Report of the exchange  
at Council of State of the French Republic  
17 - 28 October 2016  

Identification:  

Barbara Pořízková  
President of the 9th chamber of the Supreme Administrative Court of the Czech Republic, judge of the unifying chamber.  

I would like to start my report with a big thank you to the ACA, which made my training possible. It was one of the most beautiful experiences of my professional life. I would also like to thank the host institution that organised my training; especially Mr Y. G., Councillor of State, in charge of foreign relations and his team (especially Mrs L. D., who was totally committed to taking care of my Bulgarian colleague and me during our training).  

Personally speaking, I would also like to thank Mr J.-M. S., vice-president of the Council of State from the bottom of my heart. He not only found the time to have lunch with me and my Bulgarian colleague, but thanks to him, I could personally participate in the deliberations of the Administrative Claims Assembly, which for me was a matter of immense honour.  

All the government officials of the Council of State, as well as other institutions were open to listening to what I had to say and I would like to thank all most sincerely.  

Before the training, I had been contacted for information about my areas of interest. Then, a preliminary plan, which included these areas, was prepared. These areas were as follows: general functioning of the Council of State; financial law, harmonised domain of community law (VAT, cross-border fiscal matters, cross-border taxation, international treaties to avoid double taxation, fight against tax evasion); attending a session of fiscal training or a combined fiscal sub-section ruling; attending a session of the finance section (taxes) and a General meeting; asylum law.  

The exchange programme covered the functioning of the Council of State, but there also were some meetings that threw light on the functioning of other interesting institutions: The Senate, Court of Auditors, Court of Cassation, Administrative Court of Appeal of Paris, Asylum court, The Defender of Rights and the Ministry of Finance.  

As regards the Council of State, the training started with a general introduction of the institution and continued with a presentation about its advisory and judicial roles and its role in the management of the courts of appeal and administrative courts. The programme also included the specialised departments of the Council like the Centre for research and legal dissemination including the one concerning the execution of court decisions or the Directorate of Information Systems. While the programme showed the functioning of the Council of State in a wide variety of legal domains, it also focussed on the legal areas that were of particular interest to me.  

Activity co-funded by the Justice programme of the European Union
The Council of State is responsible for the execution of its rulings. Mr T. and Mrs C. explained the details of this application to me during the meeting.

The operations of the Council of State are supported by the legal centres and dissemination research which also provide comparative analyses and give information about important decisions of the courts and foreign courts that could be relevant for the functioning of the Council of State. Mr D. explained to me the work of this important department, which is a source of great support to all councillors.

The advisory function of the Council of State does not exist for my court, which is a purely judicial body. This competence, which is more or less similar to the advisory function of the Council of State, is exercised by the Legislative Council of the Government in the Czech Republic. It was very interesting to be a part of the sessions related to fiscal matters. However, although I do speak French well, it was very difficult for me to follow the discussion. Among other things, it referred to a draft decree laying down the conditions under which certain investment companies can grant loans to companies and a draft decree defining the conditions under which the insurance company can cancel the insurance of a borrower on account of increased risk. These are generally fairly complex issues that are even more complex in this case given the angle of the legislative work and possible interpretations of the text.

Something that was more comprehensible for me was the draft law authorising the approval of the agreement between the government of the French Republic and the government of the Italian Republic to undertake the final works of the cross-border section of the new Lyon – Turin railway line. The principle that governs this regulation is based on the impossibility for Tunnel Euroalpin Lyon Turin to conclude or maintain a Contract in the course of performance with an economic operator who would not be or would no longer be on “a white list”. This list contains the economic operators against whom there have been no grounds for enforcement related to the existence of a mafia infiltration after a specific audit. The said audit is the result of a dedicated two-nation structure, and includes a prefect from each of the countries, assisted by a staff that is trained for this kind of an audit, and the decisions are based on the mutual agreement of the parties. The members of the chamber particularly discussed the issue of knowing whether the authorisation of two mayors to exclude the company from the white list and thus from the public contract (this contract), simply on the basis of what they know about its connections with the mafia, conforms to the Constitution.

