The General Data Protection Regulation (GDPR) allows us to ask a search engine to remove results associated with our name. However, can the right to be forgotten be applied beyond the borders of the European Union? In 2017, Google was fined €100,000 by the French Data Protection Authority (CNIL) on the grounds that it refused to apply it globally. The Conseil d'État, in response to an application by Google, quashed the sanction in March 2020, on the basis that the recent

right to be forgotten stops, in principle, at the borders of the EU. However, the Conseil d'État's ruling clarifies that European law does not prohibit a Member State's supervisory authority, such as the CNIL, from ordering global dereferencing in certain cases. For this to be possible, however, a balance must be struck between the individual's right to privacy and the right to freedom of information, an approach that the CNIL did not adopt in dealing with Google. ●



FIND OUT MORE

DECISION no. 399922, 'Territorial scope of the right to be forgotten'

BY THE WAY...

What is personal data?

Personal data is information relating to an identified or potentially identifiable individual. It varies widely, from travel to online shopping. The European Commission adopted the GDPR to protect personal data in 2015. It came into force in 2018 and applies to all EU countries.

Guiding principles:

- **user consent;**
- **transparency of data collection and processing parameters;**
- **responsibility of entities that collect data;**
- **respect for personal rights.**

Google pays for its lack of transparency



→ Entrance to Google's headquarters in California. In 2020, the American giant appealed unsuccessfully to the Conseil d'État to overturn a sanction imposed by the CNIL.

Fifty million euros – the amount that Google will have to pay for its failures in **processing the personal data** of its users. In its decision handed down on 19 June 2020, the Conseil d'État confirmed the order issued by the CNIL against the US giant in relation to the relevant European regulations.

Inadequate information for users

In France, 75% of smartphone owners use Google's Android operating system. But **do we know exactly which of our personal data is collected, and how it is processed?** The GDPR requires entities that collect and process our personal data to inform us in a '*concise, transparent, intelligible and easily accessible*' form about its use (see previous page). This is so that we can consent to their treatment in a '*freely given, specific, informed and unambiguous*' manner.

However, as the Conseil d'État observes in its decision, on Android, this information is organised in a tree structure, which makes it difficult to review. It is not only difficult to find and opaque but also incomplete; the length of time the data is kept or the purpose for which it is processed is not specified.

Challenging targeted advertising

This lack of clarity is all the more problematic since the default setting offered to users when they create a Google account was deemed '*particularly intrusive*' by the Conseil d'État. In its decision, it noted, inter alia, that the settings for targeted advertising were scattered among others. Google does allow you to get more information on targeting *via* a dedicated link but even here, the information provided is not sufficient. **If these settings are not made clear, the consent gathered by Google cannot be valid.**

Google will not escape its penalty

Google had appealed to the Conseil d'État to challenge the penalty initially imposed by the CNIL, arguing that only the Irish data protection authority was empowered to impose a fine. The GDPR effectively allows companies to choose in which EU country their compliance is assessed. But, as the administrative judge noted, this choice is not retroactive and **Google had chosen Ireland after the CNIL sanction.** In view of the seriousness and duration of the breaches, the maximum penalties provided for in the GDPR and Google's financial situation, the judge ruled that the penalty of 50 million euros was not disproportionate. ●



75.4%
of French people
with a mobile phone
use Android*

FIND OUT MORE

DECISION no. 430810,
'Sanction imposed on Google
by the CNIL'

* Source: Kantar
World Panel (2020)



INTERVIEW

‘We need to come up with **new regulation mechanisms**’

With **ÉRIC BROUSSEAU**, Professor at the University of Paris Dauphine – PSL, Scientific Director of the ‘Governance and Regulation’ Chair

The collection and use of our personal data allow us to optimise the services we use on a daily basis – for better or for worse. For Éric Brousseau, rethinking their governance is imperative.

Why should the collection and use of personal data be regulated?

Éric Brousseau: To guarantee a fundamental right, i.e. respect for our privacy. But also to protect everyone’s freedom of choice.

What threats do they pose?

E.B.: The first threat is about the separation between our public and private lives. Not everyone wants to have their business, conversations or opinions disclosed. In the most extreme cases, there is a risk of cyber-surveillance.

Our freedom of choice as consumers and citizens is at stake; the possibilities for manipulation are manifold. Our behaviour and preferences are tracked. Algorithms decide for us what information we receive and lock us into information bubbles that influence our opinions and actions.

Are the current regulatory mechanisms, such as the GDPR, sufficient?

E.B.: The purpose of the GDPR is to ensure that the actors who use our personal data do so transparently, and provide security for users and enable them to give their consent. But it is not enough.

User consent, for example to cookies, is not necessarily informed in practice. Nor does the GDPR regulate the advertising market that stems from the collection of personal data. Yet giants like Google and Facebook have very detailed knowledge of the individuals who use their services, which allows them to sell targeted advertising, sometimes to the detriment of users.

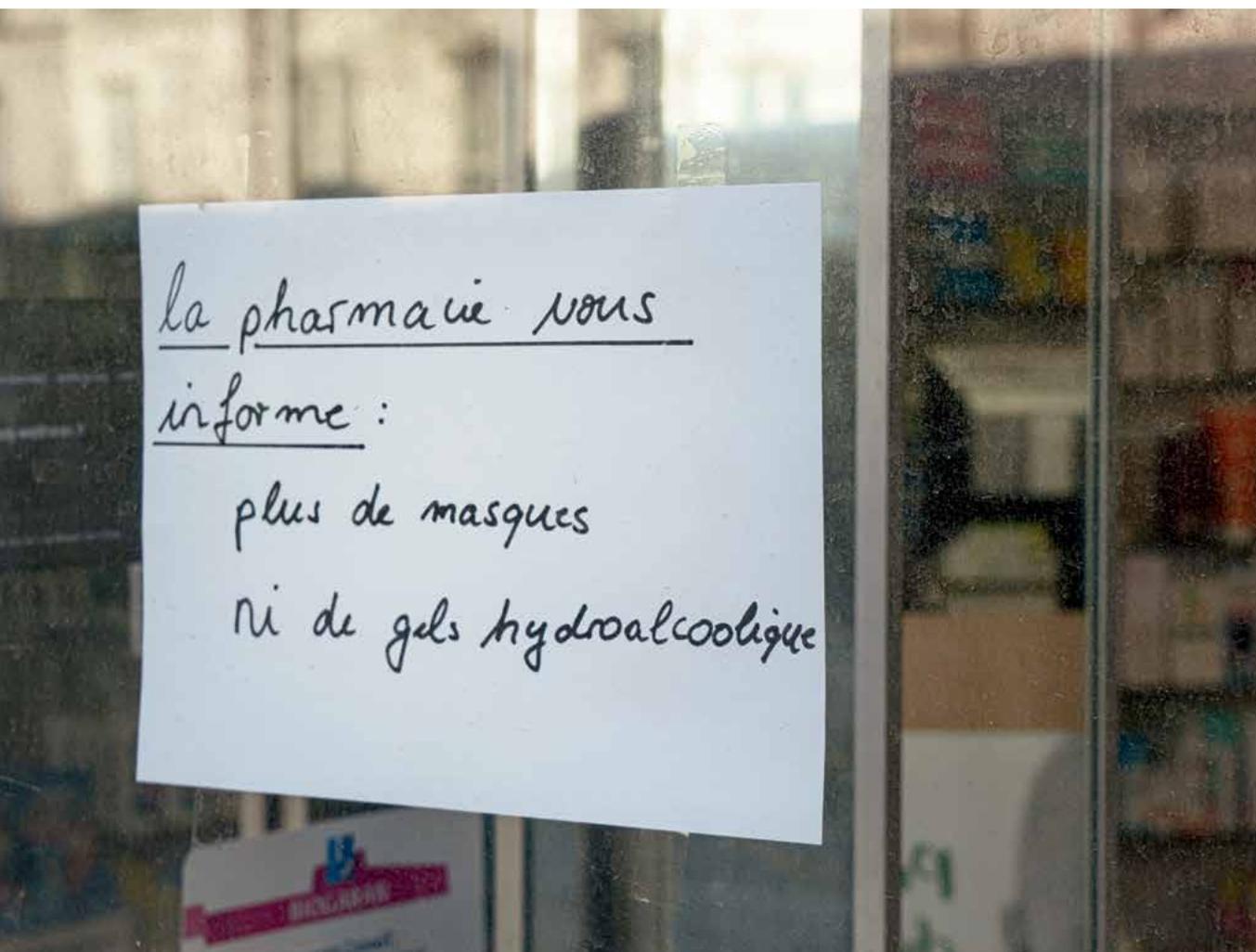
The GDPR is already outdated when it comes to the Internet, where practices are evolving all the time.

What regulatory mechanisms do we need to invent?

E.B.: That is the challenge for the next few years. If we want effective regulation, we must move away from the idea that only public authorities are legitimate or competent. In fact, multiple players can be involved, from private operators to academics, researchers and NGOs, but also – and above all – users themselves, whether they are individuals or companies. Self-regulation by each individual is essential, even if it is not enough in itself. Co-regulatory mechanisms must be devised and stakeholders must be held accountable, supervised and given obligations. ●

Safeguarding public health

From the availability of masks and tests in the midst of a health crisis to paternity leave and authorising treatments and medicines, the Conseil d'État hands down opinions and decisions that affect public health at every point in citizens' lives and in all circumstances.



↑ **March 2020, Paris.** Masks and hand sanitising gel are in short supply while the COVID-19 epidemic is in full swing. How to manage stocks of these essential tools for limiting the spread of the virus is a source of debate. From the start of the lockdown, the Conseil d'État worked to respond to the many applications it received from unions and concerned citizens.

COVID-19: Keeping a cool head

March 2020: citizens find themselves locked down for the first time, facing a virus about which we still know almost nothing. Were the health measures taken to combat COVID-19 justified? The Conseil d'État, which was asked to examine several cases in the few days following the announcement of the lockdown, relied on figures and scientific expertise to hand down the most appropriate legal decisions without interruption and in a challenging situation.

Masks: acting in periods of shortage

The number of masks available for medical personnel and the population has been a subject of debate since the start of the crisis. A doctors' union argued that the measures taken in this area were inadequate. **The Conseil d'État was asked to rule in summary proceedings and found that the French government had already requisitioned stocks, placed orders for hundreds of millions of masks and encouraged domestic production to deal with the shortage.**

On 13 April, it was the lawyers' turn to ask for masks to protect them during civil and criminal hearings, which were continuing to take place. Even though there was still a shortage and strict health rules had been put in place in the courts, the Conseil d'État was clear that the government had to help lawyers to obtain masks by facilitating their access to supply channels.

Two weeks later, however, as the end of lockdown approached, stockpiles of masks began to increase and the court immediately took this into account. On 7 May, it ordered the government to provide masks to the inmates of a prison in Martinique during their contacts with the outside world (see page 84).

The issue of hydroxychloroquine

At the same time, several applicants asked the Conseil d'État to order the state to authorise the use of hydroxychloroquine on a massive scale, which it refused to do. In fact, there are no serious studies concluding that it is effective against COVID-19. On the contrary, it carries proven risks, particularly for the heart.

The Conseil d'État also noted that the Prime Minister had not completely closed the door on this controversial drug, allowing it to be prescribed for certain cases of COVID-19, although it was normally reserved for other conditions. In addition, French stocks of medicines containing hydroxychloroquine were subject to an export ban, should

it prove to be effective. For the judge, the measures taken by the government maintained a good balance between controlled experimentation and the precautionary principle.

Ensuring the rights of residential care-home residents

At the same time, associations believed that residential care-home residents suffering from COVID-19 would have lower priority access to hospitals. **In practice, the Conseil d'État found no evidence of unequal treatment; no measures had been taken in this respect,**

and the figures showed that hospital admissions among this group were continuing as normal.

The associations concerned also wanted it to be possible to visit a dying relative in a residential care home, but the Conseil d'État noted that this right was, in fact, protected, subject to the agreement of the home's director. Again taking into account the situation at the time, the judge ordered the resumption of outings within families a few months later, provided the residents were almost all vaccinated. ●

“
It is the responsibility of the various competent authorities, in particular the Prime Minister, to take all measures likely to prevent or limit the effects of the epidemic, with a view to safeguarding the health of the population.

Decision of 15 April 2020



FIND OUT MORE

DECISION no. 439726, 'Application for measures on mask production, testing and administration of hydroxychloroquine and azithromycin'

DECISION no. 439765, 'Application for a temporary use recommendation for Plaquenil'

DECISION no. 439910, 'Access to treatment for residential care-home residents'

DECISION no. 439983, 'Protection for lawyers'

DECISION no. 440151, 'Masks and screening tests at Ducos prison (Martinique)'

DECISION no. 449759, 'Resumption of outings for families of residential care-home residents'

A new generation of paternity leave



→
Enacted in December 2020, the Social Security Financing Act for 2021 provides for an increase in paternity leave from 11 to 28 days – seven of which are mandatory. In its advisory opinion, the Conseil d'État welcomed this gender equality initiative.

It is a change that many associations have been seeking for decades. More than just an administrative issue, the extension of paternity leave is seen as a major step forward for children and equality between women and men, which the law can encourage and support. Accordingly, the Conseil d'État considered a measure included in the Social Security Financing Bill for 2021. The aim of the bill was to increase paternity leave from 11 to 28 days – seven of which are now mandatory.

Supporting child development... and gender equality

In its advisory opinion, the Conseil d'État welcomed the desire to provide better support for children's development. This was deemed an *'eminent'* consideration, since it is enshrined in Article 10 of the 1946 Constitution: *'The Nation shall provide*

the individual and the family with the conditions necessary to their development'. **The impact study carried out prior to the bill shows the extent to which the presence of the father during the first few days after birth is beneficial to the health of both the mother and the child.**



63%
of employees aged 18 to 24 were in favour of extending paternity leave between 2014 and 2016.

The 1,000 Days Commission, chaired by neurologist and psychiatrist Boris Cyrulnik, also confirmed that enhanced paternity leave was beneficial for the child's development, as it helped to foster a lasting bond with the father. Moreover, longer paternity leave contributes to equality between women and men, by encouraging a better division of tasks and responsibilities between partners. It is a development that is increasingly important for younger generations; between 2014 and 2016, 63% of employees aged 18 to 24 wanted to extend paternity leave.

FIND OUT MORE

OPINION of 5 October 2020, 'Extension of the duration of paternity and childcare leave'

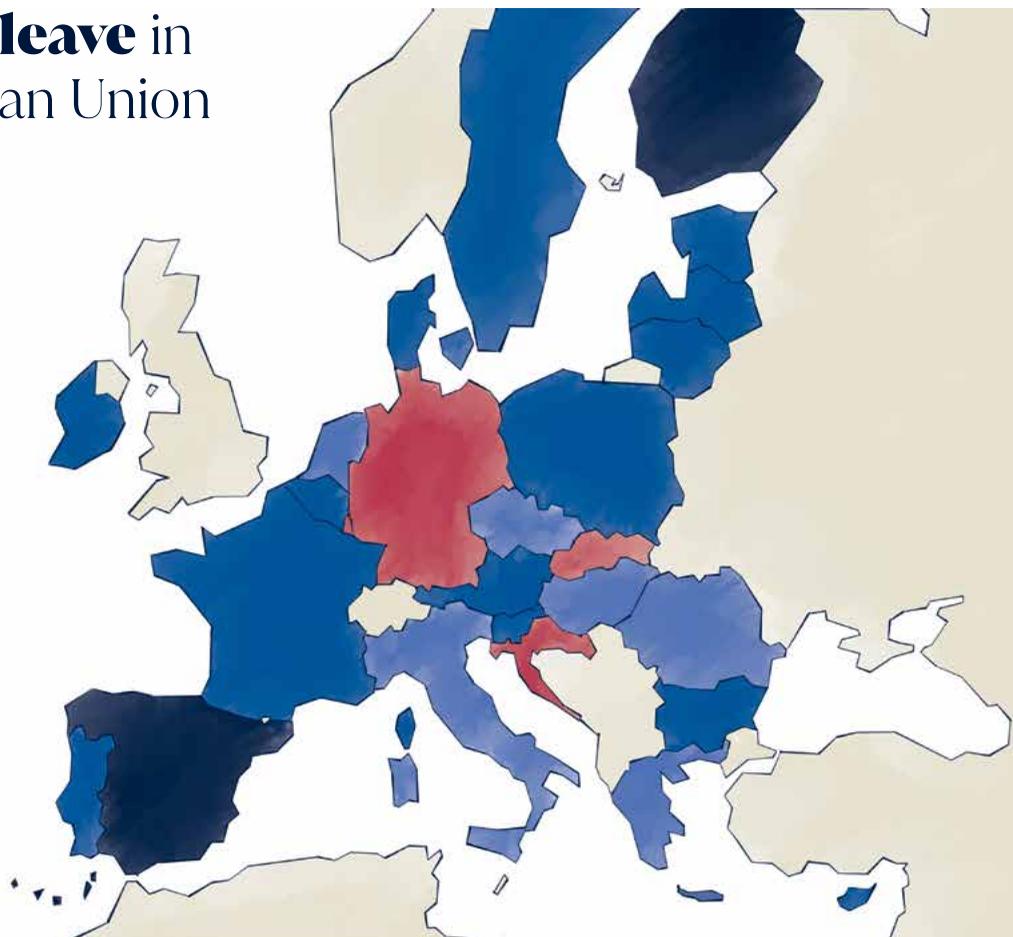
ACT of 14 December 2020 on Social Security Financing for 2021

Paternity leave in the European Union



Number of days' paternity leave granted in European Union Member States.

Source: 16th International Review of Leave Policies and Related Research 2020



Seven days of mandatory paid leave

The Conseil d'Etat responded to those who claimed that the measure put companies in difficulty by saying that issues of maternal and child health should prevail. It even approved of the government's intention to make part of the leave mandatory to encourage fathers to exercise their right. In fact, for several years now, the proportion of fathers taking paternity leave has remained steady. According to the Ministry of Health, only 67% of them do so, compared with 66% in 2003. Mindful of the specifics of certain situations, the Conseil d'État confirmed that the requirement not to work for seven days would not apply to employees who were not eligible for compensation, benefits or continued remuneration. There is no question of depriving these fathers of income or benefits. Following the opinion, the law was passed by Parliament and enacted on 14 December 2020, with the new generation of paternity leave coming into force from July 2021. ●

IN BRIEF

Regulate experiments involving the **medical use of cannabis**

A 2019 law allowed experiments involving the medical use of cannabis in France for the first time. But its implementation needed to be clarified. How can this process be managed? Under what conditions can such an experiment be carried out? The Conseil d'État examined a draft decree specifying the duration of the experiment, the maximum number of patients concerned and the training planned for the participating doctors and pharmacists. This text planned to entrust the Director of the National Agency for Food, Environmental and Occupational Health Safety (Anses) with

the task of making certain regulations. In particular, he was responsible for specifying the therapeutic indications or clinical situations for which the use of medical cannabis was authorised, setting out the characteristics of the medicines used, setting up an electronic register for patient monitoring, securing the medicines' distribution circuit, and more. However, according to the Conseil d'État, only the Minister of Health was entitled to take such measures. The draft decree was changed in response to the recommendations set out in the advisory opinion. ●



FIND OUT MORE

DECREE no. 2020-1230 of 7 October 2020 on experiments involving the medical use of cannabis

Promoting sustainable development

States have been making commitments on climate and biodiversity for several years, but the actions taken have not always matched the statements made. From air pollution to the hunting of endangered species, the Conseil d'État issued several historic opinions and decisions for the protection of the environment in 2020.

The State forced to reduce air pollution

When it comes to air pollution, declarations of intent are no longer enough. The State must keep its commitments – and do so on time. The

Conseil d'État plays a key role in ensuring that the environmental measures taken by the government are not only appropriate but also properly implemented. **A**

historic step was taken in 2020: from now on, the administrative judge will not hesitate to sanction the government very harshly if it fails to act against pollution.

Inadequate measures

In 2017, the Conseil d'État asked the French government to take action to reduce air pollution and greenhouse gas emissions in 13 areas in France. The State was supposed to implement concrete action plans to reduce

concentrations of nitrogen dioxide and fine particles to below the limit values set by the Environment Code. By 2020, it was time for a review: what measures had been implemented in these areas, and with what results? For

the association Les Amis de la Terre in France, the necessary steps had not been taken. In its ruling,

the Conseil d'Etat noted that the pollution limit values were still being exceeded in nine areas: the Arve Valley, Grenoble,

Lyon, Marseille-Aix, Reims, Strasbourg and Toulouse

for nitrogen dioxide, Fort-de-France for fine particles,

and the Île-de-France region for both indicators. In the Arve Valley, a plan had been developed in 2019 and was

considered credible as a means of achieving a significant reduction in pollution by 2022. But

everywhere else, **the roadmaps prepared by the**

government were deemed inadequate. The decision handed down by the Conseil d'État in 2017 had not been fully implemented.



48,000 premature deaths per year are attributable to air pollution in France.



FIND OUT MORE

DECISION no. 428409, 'Air Pollution'

EXECUTION of the decision, 'Air pollution and greenhouse gases: follow-up to the July and November 2020 decisions'



↑ **March 2021, Paris.** The capital is one of the nine areas identified by the Conseil d'État for which the maximum pollution thresholds remain above the limits set by the Environment Code.