We had a very interesting discussion at the Council of State with Mrs L.-C., a Councillor of State, President of the Commission des Infractions Fiscales (CIF) [Commission on Fiscal Offences]. She showed us the work of the Commission. When it comes to criminal proceedings for tax frauds, the public prosecutor can initiate criminal prosecution only on a prior complaint from the administration that is submitted with the assent of the CIF. The CIF is an independent administrative and non-judicial body established by the law. There are a certain number of cases where the matter is not referred to the CIF (fraud relating to VAT as well as fraud relating to indirect contributions and customs, laundering and forgery offences and use of forged documents).

Activity co-funded by the Justice programme of the European Union
We also discussed the interpretation and application of the “non bis in idem” principle - article 4 of Protocol no. 7 of the European Convention on Human Rights (right to not be tried or sentenced twice), in the context of a tax increase in the administrative procedure and the accusation and charges by the public prosecutor's office in the associated criminal procedure. Since the ruling of the Grand Chamber of the ECHR Sergueï Zolotoukhine, it is clear that the question of knowing whether either of the procedures involved the same offence should be analysed on the basis of the facts alone. The subject of both procedures will be the same offence if they originate “from identical facts or facts with the same substance”. Once the application of the tax increase and the subsequent criminal proceedings are based on the same action or omission, as is normally the case, it must be assumed that, pursuant to article 4 of Protocol no. 7 of the Convention, the ordinary tax increase also hinders the subsequent criminal proceedings. Such an approach has been criticised by some judges and especially the Member States.

Madam President emphasised that the law stated in article 4 of Protocol no. 7 of the Convention was not accepted unanimously by the signatory States of the Convention, including the various Member States of the Union (the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland). Among the States to have ratified it, the French Republic entered a reservation to article 4 of the said protocol, by limiting its application to criminal offences alone. The elements mentioned above clearly and unequivocally show that there is no consensus between the Member States of the Union when it comes to the problems created by the double criminal and administrative penalty.

This lack of consensus can be explained by the importance of the instruments of administrative law enforcement in a number of Member States. On the one hand, the States do not want to give up the effectiveness that characterises the administrative penalty, especially in areas where the public powers are committed to ensure strict legal compliance, like tax law or the law of public safety. On the other hand, the exceptional character of the penal intervention as well as the guarantees which the accused avails of during the proceedings prompt the States to keep a margin of discretion to determine the conduct that should be subjected to criminal proceedings. This dual interest to keep a power to impose penalties, which is both administrative and criminal, explains why many Member States are presently, in some way or the other, refusing to comply with the case-law of the Strasbourg Court, which has changed in a way that practically excludes this duality.

In this context, we talked about a long-awaited ruling pertaining to the case A. and B v. Norway that was referred to the Grand Chamber of the ECHR. This decision would either facilitate the criteria stated in Zolotoukhine, or vice versa exclude the possibility of the double sentence (administrative and criminal). The case pertains to two taxpayers that claimed to have been taken to court and sentenced administratively and criminally, i.e. two times for the same offence.

After my training, the ECHR concluded that even if two different authorities imposed different penalties, during different procedures, there still did exist a fairly close substantive and temporal link between them to consider them as being part of the penalty system provided
for by the Norwegian law (case: A and B v. Norway applications no. 24130/11 and no. 29758/11).

I greatly appreciated the work of A. B., Associate Councillor of the Council of State, and public rapporteur of the Council, who within one week, which according to me must have been the most challenging one in her professional career, found the time to explain to us the very essence of the judgment session of 17 October 2016. Before the session, we had an interview with R. S., Councillor of State, Deputy President of the litigation section. Something I found most interesting was the case involving a government official who did not behave like a normal officer - he lived and slept in his office -, who had been suspended. He had demanded that the State be sentenced to pay him an amount of 10,000 Euros as compensation for damages, which he considered to have suffered on account of workplace harassment. His appeal was dismissed, in accordance with the opinion of the rapporteur, because there was no sign of workplace harassment in his case.

I was absolutely delighted to have been able to be a part of the Administrative Claims Assembly under the chairmanship of Mr S., as well as participate in the deliberations twice. There were two significant cases on one day:

1) The competence of the Council of State to examine the international arbitration decisions if either of the parties is a legal person governed by the French public law and a person governed by foreign law, executed on French territory;
2) Putting up nativity scenes at public places for Christmas.