The State ordered to act: a historic fine

The Conseil d'État imposed a historic fine – the highest ever levied on the State by an administrative judge – to ensure the effective enforcement of its decision and oblige the State to act. **For each additional six months of inaction, the State will have to pay 10 million euros** to environmental protection associations, as well as to actors involved in public-interest initiatives in this area. The amount is justified by the seriousness of the consequences for public health, but also by the urgency of the environmental issues. This unprecedented order will be renewed until the Conseil d'État deems that its 2017 decision has been fully executed. A new hearing will be held in the summer of 2021 to verify that it has been implemented. The State now has no choice. It must act and act fast. ●



**A
WORD
FROM**

FABIEN RAYNAUD

President of the 6th Chamber
of the Litigation Section

2020: a turning point in **environmental litigation**

The environment is one of the subjects that the Conseil d'État has been familiar with since its inception. As long ago as 1810, it applied an imperial decree on factories, the first text with an environmental dimension! This issue has now come to the fore, however, particularly because of the development of environmental law, which affects a wide range of areas. The Conseil d'État checks, for example, that the administration complies with this law in cases with very localised issues, such as hunting dates or attacks on protected species, or in cases with a global dimension, such as those involving the Paris Agreement on climate change. In this respect, the major decision of the Conseil d'Etat in 2020 (see page 60) sends a message that is likely to elicit broad support: it is up to each national court to verify compliance with the commitments of the Paris Agreement, as transposed into the law of its state. At this very moment, other national courts are also handing down judgments on this vital topic.

Climate commitments are **binding targets**



→
March 2021, Nantes.
 With air pollution high on the public agenda, the Conseil d'État issued several landmark decisions in 2020 that marked a turning point for climate action.

November 2020: the Conseil d'État delivers a historic decision for climate justice. From now on, the commitments made by France in 2015 to reduce greenhouse gas emissions are considered binding targets, for which the government can be held to account. By signing the Paris Agreement, France committed to reducing its emissions by 37% by 2030 compared with 2005. How can we ensure that these objectives are translated into action?

The State confronted with its commitments

It was an application from the municipality of Grande-Synthe (Nord) that led the Conseil d'État to rule on this subject for the first time. Supported by associations and other local authorities, the municipality had been asking the government since 2018 – in vain – to take additional measures to meet its commitments. In an innovative move, the Conseil d'État began by ruling that the municipality, insofar as it bordered the North Sea and was therefore particularly exposed to the effects of climate change, could lawfully challenge the government's refusal to act. **Going back to the climate targets that France had transposed**

into law, the Conseil d'État then recognised their binding nature – a major first. It is now clear that the government is accountable for meeting these targets. Can it postpone a significant part of the emission reduction effort to after 2020? Will this postponement not prevent the targets from being met by 2030?

Acting today for 2030

In reality, France is already lagging far behind. For the period 2015–2018, it was supposed to reduce its emissions by 2.2% per year but achieved only a 1% decrease. According to the Conseil d'État, the lowering of the reduction target for 2019–2023 set out in the decree issued by the government on 21 April 2020 meant that the bulk of the effort would be postponed, without knowing whether it would still be possible to achieve our targets by 2030. **The administrative judge therefore gave the government three months to explain how it intended to fulfil its commitments.**

The justifications provided will be examined at a hearing scheduled for the summer of 2021. The Conseil d'État will then decide whether the strategy outlined is tenable or whether additional measures should be ordered against the State. ●



76%

of French people believe it is legitimate for the courts to force the State to act in order to comply with the targets laid down in the Paris Agreement.*

FIND OUT MORE

DECISION no. 427301, 'Grande-Synthe/Greenhouse gas emissions'

EXECUTION of the decision, 'Air pollution and greenhouse gases: follow-up to the July and November 2020 decisions'

* Source: BVA Institute for Greenpeace France



INTERVIEW

‘Judges have become courageous’

With **DANIEL ESTY**, Director of the Center for Environmental Law and Policy at Yale University (USA)

In 2020, the Conseil d’État ruled in the Grande-Synthe case (see *opposite*) that the French State should be held accountable for its climate commitments. For Professor Daniel Esty, this decision could well inspire the rest of the world.

Why is the decision in the ‘Grande-Synthe’ case a breakthrough?

Daniel Esty: This decision shows that there will now be legal control of the French government’s climate action. Moreover, shortcomings will not be accepted. The Conseil d’État considered that the State should fulfil its international commitments under the Paris Agreement, and it is prepared to monitor its action. In most countries in the world, there is no one to hold states accountable for meeting their climate targets: judges do not see it as their responsibility.

Have similar actions already been taken in other countries?

D. E.: There are a few similar cases. Perhaps the most interesting of these is the Urgenda case, following a complaint filed by an environmental protection association against the Dutch government. The court found that the government had failed to

meet its obligations under both its own Constitution and the European Convention on Human Rights. It therefore ordered a tougher national plan against global warming.

Do you think that the ‘Grande-Synthe’ case will inspire other similar decisions elsewhere in the world?

D. E.: The ‘Grande-Synthe’ case is not an isolated example in France; three or four cases over a short period of time have shown that the French courts are ready to tackle climate issues head on. Judges have become courageous in the face of environmental challenges. This handful of cases will most certainly have an effect on the rest of the world – **France is poised to become the global judicial centre for climate action.**

Recently, in April 2021, the German Supreme Court ruled that the

fundamental right to life and physical integrity guarantees protection against climate change. It found that the government’s action in this area was inadequate. We are beginning to see a trend emerging, and I hope that the American courts will be as courageous as those in France and Germany. Since it is very difficult to make international commitments as binding as national ones, justice has a major role to play in combating global warming, which is a worldwide phenomenon. ●

Supporting the development of environmental laws



These are the most widely publicised pieces of legislation in recent years. Drafted based on proposals from the Citizens' Climate Convention, the climate change bill and its effects and the amendment to Article¹ of the French Constitution were particularly eagerly awaited. Which proposals would be taken up as they stood? Which ones will have to change? At the beginning of 2021, the Conseil d'État issued two advisory opinions to the government on these texts, which had not yet been published.

Anticipating the impact of measures more accurately

In many areas (education, biodiversity, economic and ecological transition), the Conseil d'État found that the provisions included in the bill concerning climate change were consistent with the Constitution. Two examples were strengthening efforts to combat imports of products derived from deforestation and the obligation imposed on airlines to offset the greenhouse gas emissions produced by domestic flights. On this last point, as on several others, **the Conseil d'État pointed out, however, that it was difficult to assess their effects in real life. At issue were the inadequacies of the impact study accompanying the bill.**

Clarifying the law to ensure its effectiveness

Some provisions, moreover, breached fundamental freedoms. The obligation for supermarkets to dedicate 20%

of their surface area to bulk sales by 2030, for example, had to be removed since it hindered freedom of enterprise. The scope of certain proposals also needed to be clarified, such as the ban on advertising for fossil fuels, which was too vague to be applicable. In other cases, **the challenge is to link more closely to the objectives already set or to check their consistency with existing laws.** The creation of new environmental offences, including the

“

How can we reduce greenhouse gas emissions by at least 40% compared with 1990 by 2030, while respecting social justice?

Question to the Citizens' Climate Convention

offence of ecocide, was thus ruled out. These provisions were inconsistent with those already provided for in the French Environment Code; comparable acts were likely to be punished by different sanctions, which posed a serious legal problem.

Climate action soon to be included in the Constitution?

At the same time, the Conseil d'État ruled on the Citizens'

Convention's proposal to include the fight against climate change in Article 1 of the French Constitution, worded as follows: *'[France] guarantees the preservation of biodiversity and the environment and fights against climate disruption'*. In order to clarify the scope of the constitutional obligation, it proposed to refine the wording, recommending, in particular, that the verb *'guarantee'* be avoided since it has serious ramifications for the legal liability of local authorities and the State. However, this opinion was not followed. The original text will be debated in Parliament in 2021. ●



FIND OUT MORE

OPINION of 14 January 2021, 'Constitutional bill supplementing Article 1 of the French Constitution on protecting the environment'

OPINION of 4 February 2021, 'Bill to combat climate change and its effects'

All actors in environmental protection



February 2020, Paris. Members of the Citizens' Climate Convention discuss ways to reduce greenhouse gas emissions. A year later, the Conseil d'État issued two opinions on the bills drawn up on the basis of the Convention's proposals.

Included in the preamble to the French Constitution, the Charter for the Environment guarantees French people's right to participate directly in the drafting of certain laws, provided they have a significant impact on the environment. **This strong democratic principle is defended by the Conseil d'État whenever a text requires it.** In 2020, it issued three advisory opinions to this effect.

French citizens consulted on the environment

It thus welcomed the organisation of a public consultation by the government prior to the adoption of a decree on energy performance assessments. This text is aimed at

protecting the environment since it encourages renovation work to reduce the energy consumption of housing.

The Clean Energy for All Europeans directives also have an undeniable environmental impact. Adopted by the European Parliament in 2018, they aim to promote clean energy across the EU. The Conseil d'État held that citizens should be consulted on their transposition into French law. It applied the same logic to a draft decree seeking to amend air traffic procedures. The instrument addresses the noise aspect of the environment, the aim being to reduce the noise pollution suffered by people living near airfields. In this context, the Conseil d'État recommended the organisation of a local public survey of people living in the areas concerned. ●



FIND OUT MORE

ORDINANCE no. 2020-866 of 15 July 2020 containing various provisions for adapting to European Union law in the field of energy and climate

DECREE no. 2020-1609 of 17 December 2020 on energy performance assessments and the display of information on the energy consumption of housing in property advertisements and leases

IN BRIEF

Simplifying the law on the energy performance of housing

How can we encourage landlords to improve the energy performance of their properties without impeding their rights? In 2020, the Conseil d'État issued two advisory opinions on proposals to reduce the obligations on landlords while ensuring that the energy performance of housing is improved. In particular, it simplified the legislation linking changes to certain rents to energy performance criteria. In its original version, even increasing an undervalued rent had to be preceded by

an energy assessment. Following the amendment, it is not necessary to repeat the assessment if a satisfactory level of performance was established less than four years ago. The Conseil d'État also approved the government's creation of a housing information booklet, which will be mandatory from 2022. This booklet will be in a form decided by the owner and will only need to be completed if any work is carried out that affects the energy performance of the property. ●



FIND OUT MORE

OPINION of 23 June 2020, 'Bill ratifying the ordinance on building regulations and the Building and Housing Code'

DECREE no. 2020-1818 of 30 December 2020 on the energy performance criterion governing changes to certain rents

Agriculture: the State reminded of its responsibilities

→
From the use of glyphosate to regulation of GMOs and suspension of spraying during the health crisis: the Conseil d'Etat issued several decisions regulating agricultural practices in 2020.



How do we ensure the transition to a more sustainable agriculture? Which products, techniques or seeds should be banned and which should be regulated? The Conseil d'État ruled on these essential topics three times in 2020.

Pesticides: clarifying responsibilities

31 December: the Conseil d'État hands down a legal decision that will set a precedent. Ruling on an application by the Prefect of Val-de-Marne, it notes that **the use of pesticides can only be regulated by the State authorities**. A few months earlier, the mayor of Arcueil had banned the use of glyphosate and other plant protection products in his town. The problem, however, was that he could not lawfully make such a decision.

Strengthening the risk assessment for GMOs

In another decision, this time dealing with mutagenic agricultural plants, the Conseil d'Etat urged the government to act. Unlike transgenesis, which introduces a gene from another species into a living organism, mutagenesis involves causing genetic mutations within an organism. Until now, agricultural plants obtained in this way have been able to bypass the 2001 regulations on genetically modified organisms (GMOs). According to the Conseil

d'État, the loophole must be closed and varieties referenced since 2001 must be retroactively assessed. In addition, the specific risks associated with plants made tolerant to herbicides through mutagenesis must be measured more accurately. **A year after handing down its decision, in April 2021, the Conseil d'État opened a litigation procedure to verify that the government had fully implemented its decision** and to decide whether it should be forced to do so.

Spraying and air pollution: increasing vigilance

The precautionary principle does not prevail in all cases. In April 2020, in the midst of the lockdown, the Respire association asked the Conseil d'État to restrict agricultural spraying as a matter of urgency. Although this measure is provided for in law, it is only supposed to apply if there is a peak in pollution. According to the association, the health situation demanded an exception since spraying would aggravate the spread of COVID-19 and its consequences for people suffering from respiratory problems. Based on the studies presented, **the administrative judge found that such a measure was not justified in the immediate future given that the level of pollution was low during the lockdown**. On the other hand, it reminded the government of its obligations during these uncertain times for health, stating that it should be more vigilant to avoid peaks in pollution. ●

FIND OUT MORE

DECISION no. 439253, 'Legality of anti-pesticide by-laws issued by mayors'

DECISION no. 388649, 'Organisms obtained by mutagenesis'

DECISION no. 440005, 'Restriction of agricultural spraying'

Rules on hunting birds

With biodiversity now more threatened than ever, how can we protect endangered bird species and regulate those whose numbers are too high? Are all forms of hunting acceptable? In 2020, the Conseil d'État responded on a case-by-case basis.

Not all forms of hunting are equal

Ruling on an application by the Ligue pour la protection des oiseaux and the association One Voice, it suspended permission for the hunting of turtle doves for the 2020-2021 season, in two decisions handed down in September. Populations of this species have declined by nearly 80% in 15 years – protecting it is a matter of urgency. Skylarks, lapwings, golden plovers, thrushes and blackbirds are not in the same situation. The Conseil d'État decided that given their very large populations, they could be hunted for purposes of regulation. Hunting of these species must remain reasonable, however with quotas, so-called 'selective' methods and numerous precautions imposed on hunters.

Mindful of hunting methods, **the Conseil d'État refused to lift the temporary ban on hunting with bird lime**, in another decision handed down a few weeks later. It had already turned to the Court of Justice of the European Union (CJEU) in response to an application by hunters' federations to verify the compatibility of this traditional, unselective and controversial process with a European directive on the conservation of wild birds. In March 2021, the CJEU ruled that hunting with bird lime was not



compatible with the directive. The Conseil d'État will rule on this issue once again – this time on the merits of the case – before the summer of 2021. ●



FIND OUT MORE

DECISIONS n^{os} 443482, 443567, 'Turtle dove hunting'

DECISIONS n^{os} 443851, 443778, 443779, 443781, 443782, 443784, 443788, 'Bird hunting'



September 2020, Prades. Hunters gather at the instigation of the Fédération nationale des chasseurs de France. The reason? The ban on hunting birds with bird lime, confirmed by the Conseil d'État in its decision of 22 September 2020.

IN BRIEF

Our countryside: heritage to be protected?

These neighbourhood disputes have often been publicised in the media. Former city dwellers who have moved to the countryside complain about the crowing of a rooster, the smell of manure or the sound of the neighbouring church bells. But what if these features of rural life were not irritations but heritage that should be protected? This is the thrust of the bill to define and protect the sensory heritage of the French countryside, which was examined by the Conseil d'État in early 2020. In its advisory opinion,

the Conseil d'État hailed the potential of an approach that affects '*French identity and community*'. However, it found that the text would be difficult to apply as it stood. Some of the provisions were still too vague and could be usefully informed by a quantitative study. The definition of 'sensory heritage', which encompasses a diverse range of realities, is itself difficult to interpret. The legislature should therefore make further efforts to preserve a certain kind of cultural heritage and protect biodiversity. ●



FIND OUT MORE

OPINION of 16 January 2020, 'Bill to define and protect the sensory heritage of the French countryside'

Looking after education, culture and leisure

From school to university, football stadiums to theatres and history books to the search for the future... education, culture and leisure help to unite us. The Conseil d'État ensures that these activities – which are so essential to our life as a community – operate within the appropriate framework.

Home schooling: setting a framework, not prohibiting

Education is compulsory in France between the ages of three and 16. However, there is no obligation for it to be provided at school rather than at home. How can we ensure that the values and knowledge that make us citizens are passed on to children who do not attend school? In December 2020, the Conseil d'État examined the bill to strengthen respect for the principles of the Republic. At the heart of the debate was the French government's proposal to make schooling compulsory, with some exceptions.

and, in some cases, abusive practices, in particular where home schooling provided a cover for clandestine schools. **The Conseil d'État found, however, that these practices were still too rare to justify restricting a freedom parents had long been free to exercise.** In its advisory opinion, it therefore proposed a framework to ensure that there were specific and justified reasons for home schooling. How? By including in the law a detailed list of reasons authorising home schooling, namely, the child's state of health or disability, intensive sporting or artistic activities, being too far away from a school or if the family lived as itinerants in France, but also situations justified by the child's interest in the context of an educational plan submitted by the parents. A framework that is both open – to guarantee freedom of education – and strict, to avoid possible abusive practices. ●

FIND OUT MORE

OPINION of 9 December 2020, 'Bill to strengthen respect for the principles of the Republic'

Towards a system of exceptions

For the government, the reform was justified by the gaps in children's education found during checks on families



↑ **November 2020, Toulouse.** Citizens demonstrate against the bill to strengthen respect for the principles of the Republic, which aims to ban home schooling in France. In its advisory opinion of December 2020, the Conseil d'État proposed solutions to preserve the fundamental freedom of education and avoid certain abusive practices.

IN BRIEF

Ensuring the future of research

What should the future of French research look like? In 2020, the Conseil d'État examined the planning bill for the period 2021 to 2030. The text aims to improve the funding of research, make working in the field more attractive and strengthen the links between the academic world and society, including with companies. Among other things, it provides for a dedicated budget of 25 billion euros for public research, the upgrading of scientific careers and the creation of new contracts. The Junior Professorship, for example, will be dedicated to supporting young scientists at the beginning of their careers. In its advisory opinion, however, the Conseil d'État expressed several fundamental questions shared by many researchers. For example, is 2030, which is a long way away, a realistic timeframe for budgetary measures? It was also sorry to see that some recruitment procedures had not been simplified. The law was enacted in late 2020. ●



FIND OUT MORE

OPINION of 23 July 2020, 'Bill on multi-year research planning for the years 2021 to 2030'

IN BRIEF

Tuition fees in line with students' means

Should public higher education be free of charge? Having considered an application by student associations and unions, the Conseil d'État referred the question to the Conseil constitutionnel. In its decision of 11 October 2019, the latter reiterated that the French Constitution does provide for free tuition, noting, however, that 'modest' fees may be charged, provided they take students' financial means into account. The Conseil d'État had to consider the practical consequences of this case in order to assess the legality of a new government decree setting enrolment fees in higher education. Illustrating its essential

role in translating our rights and freedoms into reality, it provided a guide for evaluating students' resources that takes the support and exemption schemes to which they are entitled into account. The amounts set by the order are, to this extent, still modest. The Conseil d'État also saw no problem with the fact that, as a matter of principle, these fees are higher for foreign students from non-European countries who come to study in France. However, those who are permanently settled in the country should not be subject to higher fees, regardless of their nationality. ●



FIND OUT MORE

DECISIONS n°s 430121, 430266, 431133, 431510, 431688, 'Order setting higher education fees'

Lockdown: defining the essentials



→
March 2021, Paris. In its decision of 23 December 2020, the Conseil d'État described the closure of cinemas, theatres and entertainment venues as a 'serious breach of fundamental freedoms'. Only a critical deterioration in the health situation could justify such a measure.

How do we define an essential shop, place or item? The issue has continued to be debated as the French government has imposed or eased lockdown measures. The Conseil d'État made its position on the matter clear when the second lockdown came into effect on 29 October, seeking to establish an appropriate balance between protecting freedoms and managing the health risk from a pragmatic perspective.

Too much risk in bars and restaurants

When the Union des métiers et des industries de l'hôtellerie asked for the closure of bars and restaurants to be suspended, the administrative judge refused. **It was found that the health situation justified exceptional restrictions on freedom of trade and industry.** In fact,

hospitals were under increasing stress and gatherings in enclosed spaces remained one of the main causes of transmission of the virus. The Conseil d'État relied, in particular, on a study published in the international scientific journal *Nature*, which highlighted the particular risk posed by bars, restaurants, hotels and sports halls. In light of this data, a simple curfew or local measures would not be sufficient to reduce the health risk. Protecting the health of citizens remained the priority.

Special status for bookshops as places of culture

At the same time, other appeals led the Conseil d'État to reflect on the closure of arts venues and bookshops. In the case of the latter, it noted that the free flow of ideas and opinions had not been hampered excessively, thanks to systems for collecting or delivering orders. Their closure was justified by the need to reduce social interaction – especially since these businesses benefit from targeted

financial support measures.

Nonetheless, it recognised the 'essential' nature of books and held that special attention should be paid to bookshops in the context of lockdown. The French government was to move in this direction by allowing them to open during the third lockdown in 2021.

“
The essential nature of books must be taken into consideration by the government.”