In the first case, the Fosmax LNG company asked the Council of State:
1) to cancel the arbitration decision (ICC no. 18466/ND/MHM) delivered in Paris on 13 February 2015 by the arbitration tribunal formed under the aegis of the International Chamber of Commerce which, firstly, limited the amount, which the STS consortium, comprising the companies TCM FR, Tecnimont and Saipem, shall have to pay it, to 68,805,345 Euros, of which 48,217,345 Euros coupled with an interest from 28 February 2009 and their capitalisation, secondly, sentenced it to pay the STS consortium the amount of 128,162,021 Euros coupled with an interest and their capitalisation and, lastly, sentenced it to bear half the arbitration costs, fixed at the amount of 1,200,000 American dollars;
2) to have the companies TCM FR, Tecnimont and Saipem pay the amount of 10,000 Euros under article L. 761-1 of the code of administrative justice.

The Assembly decided in favour of the competence of the Council of State. The contract concluded between a legal person governed by the French public law and a person governed by foreign law, executed on French territory comes under the administrative system of public order. The appeal directed against an arbitration decision delivered in France in a dispute that was created from the execution or termination of this contract therefore involves checking the compliance of the arbitration decision with the mandatory rules of French public law relating to the occupation of the public domain or those that govern public contracts, as per the competence of the administrative jurisdiction.

The Council of State has jurisdiction to hear the appeals directed against such an arbitration decision. It must ensure the legality of the arbitration agreement, whether it refers to an arbitration clause or a special agreement; only the pleas alleging that, on the one hand, the decision has been delivered under irregular conditions and, on the other hand, that it is
Activity co-funded by the Justice programme of the European Union

contrary to law and order, can be effectively raised before it; an arbitration decision can be viewed as having been delivered under irregular conditions only if the arbitration tribunal has been incorrectly declared to be competent or incompetent, if its composition was irregular, especially with regard to the principles of independence and impartiality, if it did not give a ruling in compliance with the task entrusted to it, if it disregards the principle of contradictory character of procedure or if it did not justify its decision.

As regards control on the merits, an arbitration decision is contrary to public order when it implements a contract whose purpose is unlawful or flawed by a particularly serious fault mainly relating to the conditions under which the parties had given their consent, when it disregards rules that cannot be infringed by public legal persons, like mainly the ban on granting favours, alienating the public domain or giving up prerogatives that these persons have in the general interest during the execution of the contract, or when it disregards the rules of public order of the law of the European Union.

If the Council of State observes the illegality of the appeal to arbitration, it cancels the arbitration decision and decides to either send the dispute back to the competent administrative court to be heard, or summons the case for review and gives a ruling itself on the claims presented before the arbitration board; if it observes that the dispute is arbitrable, it can dismiss the appeal directed against the arbitration decision or totally or partially cancel it; it can then settle the case on its merits only if it is stated in the arbitration agreement or if it is called upon to do so by both parties; in the absence of any such stipulation or agreement between the parties on this point, the parties need to decide if they intend to again take their contractual dispute to an arbitration tribunal, unless they jointly decide to appeal to the competent administrative court.

The second case was extremely complex and the decision has been postponed to November. The subject of the dispute: “Is a Christmas nativity scene a religious emblem or sign whose installation in a public location or building is systematically prohibited by the provisions of the law of 9 December 1905 on the separation of Church and State.” It mainly refers to the interpretation of article 28, which prohibits putting or fixing any religious emblem or sign on public monuments or at any public location (principle of secularism).

The Administrative Claims Assembly was referred two appeals, one from the city council of Melun and the other from the Fédération de la libre pensée de Vendée [Federation of free thought of Vendée]. The Federation of free thought, having observed that it had become customary to set up nativity scenes at public places during Christmas, asked the local authorities – one of them being the city council of Melun while the other the Chairman of the General Council of Vendée – to stop this practice in the month of December 2012.

In both cases, there were implicit decisions of dismissal of the appeals, followed by the putting up of nativity scenes materialising these dismissals. The results of the two disputes were totally divergent in the administrative courts. As regards Melun, the administrative court dismissed the appeal of the Federation, but the administrative court of appeal of Paris accepted its appeal. As regards the General Council of Vendée, the administrative court dismissed the refusal of not setting up a nativity scene, and the administrative court of appeal of Nantes reversed the solution.
The first question before the judges is to know whether, while formulating the ban in article 28, the legislator intended to target the religious emblems and signs placed temporarily at a public place. The public rapporteur (A; B.) concluded that article 28 is the suitable framework to assess the legality of setting up nativity scenes during Christmas at public places.