Decision of 13 November 2020

For cinemas, theatres and performance venues, the picture was bleaker. The Conseil d'État found that their closure constituted a serious breach of freedoms, including freedom of expression and freedom of artistic creation. Moreover, most operators had already implemented strict protocols to limit the spread of the virus in their venues. In itself, the circulation of the virus was not sufficient to justify their closure. Only the very serious deterioration of the health situation observed at the time of the second lockdown required it, and the measure should be lifted if the situation improved. ●

FIND OUT MORE

DECISIONS n^{os} 445883, 445886, 445899, 'Closure of bookshops'

DECISION no. 446715, 'Closure of bars and restaurants'

DECISIONS n^{os} 447698, 447783, 447784, 447785, 447786, 447787, 447791, 447799, 447839, 'Cinemas, theatres and performance venues'

Returning African cultural heritage

Ouagadougou, 2017: a few months after taking office, Emmanuel Macron pledged 'temporary or permanent restitutions of African heritage' kept in our museums. This was a historic moment for relations between France and the countries of the former colonial empire. But transferring a work from the State's collections is no simple matter. There is no national or international law governing the process, which can only be authorised by a dedicated law. This has already happened twice, with the return of the remains of Saartjie Baartman to South Africa in 2002 and the return of Maori heads to New Zealand in 2010.

Keeping France's commitments to Benin and Senegal

In 2020, the Conseil d'État considered a new bill. This time, property would be returned to the Republic of Benin and the Republic of Senegal. To Benin: 26 pieces taken by a French general in 1892 following battles against the king of Danhomè Behanzin, kept at the Quai Branly-Jacques Chirac Museum. To Senegal: a sword said to belong to El Hadj Omar Tall, a religious and military leader born in present-day Senegal, donated to the Army Museum by a French General in 1909.

In its advisory opinion, the Conseil d'État confirmed that returning both items would enable France to fulfil

the commitments made in the context of its cultural cooperation policy with African states. **The pursuit of this objective and the historical origin of the items justified their transfer free of charge** – especially since Benin and Senegal had the means to ensure their proper conservation in the future. The bill was approved. ●

FIND OUT MORE

OPINION of 3 March 2020, 'Bill on the restitution of cultural property to the Republic of Benin and the Republic of Senegal'



IN BRIEF

Enabling historical research in the public interest

How can we build the future without knowing and understanding history? It was in this spirit that the Conseil d'État authorised a researcher to consult the presidential archives on Rwanda, which the Ministry of Culture had forbidden him from doing until 2055. These documents concern the role played by France during the 1994 genocide. They had been deposited in the National Archives by the President of the Republic, François Mitterrand. Normally, a protocol prohibits access to such records for 60 years

– hence the ministry's refusal. But for the Conseil d'État, the researcher's request was legitimate. Access to these documents would enable him to shed light on the debate on a historical issue that concerns us all. Moreover, even if the documents in question contained information that would be sensitive for the State, consulting them had already been authorised for research purposes. In fact, some documents had already been made public. The 60-year time limit must therefore be lifted. ●

FIND OUT MORE

DECISIONS n^{os} 422327, 431026, 'Archives of President Mitterrand on Rwanda'

Football: Managing an early end to the season



January 2020, Toulouse.

The French Cup match between Toulouse Football Club and Chamois Niortais was played in front of empty stands. During the year, the Conseil d'État ruled on the continuation of football activities in the face of health risks on four occasions.

Spring 2020: the COVID-19 epidemic brings sporting competitions to a premature halt. Some football teams see their fate sealed earlier than expected; for some, their relegation was decided before they could play all their games. How could the season be brought to a peaceful end in such circumstances? The Conseil d'État checked to ensure that the measures taken by the authorities in the sector were lawful, in response to an application by amateur and professional clubs.

Professional football: relegations suspended

The Professional Football League ended the 2020–2021 season on 30 April. Three clubs challenged the decision in the Conseil d'Etat: Olympique Lyonnais, Toulouse Football Club and Amiens Sporting Club. **The administrative judge referred them to the decision taken by the Prime Minister and the Minister of Health to end the 2019–2020 season of team sports competitions due to the health situation.** Regarding the ranking established based on a ratio – namely, the number of points won by each team, divided by the number of games played – it was held that the League had acted entirely lawfully, insofar as the methods used were fair and appropriate to the context.

However, the Conseil d'Etat asked for Amiens and Toulouse not to be relegated to League 2. The League was due to negotiate the agreement that would set the number of clubs allowed in League 1 for the following season. The judge therefore advised that the time be used to review the format of the top division, including the number of clubs allowed to compete in it.

Amateur football at a standstill

The French Football Federation, for its part, blew the whistle on the end of the amateur leagues in the first few weeks of the lockdown. In light of the exceptional circumstances, it also defined the classification rules to be applied to relegations and promotions. A number of clubs were unhappy with the decisions and challenged them unsuccessfully in the Conseil d'État.



Amateur football in France is*

15,000 clubs
2.1 million licensees
3,000 matches every weekend

To start with, the administrative judge first held that the health situation justified the implementation of these exceptional measures. It was also confirmed that it was the

Federation's responsibility to adopt the rules for such competitions. It was therefore up to the Federation to decide on the steps to be taken in the event of an unforeseen situation. Finally, the Conseil d'Etat noted that the Federation had shown goodwill by giving clubs as much visibility as possible on the management of the off-season and organisation of the following season. ●

FIND OUT MORE

DECISIONS n^{os} 440809, 440813, 440824, 'Football League 1'

DECISIONS n^{os} 440439, 440966, 'Amateur football championships'

* Source: FFF

Supporting French audiovisual creation



Television channels in France are obliged to contribute to the production of European works, particularly works in French, as well as to finance the French film industry. The aim is to contribute to the vitality of this key sector and promote the French cultural exception.

Video platforms that encourage French creation

However, for some years now, this system has been undermined by the decline of the historical audiovisual players. In response, video-on-demand platforms such as Netflix or Amazon have disrupted our usual patterns of behaviour. [How can we ensure that these foreign](#)

[companies, which generate part of their turnover in France, also contribute to the survival of our audiovisual sector?](#)

This is the purpose of the European directive on audiovisual media services, the ordinance transposing which was submitted to the Conseil d'État for an opinion in December 2020. This text is a minor revolution – from now on, 20 to 25% of the turnover generated in France by a foreign platform or television channel will have to be devoted to film and audiovisual production, including for French-language heritage works and independent production. It is a way of adapting our contribution system to the new market realities. The Conseil d'État has approved the transposition text in its entirety – with the exception of a tax detail. ●

 **FIND OUT MORE**

ORDINANCE no. 2020-1642 of 21 December 2020 transposing the EU Audiovisual Media Services Directive

IN BRIEF

End of the sporting season: no exceptions for relegations

Following the premature termination of sporting competitions, some football clubs challenged their relegation in the Conseil d'État. Among them were Amiens, which was relegated to League 2, and Orleans and Le Mans, which were relegated to National 1. In the case of Amiens, it was the Professional Football League that had the final say. As ordered by the Conseil d'État previously, it reviewed the club's relegation when defining the number of teams allowed to join League 1 for the 2020-2021 season. The verdict: the limit remained set at 20 clubs

and Amiens would play in League 2. For the Conseil d'État, the legality of the decision was indisputable. In the case of Orleans and Le Mans, the French Football Federation held the key. It too refused to make an exception to the usual rules and expand the number of clubs allowed to compete in League 2. Its argument was that it would not be in line with '*sporting merit*'. As this measure applied equally to all football competitions, the Conseil d'État found it to be fair. Le Mans and Orléans were duly relegated to National 1. ●

 **FIND OUT MORE**

DECISIONS n^{os} 441443, 441450, 'Relegation of Orléans and Le Mans to football National 1'

DECISIONS n^{os} 441559, 441585, 'Relegation of Amiens to football League 2'

Reconciling the neutrality of the State and **freedom of worship**

From the menus served in the canteens of our municipalities to the health protocol implemented in places of worship, the Conseil d'État ensures, on a daily basis, that the two founding principles of secularism – freedom of worship and the neutrality of the State – are respected in all circumstances.

Places of worship: pragmatism in the face of health risks

What is freedom of worship without the right to participate in religious ceremonies? In the midst of the COVID-19 pandemic, access to places of worship varied in line with the health situation. In several decisions, the Conseil d'État tempered the government's restrictions, proposing solutions that reflected the realities on the ground.

Gatherings of more than 30 people during COVID-19

May 2020: the health situation improves and France emerges from lockdown, but gatherings in places of worship are still forbidden. The Conseil d'État, ruling on an urgent application for release by the Catholic Church and several associations, ordered the Prime Minister to review the

rule concerned. In its view, there was no justification for such a restrictive measure. **While the health situation called for oversight of such gatherings, prohibiting them was a serious breach of freedom of worship.** This was all the more true given that certain essential places were at that time permitted to welcome the public in limited numbers, provided they were able to comply with the health protocol set out in the plan to end the lockdown. In another decision a few months later, the Conseil d'État reversed the government's initiative to set the maximum number of people who could gather in places of worship at 30, regardless of size. While religious ceremonies presented specific risks of infection, imposing the same ceiling on village churches and cathedrals was not justified. Common sense prevailed. The Conseil d'État gave the government three days to adapt the permitted capacity to the surface area of each place of worship. ●



FIND OUT MORE

DECISIONS

n^{os} 440366, 440380, 440410, 440531, 440550, 440562, 440563, 440590, 'Gatherings in places of worship'

DECISIONS n^{os} 446930,

446941, 446968, 446975, '30-person limit in places of worship'



IN BRIEF

Reinforcing the principles of the Republic

The Act of 9 December 1905 on the separation of church and State is a founding text of the French Republic. However, faced with the emergence of fundamentalist religious movements that advocate breaking away from the values of the Republic, the government felt that it provided the administration with few levers. In its opinion on the bill to strengthen respect for the principles of the Republic, the Conseil d'État considered that the checks imposed on non-profit associations formed under the 1901 Act did not infringe on freedom of worship or association. The new regime also provided new benefits, such as the possibility of accessing buildings used for public worship free of charge. However, the bill proposed that the special status of religious associations be recognised by the prefecture to prevent those that were not really religious in nature from securing the benefits associated with that status. For the Conseil d'État, this measure was contrary to freedom of association. It proposed replacing it with a declaration to the prefecture, which could object to it within two months. This would allow the administration to achieve its objective but with a less restrictive procedure. ●



FIND OUT MORE

OPINION of 9 December 2020, 'Bill to strengthen respect for the principles of the Republic'



February 2020, Colmar. Worshippers attend church in Saint-Martin, according to health protocols, while the COVID-19 epidemic is in full swing in the Grand Est region. A few months later, the Conseil d'État ordered the government to show greater consistency in its measures restricting access to places of worship.

IN BRIEF

Alternative menus in the canteen: neither compulsory nor forbidden

Secularism is not an abstract principle; it is a reality in the public arena, even in our school canteens. In 2020, the Conseil d'État examined how it applies in practice in response to an application by the municipality of Chalon-sur-Saône on the menus served to children. The municipality had been challenged by individuals and the Ligue de défense judiciaire des musulmans for deciding to serve only one menu in its canteens. Was this decision contrary to the

principle of secularism? In its December court ruling, the Conseil d'État held that local authorities were not obliged to provide alternative meals for pupils who could not eat certain foods for religious reasons. However, the principles of the neutrality of public services or their equal treatment of users did not prohibit this. In short, it was up to local authorities to choose the best solution in the public interest, within their resources. ●



FIND OUT MORE

DECISION no. 426483, 'Alternative menus in school canteens'

Better management of public policies

In 2020, the Conseil d'État adjusted its scrutiny of the administration to reflect the changes that have taken place in how it operates and offered advice on ever-more effective action, both in times of crisis and over the long term.



↑ The Conseil d'État's lecture series on the evaluation of public policies led to the publication, in the summer of 2020, of the annual study *Conducting and sharing the evaluation of public policies*.

For more effective public action

If citizens are not aware of the real effectiveness of the many reforms undertaken over the years, they become increasingly distrustful of public action. In 2020, the Conseil d'État devoted its annual study to the evaluation of public policies and examined a bill on trialling them. The aim: to promote transparent and proven effective public action.

Putting the evaluation of public policies back at the heart of the debate

Evaluations are important allies for improving public policies at all levels; they help ensure that discussions and choices are always based on facts and analyses, and feed the democratic debate.

The Conseil d'État devoted its annual study to this subject in 2020. **Analysing the evaluations carried out since 2007, it stressed the importance of improving their reliability, but above all, of sharing their results with citizens and really using them to guide public action.**

The Conseil d'État concluded its study with 20 concrete proposals addressed to the public authorities, all of which were calls to action: promoting a multidisciplinary

approach, encouraging exchanges between the academic world and the administrative sphere, and giving priority to the evaluation of public policies designed to have an impact on a large part of the population.

Developing public policy trials

Many public policies are now trialled before being rolled out more widely, an approach that has been allowed

under the French Constitution since 2003. In July 2020, the Conseil d'État examined a draft framework to encourage its application. **Based on the study by the Conseil d'État, *Experimentation: How to innovate in the conduct of public policy?, the bill simplifies the procedure*** from an administrative point of view and reverses the binary nature of its outcome, since

a trial could previously only result in either a rollout or simply abandoning it.

The Conseil d'État welcomes the inclusion of measures proposed in its study, particularly concerning the addition of new options at the end of a trial. It also proposed several changes to the text to further streamline the trial process and highlight the diversity of possible outcomes. ●

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Society has the right to require every public official to provide an account of their administration.

Article 15 of the 1789 Declaration of the Rights of Man and of the Citizen



FIND OUT MORE

ANNUAL STUDY 2020, *Making the evaluation of public policies a genuine tool for democratic debate and decision-making*

OPINION of 16 July 2020, 'Draft Framework Act on the simplification of trials'

ANNUAL STUDY 2019, *Experimentation: How to innovate in the conduct of public policy?*

IN BRIEF

Simplifying administrative procedures

That is the ambition of the bill to accelerate and simplify public action submitted to the Conseil d'État in early 2020, which dissolves committees that are no longer needed, abolishes regulations that go beyond the requirements of European directives and confers ministerial powers on decentralised authorities to bring public action closer to citizens. Above all, the bill simplifies many administrative procedures, such as the issue of identity documents,

which are partly dematerialised. In its opinion, the Conseil d'État welcomed the simplification approach, although it found that the trial period allowed was too short. It also noted that some proposals cancelled out recent measures and urged the government to check that the new law was consistent with other legislation already in force to avoid simplification becoming a new kind of complexity. ●



FIND OUT MORE

OPINION of 30 January 2020, 'Bill to accelerate and simplify public action'

The ability to **challenge** all actions taken by **the administration**



With the government making increasing use of ordinances and public action no longer relying solely on restrictive norms to guide our behaviour, the conditions for challenging and monitoring the actions of the administration have to change. The Conseil d'État ensured that these developments in public action did not result in a retreat from the rule of law in several decisions in 2020.

and freedoms guaranteed by the Constitution, which will have to be judged by the Conseil constitutionnel, the **Conseil d'État will continue to review its legality** on all other points: compliance with other rules and principles of constitutional value, with France's international commitments, with French law or with the limits set by Parliament in the enabling act.

'Soft law': broadening the possibilities for appeal

The administration's action now also involves texts other than laws, decrees and orders. In its decision of 12 June 2020, the Conseil d'État is clear: **if an administrative document (circular, instruction, recommendation, note, interpretation of the law, etc.) has a real impact on the rights and situations of citizens, it must be possible to challenge it before an administrative judge, regardless of its form.** These documents fall under what is known as 'soft law' (see *opposite*).

Maintaining monitoring of ordinances

In the summer of 2020, the Conseil constitutionnel took an unprecedented decision: government ordinances not ratified by Parliament could be reviewed through a priority preliminary ruling on constitutionality. Did this mean that these ordinances, which had not been approved by Deputies and Senators, could no longer be challenged in the Conseil d'État like other actions by the executive? When it was asked to rule on an appeal against an ordinance concerning the reduction in working time during lockdown, the Conseil d'État noted the Conseil constitutionnel's decision and adopted a new oversight policy. **Its objective was to ensure that this reversal of case law would not deprive citizens of the ability to challenge the actions of the executive and undermine the rule of law.**

As long as an ordinance has not been ratified by Parliament, it can therefore still be challenged in the Conseil d'État. Apart from the ordinance's compliance with the rights



125
ordinances
were issued in 2020,
compared with 58
in 2019

FIND OUT MORE

DECISION no. 440258, 'Monitoring of ordinances before their ratification by Parliament'

DECISION no. 418142, 'Soft law: the right to challenge an internal administrative document when it is likely to have an effect on citizens'

* Source: General secretariat of the French government



INTERVIEW

‘The monitoring of **soft law**, a real **advance for citizens**’

With **CHRISTOPHE CHANTEPY**, President of the Litigation Section of the Conseil d'État

By recognising the right of citizens to challenge administrative documents that have a significant effect on their situation or their rights, the Conseil d'État is adapting to changing nature of public action and broadening its monitoring of ‘soft law’.

| What is ‘soft law’?

Christophe Chantepy:

The law is made up of rules laid down in laws, decrees and orders. Soft law is what surrounds it: circulars, instructions, notes issued by a minister or an administration – **all the documents in which the public authorities explain or interpret the law or give details of its application.** The advent of the Internet has increased the amount of soft law. From news updates to online FAQs, the ways in which the administration interacts with citizens are becoming less and less formalised.

| How has administrative justice adapted?

C.C.: From the 1950s onwards, the administrative justice system has intensified its monitoring of soft law, gradually including circulars and instructions. The arrival of the Internet made it necessary to widen the focus even further. Since the

‘Gisti’ decision (*see opposite*), handed down in 2020, this has been the case.

From now on, a citizen can ask the administrative judge to review any administrative document of general scope whenever it is likely to have a significant effect on their rights or status. This is a real step forward for citizens, who are – now more than ever – likely to get their information from the question-and-answer pages or news updates accessible at the click of a button on government websites, rather than by delving into complex legal texts.

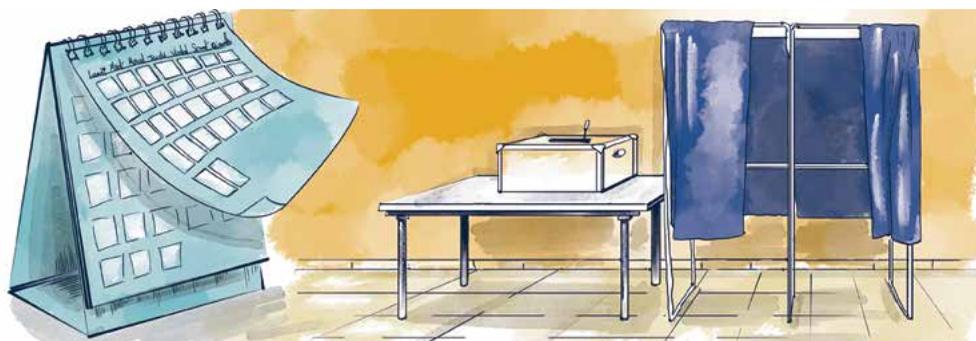
| Are there limits to this monitoring of soft law by judges?

C.C.: The case law does not set any limits on the form or medium used to communicate soft law. Even a tweet published by an administration can fall under it! In practice, however, this format is rarely suitable for explaining a complex rule of law.

| What challenges do these developments pose for the administrative judge?

C.C.: First of all, we will have to apply the new case law to define the notion of ‘significant effect’ and what it covers more clearly as we are asked to rule on actual cases. In the longer term, it is difficult to envisage the ways in which the administration might act, especially depending on changes in communications technologies. One thing is certain: the administrative judge and the Conseil d'État will always ensure that they adapt to these developments, as they have done for over 70 years. ●

Ensuring the smooth running of elections



The health crisis disrupted the organisation of elections and forced the State to postpone certain elections. How can we protect democracy and ensure compliance with electoral law in these circumstances?

Judging challenges to municipal elections

On Sunday, 15 March 2020, the first round of municipal elections is held across the country as the health situation deteriorates. But one in two citizens does not go to the polls. Many people feel that the results are not accurate and take the matter to the administrative courts. In ruling on the case of a municipality in the Orne region, the Conseil d'Etat sets the framework; a high level of abstention is not sufficient, in itself, to challenge the results of the election. However, the administrative judge will check on a case-by-case basis whether circumstances in the municipality have affected the accuracy of the ballot and whether candidates have been treated equally.

Adapting the electoral calendar to the health situation

In May 2020, the Conseil d'État examined a bill detailing how the second round of municipal elections would be postponed to June 2020 and, at the latest, to January 2021. While this exceptional and unprecedented postponement seemed justified, it asked the government to plan for the

fact that the health situation might not have improved by the start of the new year. Provision should therefore be made for the possibility of a new two-round election in municipalities where the councils still had vacant seats after the first round. **The aim was to prevent too much time elapsing between the two rounds, which would seriously distort the electoral debate.**

More broadly, the Conseil d'État held that the protection of public health justified exceptional measures, such as the postponement of consular, senate and parliamentary by-elections.

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The exemption provided for by the draft texts was linked to the constitutional objective of protecting public health and justified by the worsening health situation.

Opinion of 16 November 2020

Improving the rules of the presidential election

A draft framework act amending electoral law for the 2022 presidential election was also submitted to it. Among other things, this provided for the introduction of a postal voting system for prisoners. The Conseil d'État found that this was suitable for a national election since it did not justify being attached to a local polling station.