The second question relates to the nature of the symbol. According to the opinion of the public rapporteur, it is the historical overview that emphasises a gradual disconnection of the nativity scene from its religious base. In this regard, the nativity scene has been sort of swept away in the vast movement of the secularisation of Christmas which the French society, like others, has seen from the XIXth century, till it became, to a certain degree, an element of the protocol of this festival in which a nativity scene sometimes serves no other purpose than to capture Christmas in pictures. However, it is quite obvious that the nativity scene still holds great religious meaning.

A rather interesting non-judicial argument was a survey conducted by the “Ifop” institute for “Dimanche Ouest France” about setting up nativity scenes at public places which revealed that 71% of the respondents see nativity scenes as “more to do with cultural tradition than being a Christian symbol”, while 18% see them as a “religious symbol”.

It is thus a mixed object. According to the opinion of the public rapporteur, article 28 of the law of 1905 did not explicitly deal with the case of mixed objects, which carry a religious meaning and a secularised cultural dimension all at once. To assess the object with a dual nature, she recalled a case-law relating to the principle of neutrality taken alone in the sense that the only thing that counts, through the object, is the characterisation by its exhibition of the claims of philosophical, religious, or policy opinions (EC, 27 July 2005, Commune de Sainte-Anne, no. 259806, mentioned previously concerning the decoration of a city council). Her arguments stated that article 28 of the law of 1905 is nothing other than the formulation, concerning the signs put up at public places, of the requirement of neutrality of public legal persons in its secular aspect, prohibiting any form of recognition of a religion in the strictest sense.

This case-based approach is finally what was tried by many trial courts, especially the administrative court of Montpellier which, concerning the nativity scene of Béziers, took the problem of the multiplicity of meanings head-on. At the institutional level, it is also a case-based position that is defended by the Observatoire de la laïcité [Observatory of Secularism], which treats the nativity scene as a religious and cultural object, whose set up should point towards the second of these meanings in order to be legal. It was also the position of the government expressed by the Minister for Home Affairs on 15 March 2007 in response to a written question to the Senate.

The final conclusion of the rapporteur: article 28 of the law of 1905 and, especially, the principle of neutrality whose scope is greater and the field of territorial application is wider, do not, as a matter of principle, prohibit setting up a nativity scene in a public area, but only prohibit setting up a nativity scene that would demonstrate a gesture of recognising a religion.
In a decision of 09/11/2016 (after my training) the Council of State ruled that on account of the multiplicity of the meanings of the Christmas nativity scenes, which in addition to having a religious character are also elements of secular decorations put up during the New Year celebrations, setting them up temporarily on the initiative of a public legal person, at a public location, is legal if it has a cultural, artistic or festive character to it, but not if it demonstrates the recognition of a religion or religious preference.

The Senate
I would like to thank Mrs N. T., who accompanied us on the representative premises of the Senate and discussed issues related to tax fraud and evasion of the law with us and the experts from the Finance committee (Mr B. and B.). We discussed the issue of knowing whether the method of obtaining proof can affect its lawfulness. For example, for the French Constitutional Council the publication of the registry of trusts, which was demanded after the “Panama papers” revelation, is an invasion of privacy.

The Court of Cassation
The Court of Cassation settles civil, commercial, social or criminal cases. It is unique – it standardises the case-law and ensures that the texts are interpreted in the same manner across the entire territory. It is the uniqueness of the court that enables the uniformity in interpretation, and thus the development of an authoritative case-law. It is not a third level of jurisdiction, it is essentially called upon not to give a ruling on the substance of the case, but to decide, depending on the facts that have been assessed without appeal in the decisions referred to it, whether the legal rules have been correctly applied.
I thank Mrs B., advisor to the commercial chamber specialised in tax issues at the Court of Cassation for our meeting and for her explanation about the powers of the Court of Cassation, as well as Mrs G., for the visit to the beautiful hallways of this historical courthouse.