The bill also shortened the time frame for candidates' teams to raise money to finance their campaigns from twelve to nine months. The idea was to prevent these accounts from clashing with those of the departmental and regional elections, which had been postponed until June 2021. **However, the Conseil d'État recommended maintaining the 12-month period in its advisory opinion:** few candidates would run in both elections, and the risk of overlapping and confusion of expenditure was low. ●

FIND OUT MORE

- DECISION** no. 440055, 'Municipal elections in Saint-Sulpice-sur-Risle (Orne)'
- OPINION** of 26 May 2020, 'Two bills containing various provisions on municipal, consular, senate and parliamentary by-elections'
- OPINION** of 16 November 2020, 'Two bills on the deadlines for holding parliamentary, senate, municipal and trade union committee by-elections'
- OPINION** of 17 December 2020, 'Draft Framework Act adapting various provisions of electoral law in view of the next presidential election'
- OPINION** of 17 December 2020, 'Bill postponing the renewal of departmental and regional councils and the assemblies of Corsica, Guyana and Martinique scheduled for 2021'



↑ **June 2020, Nice.** Despite the controversy over the continuation of the second round of municipal elections following the coronavirus epidemic, polling stations in Nice recorded a high turnout. The previous month, the Conseil d'État had examined the bill organising this unprecedented postponement.

IN BRIEF

Monitoring the attribution of **political groupings** to municipal lists

In view of the 2020 municipal elections, the 'Castaner circular' set out the rules for attributing political groupings to candidate lists to position them on the electoral chessboard as 'various left' or 'various right'. The aim was to provide citizens and the public authorities with more accurate election results. The Conseil d'État suspended certain provisions of the circular in response to several applications. First, the attribution of political groupings was limited to municipalities with more than 9,000 inhabitants. This rule did not meet the objective of informing citizens since it excluded the votes cast by almost half of the electorate.

It also suspended the possibility of attributing the 'various centre' grouping to lists *supported* by LREM, MODEM, UDI or claiming to be part of the presidential majority. Why? The inequality of treatment between this grouping and 'various left' or 'various right' groupings, which are attributed only if the list is *nominated (and not merely supported)* by a left or right party. Finally, the 'Debout la France list' grouping could not be attributed to the 'extreme right' bloc solely on the basis that the party's president supported Marine Le Pen in 2017. The party's manifesto had to be taken into account. ●

FIND OUT MORE

DECISIONS n^{os} 437675, 437795, 437805, 437824, 437910, 437933. 'Partial suspension of the circular concerning the attribution of political groupings to candidates in municipal elections'

Guaranteeing the **rights** of foreigners

Whether they come to France to work, study, join their family or, in some cases, flee a dangerous situation in their country of origin, foreigners can appeal to the Conseil d'État in the same way as French citizens if they feel that their rights have been violated.

Maintaining the **rights** of foreigners during a health crisis

From residence permits to the right of asylum and family reunification, in the midst of the crisis, the Conseil d'État ensures that the most important procedures are maintained to cover the variety of emergency situations in which foreigners may find themselves.

Continuing to process asylum applications

As soon as the first lockdown began in March 2020, the French Ministry of the Interior and the French Office of Immigration and Integration (OFII) interrupted the procedures for registering asylum applications in Île-de-France.

The Conseil d'État ordered their reinstatement at the end of April in response to applications by associations and individuals. Although, during a previous appeal examined a few weeks earlier, the administration had committed itself in the Conseil d'État to registering the

applications of those who were most vulnerable and recording the rest, the judge found that it had not kept its word. **A serious breach of the right to asylum had therefore taken place.** In the judge's view, it was quite possible to reopen offices using a minimum number of staff and inviting applicants to comply with health protection measures.

Residence permits: speeding up deadlines in urgent cases

As the pandemic disrupts administrative timescales, what can foreigners do to get their case reviewed in time? **The Conseil d'État ruled that foreigners could refer their case to the urgent applications judge if the appointment offered by the prefecture to register their application for a residence permit was not scheduled within a reasonable time.**

Depending on the situation, the administrative judge could order the prefect to bring forward the date of the appointment and even impose a maximum time limit.



FIND OUT MORE

DECISIONS n^{os} 440250, 440253, 'Registration of asylum applications in Île-de-France'

DECISION no. 436288, 'Notice to attend the prefecture to apply for a residence permit'

DECISION no.447878, 'Issue of family reunification visas'

Resuming family reunification procedures

In order to limit the movement of people from abroad in the context of the epidemic, the Prime Minister also interrupted the issuance of family reunification visas to the spouses and children of non-European foreigners residing in France.

The Conseil d'État suspended this decision on the basis that the right to a normal family life and the best interests of the children were seriously threatened.

In its view, the health risk was manageable since only about 60 people were granted family reunification each day, and screening and isolation measures could be imposed on them. ●

INSIGHT

Simplifying litigation involving foreigners, in the interests of everyone.

Over the course of 20 years of reforms, the law on foreigners has become excessively complex, with a multiplicity of special rules, procedures and deadlines. At the request of the Prime Minister, the Conseil d'État has drawn up 20 proposals to simplify the system, from administrative offices to the courts. The objective is twofold: guaranteeing the right of foreigners to challenge administrative decisions, and ensuring better processing of their appeals.



FIND OUT MORE

STUDY *Twenty proposals to simplify litigation involving foreigners, in the interests of everyone*



March 2021, Paris. Several organisations gathered at the Place de la République for 'Solidarity Night' to highlight the lack of emergency accommodation for foreigners. The Conseil d'État issued several rulings aimed at preserving the rights of foreigners during the health crisis in 2020.

IN BRIEF

Rules for **assessing** whether foreigners are **minors**

Before being taken into care by the child welfare system, unaccompanied foreigners who declare themselves to be minors are assessed by the departments to confirm that they are under age. A decree issued in 2020 aimed to make the process more efficient. The first new feature was that the departments will be able to ask prefectures to check whether the individual is in a Ministry of the Interior database and to find out more about their identity and history of migration. Secondly, a national file will list those foreigners whose minority is being assessed to identify

those who submit applications in several departments. Ruling on applications submitted by 19 associations, trade unions and foundations, the Conseil d'État found that the decree had to be clarified to avoid any abuse when it was applied. Among the safeguards it asked to be added was that the foreigner had to be given temporary emergency accommodation while waiting to be assessed. The assessment had to be completed, even if the person appeared as an adult in another database. Finally, no removal order could be issued until the process had been completed. ●



FIND OUT MORE

DECISIONS n^{os} 428478, 428826, 'Unaccompanied foreign minors'

Defending our social rights

From access to education for children with disabilities to the pension system, unemployment insurance and more, the Conseil d'État is committed to ensuring that our social system remains fair and true to our shared values as reforms are implemented and society changes.



↑ **April 2021, Nantes.** Procession of demonstrators against instability and the reform of unemployment insurance. In November of the previous year, the Conseil d'État had suspended part of this reform on the grounds that some of the measures it contained did not ensure equal treatment.

Defining the rules on unemployment insurance

In normal times as well as during a health crisis, unemployment insurance is an essential protection for citizens. In 2020, the Conseil d'État handed down two key decisions to ensure a fair unemployment insurance framework in all circumstances.

Ensuring a fair unemployment insurance system

In particular, it overturned two measures of the government's unemployment insurance reform. The first concerned the new methods of calculating unemployment benefits. Under the reform, the amount of benefits was to be calculated on the basis of total salary divided by all the days in the year, instead of just the days worked. **The new rule was considered unfair by the Conseil d'État** because it penalised some workers compared with others, in particular precarious workers who alternated between short contracts and periods of inactivity. The basis for calculating the allowance could vary by as much as four times for the same number of hours worked.

The other measure that was quashed was the introduction of a bonus-penalty scheme on the unemployment

insurance contribution paid by companies in seven sectors that frequently use short contracts. In this instance, the problem was one of form: in order to be legal, such a provision had to determine its own scope and not refer it to an order.

Oversight of short-time working

At the same time, in the context of the COVID-19 epidemic, a law and its implementing decree laid down the vulnerability criteria entitling an employee to short-time working. Eleven scenarios were initially selected, including people at risk of developing a severe form of infection.

But in August, a new decree reduced the number of criteria to four. Among other things, diabetics and obese people under 65 years of age were no longer eligible.

The Ligue nationale contre l'obésité and individual applicants appealed to the Conseil d'État, which suspended the restrictions. It held that the new vulnerability criteria were not relevant to the issues at stake and were not consistent. Some of the diseases excluded by the decree presented an equivalent or greater risk than others that were retained and therefore permitted for short-time working. The original 11 criteria were reinstated. ●



8.4 million
employees were on short-time working in April 2020, at the peak of the first lockdown.*



FIND OUT MORE

DECISION no. 434920, 'Partial suspension of the unemployment insurance reform'

DECISION no. 444425, 'COVID-19 vulnerability criteria for short-time working'

* Source: Ministry of Labour

IN BRIEF

What pension system for the future?

As part of the government's reform of the pension system, the Conseil d'État examined both a draft framework act and an ordinary law bill. In its advisory opinion, it found that the drafts were generally in line with the law but had a number of reservations. It expressed concern, for example, over the brevity (three weeks) of the period of consideration granted to it, which meant it was unable to guarantee the legal certainty of such an important reform to the extent it would have liked. It also held that the impact study accompanying the texts was incomplete. Certain key points

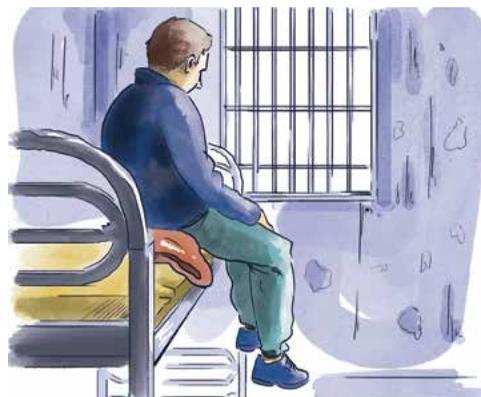
had not been anticipated, such as the financial impact of an increase in the retirement age or the consequences of the reform on unemployment insurance expenditure. Moreover, the decision to use ordinances to define certain structural elements of the new system undermined the intelligibility of the law. These problems were all the more regrettable in that this reform was the first of this magnitude since 1945 and that it was '*destined to transform a social system which constitutes one of the major components [of our] social contract for the decades to come*'. ●



FIND OUT MORE

OPINION of 24 January 2020, 'Draft Framework Act and Bill introducing a universal pension system'

Ensuring the **dignity** of prisoners



For the administrative judge, this was also an opportunity to clarify the scope of their role in terms of detention conditions, including the imposition of financial penalties for non-compliance and ordering urgent adjustments to prisons. However, it is up to the legislature to implement structural measures and to create an appeal process involving the ordinary courts with a view to better protecting prisoners' rights.

Creating a permanent remedy for prisoners

Accordingly, the government wished to change the law. The draft amendment to the Code of Criminal Procedure that it submitted to the Conseil d'État for analysis established a specific process allowing prisoners to apply to the courts to end degrading detention conditions.

In its advisory opinion, **the Conseil d'État proposed several amendments to the text to better protect the rights of detainees and simplify the relationship between interventions by the ordinary and administrative courts.** It held that an evaluation should be planned to ensure good coordination between both parts of the justice system once the scheme was in place.

While the draft amendment was not voted on by parliamentarians, this appeal process was created through a dedicated bill, which came into effect in April 2021. ●

FIND OUT MORE

DECISION n° 439372, 'Duties of the judge for urgent applications for release hearing applications on establishing conditions of detention suitable for human beings'

OPINION of 1 December 2020, 'Creation of an appeal process in the ordinary courts in cases of degrading detention conditions'

In 2020, France was condemned by the European Court of Human Rights (ECHR) for degrading conditions of detention. The lack of effective legal recourse to end these conditions was also highlighted. What was the right reaction? The Conseil d'État ruled on this issue twice in 2020.

Emergency measures for less degrading detention conditions

The Conseil d'Etat, ruling on an application by the French section of International Prison Watch (OIP), demanded that the prison administration take immediate measures to guarantee the dignity of persons held in Nouméa prison, where serious breaches of fundamental rights had been observed.

IN BRIEF

Protecting the **health of prisoners** during the health crisis

In the midst of a health crisis that spares no one, prisoners must be given special attention. The Conseil d'Etat responded to the French section of International Prison Watch and the lawyers' associations who were asking for additional measures to be taken in prisons by stating that the authorities had already issued instructions to protect prisoners from infection, including the implementation of protective measures, reduction of traffic flows between inside and outside, tracing and testing of people with symptoms, etc. Distributing more masks and organising

systematic testing was not possible at the time, as stocks had run out. Nonetheless, the administrative judge reminded the prison authorities that they were responsible for ensuring compliance with the health protocol in place to protect the health of prisoners. A few weeks later, when similar appeals were lodged for Ducos prison (Martinique) and Toulouse-Seysses prison and stocks had been replenished, the administration was ordered to provide prisoners with masks for all their contacts with the outside world. ●

FIND OUT MORE

DECISION no. 439827, 'Health measures for prisoners'

DECISION no. 440151, 'Masks and screening tests at Ducos prison (Martinique)'

DECISION no. 444741, 'Masks and screening tests at Toulouse-Seysses prison'

Enabling access to education for **children with disabilities**

The right to education and compulsory schooling applies to all children in France. But how can we ensure that everyone really benefits, including those with disabilities who need special support?

In a decision handed down in November 2020, the Conseil d'État clarified the division of responsibilities between the State and local authorities. In this instance, a father asked the French Ministry of Education to provide financial support for a carer to assist his daughter during lunchtime and after-school activities. The Ministry rejected his request.

A shared responsibility

The Conseil d'État noted that it was the State's responsibility to take the necessary measures to ensure that the right to education was effective for children with disabilities. Accordingly, when additional human support was needed to ensure a child's education, the State had to pay for their recruitment and cover the costs of their work during school hours.

However, this obligation did not apply to canteen time and extracurricular activities. Where a local authority organised a catering service and additional activities within the school, it was up to the authority to pay for assistants for the pupils concerned. Furthermore, it was the responsibility of the State and the local authority to coordinate their actions to ensure continuity of support throughout the day. ●



↑ In November 2020, the Conseil d'État handed down a key decision for the inclusion of children with disabilities in school. It clarified the responsibilities of the State and local authorities to provide financial support for assistants during school hours and extracurricular activities.



FIND OUT MORE

DECISION no. 422248, 'Effectiveness of the right to education and compulsory schooling for children with disabilities'

IN BRIEF

Organising **voting by prisoners**

In December 2020, the Conseil d'État examined a draft framework act adapting various provisions of electoral law in view of the next presidential election. Among other things, it provided for the introduction of a postal voting system for prisoners. This system is already used for European elections, but this would be the first time it would be used for presidential elections. While it is not suitable for a local election, since it does not provide for prisoners to be attached to a specific polling station,

it is perfectly appropriate for this national election. In its advisory opinion, the Conseil d'État invited the government to remove the provision whereby a prisoner who had opted for postal voting and who was released before the date of the election would have to apply to a judge for permission to vote in person. This created an unnecessary and regrettable obstacle: it was the administration's responsibility to send the information to the polling station concerned. ●



FIND OUT MORE

OPINION of 17 December 2020, 'Draft Framework Act adapting various provisions of electoral law in view of the next presidential election'

Economy and taxation: clarifying the rules

From taxpayers to businesses, financial markets and public bodies, the rules of taxation and economics apply to everyone but often vary.

When a complex case arises, the Conseil d'Etat endeavours to clarify the law and to preserve the right of taxpayers to challenge the administration's decisions.

Taxes: clarifying the system for taxpayer appeals

One of the roles of the Conseil d'État is to ensure that French citizens are able to challenge the decisions of the administration. In the event of a tax dispute, however, the rules to be followed are not always clear. In two decisions handed down in 2020, the administrative judge clarified the appeal procedures available to taxpayers.

Complaint: a matter of timing

For example, when we file a complaint against the tax authorities and they reject it, how much time do we have to bring the dispute to court? This was the question put to the Conseil d'Etat by the Versailles Administrative Court of

Appeal in a case involving the company Marken Trading. For the judge, the key factor was the way in which the administration's decision was notified. If the rejection of the complaint was accompanied by a statement detailing the possible ways to appeal and the associated time frames, the taxpayer had two months to bring the matter to the administrative court. If this information was not provided with the decision, this time limit was extended to one year. If the tax authorities did not respond to the complaint for at least six months, no special time limit applied.

Proven fraud invalidates an appeal

The Conseil d'Etat, on this occasion ruling on an application by a private individual, noted that taxpayers could not



FIND OUT MORE

DECISION no. 443327,
'Time frame for tax appeals'

DECISION no. 428048,
'Protection for taxpayers
against changes in the tax
authorities' interpretation
of the law does not apply
in the case of artificial
arrangements'



November 2020, Montbert. Rally against the project to instal an Amazon distribution centre to the south of Nantes. The following month, the Conseil d'Etat handed down a decision in which it clarified the scope of taxation in France for companies whose parent company is based abroad.

be sanctioned if they relied on an interpretation of the tax law that had already been accepted in administrative texts. **The aim is to protect taxpayers from a possible change in the interpretation of the laws by the administration itself.** However, taxpayers are no longer protected if they have relied on this interpretation to commit a deliberate fraud. In the case of the applicant in question, the existence of an artificial arrangement meant that the application had to be dismissed. In reality, the practice concerned was designed solely to evade tax. ●

IN BRIEF

Preventing corporate tax evasion

How can foreign companies be prevented from evading taxes when they conduct part of their business in France? According to international agreements, a foreign company can be taxed in another state if it operates *via* a 'permanent establishment' there. What is meant here? A permanent establishment is a subsidiary that has the power to enter into contracts on behalf of its parent company. On 11 December 2020, the Conseil d'Etat clarified that French subsidiaries that can make binding commitments and initiate contracts on behalf of the foreign company, without necessarily signing them, are classed as permanent establishments. Accordingly, it ruled that the French company that had referred the case to it – whose parent company was based in Ireland, where taxation is more advantageous – should, in reality, be taxed in France. While many foreign businesses use this type of operation, especially in the digital sector, this decision is a small tax revolution. ●



FIND OUT MORE

DECISION no. 420174, 'Notion of permanent establishment in treaty and European law'



IN BRIEF

Clarifying the operation of the French Financial Markets Authority

The French Financial Markets Authority (AMF) can sue a bank if it finds flawed practices. In order to resolve the problem, it can suggest reaching an agreement on the amount of the financial penalty and the undertakings made. Two internal AMF bodies then work together: the AMF Board initiates the proceedings and seeks agreement with the bank, and the Enforcement Committee then approves the agreement. But can the Enforcement Committee refuse to approve an agreement? Until now, this point was unclear. The AMF

Chairman and one of the banks concerned therefore referred the matter to the Conseil d'État, which clarified the roles of each. The situation is now clear: the Enforcement Committee can only refuse to approve an agreement on an exceptional basis, if the case raises a difficult or novel issue that it believes must be decided following public adversarial proceedings. All companies in the sector benefit from knowing the regulator's position, so this decision increases legal certainty for everyone. ●



FIND OUT MORE

DECISIONS n°s 422186, 422274, 'AMF Enforcement Committee'

Repairing the damage caused by **anti-competitive practices**

Eight road signage companies were found guilty of anti-competitive practices by the French Competition Authority, having colluded to charge higher prices than the market rate. Among the customers who suffered were the department of Orne, which took legal action to obtain compensation. **How could this 'public entity' be compensated for the harm suffered?** Ruling on a final appeal by one of the companies found guilty, the Conseil d'État clarified the two possible options in a decision handed down in March 2020. This was also an opportunity to confirm that the administrative judge is indeed competent to rule on this type of dispute.

Two options for compensating victims

In the first case, public persons may choose to invoke the 'quasi-tortious liability' of companies. This means, in particular, that they can request that all participants in the arrangement be sentenced jointly and severally, even if the contract was with only one of them. In this case, the expected compensation is based on the additional cost, calculated by comparing the prices paid with what they should have been under normal circumstances. However, the public entity may also request the total cancellation of the contract entered into while the arrangement was in place. In this case, the signatory companies must return the sums paid to them. ●

FIND OUT MORE

DECISION no. 421758, 'Compensation of public persons who are victims of anti-competitive practices'



While the health crisis is in full swing, the price of hand sanitising gel soars. In March 2020, the Conseil d'Etat noted that the government could regulate its price in the public interest.

IN BRIEF

Limiting **price increases** in times of health crisis

In March 2020, a crisis emerged within the crisis: demand for hand sanitising gel soared and its price rose exponentially. But should the law of the market prevail in a situation as exceptional as this? As the epidemic progressed, the Conseil d'État thought not. It held that access to hand sanitiser at a normal price was in the public interest; the

government could therefore regulate its price as a matter of urgency. Such measures occasionally impinge on freedom of enterprise. However, they remain legal because they comply with a number of conditions: they are limited in time, restricted to a specific category of products and, above all, proportionate to the gravity of the situation. ●

FIND OUT MORE

DECREE no. 2020-858 of 10 July 2020 on the sale prices of hand sanitising gels and solutions and single-use surgical masks

An interactive version of this report is available at
www.conseil-état.fr/CE/en-action

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