The Court of Appeal of Paris
I spent an extremely interesting day at the Administrative Court of Appeal of Paris. During the panel hearing of the 3rd chamber in law of territorial public service; tax law and disputes relating to foreigners under the presidency of Mrs G.-M.; We also had an interview with Mrs J.-D., President of the Administrative Court of Paris. We also discussed the meaning of costs for access to justice, issues relating to organisation of work, vacations system, functioning of the Administrative courts and also the functioning of the Court. We realised that we all have nearly the same problems.

I also visited the Court of Auditors, National Asylum court and The Defender of Rights

Court of Auditors.
I appreciated the vast experience and knowledge of Mrs G.-R., who told us about the history of the court, explained its competence to independently decide certain cases of public finance, including its new tasks.

The basic idea of this court is article 15 of the Declaration of the Rights of Man and of the Citizen: “Society has the right to call for an account of its administration from every public agent”.

Activity co-funded by the Justice programme of the European Union
According to the Constitution, the Court assists the Parliament and the government to keep a check on the execution of the laws of finance and the application of the financing laws of social security as well as in the assessment of public policies. It contributes to keeping the citizens informed through its public reports. It is an administrative court with four important missions: it appraises the accounts of public accountants by checking the legality of revenue and expenditure, it controls the management and proper use of public funds by ensuring legality, efficiency and effectiveness of this management, it assesses public policies (State and public establishments; public companies; social security bodies; bodies governed by private law and bodies that appeal to public generosity) and it certifies the accounts of the State and social security to guarantee that the accounts of the public administrations are accurate and true, and that they provide a true picture of the result of their management, capital and their financial situation.

Mrs G.-R. explained to us the system of training and recruitment of magistrates, as well as the mandatory practical experience of the magistrates in the administration (secondment).

The Cour Nationale du Droit d’Asile [National Court of Asylum Law]
I spent a very interesting and beneficial afternoon in the meeting rooms of the Cour Nationale du Droit d’Asile. Its president, Mrs M. de S explained everything about the Court, its organisation and its way of working to me. It’s a unique and complex organisation. More than 600 judges and officers are a part of its mission of safeguarding the fundamental rights for men and women in danger - asylum seekers. These asylum seekers mainly come from the Democratic Republic of Congo, Bangladesh, Russia, Kosovo, Pakistan, Guinea, Albania, Sudan and China.

We also talked about the situation in Syria. The requests for asylum from Syria remain small in number with regard to the number of people having fled their native country and require international protection. This situation could be due to the fact that the majority of Syrians are granted protection by OFPRA (French Office of Protection for Refugees and Stateless Persons; 97% in 2015) and do not file any appeal at the Court.

As regards the organisation of work, I was very intrigued by the videoconference sessions for asylum seekers residing in the overseas regions and departments. The judges heard the appeals in Paris while the asylum seekers and their lawyers were in overseas regions. This statute concerns Guadeloupe, Guyana, Martinique, Mayotte and Réunion.

We also talked about issues relating to the persecution of homosexuals. In the case of a Bangladeshi national, the Court concluded that there exists a social group of homosexuals in this country by referring to the available sources of geopolitical information to state that homosexuality is penalised in Bangladesh as a means of intimidation to force homosexuals to hide their orientation and that they are victims of persecutions inflicted by private individuals as well as government officers. As regards the production of photographs and video recordings seeking to prove the sexual orientation of the applicant, the Court based its decision on article 4 of directive 2011/95/EU of 13/12/2011 on the assessment of the facts and circumstances supporting the request for asylum, combined with article 1 of the Charter of Fundamental Rights of the European Union, to oppose the consideration of evidence that is likely to violate human dignity, in accordance with CJEU case-law (Netherlands).
Another interesting decision, whose conclusions I can explain is the case of a Palestinian residing in Syria who refused to serve in the Syrian armed forces so as to avoid participating in the acts of violence attributed to them. The court considered the obligation on Palestinians residing in Syria to carry out their military service. It referred to the Guide des procédures et critères du Haut-Commissariat pour les Réfugiés [Handbook on Procedures and Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner] recommending to consider a punishment for desertion or draft-evasion as persecution when the military action with which an individual does not want to associate is condemned by the international community, and then revealed that Syria had been condemned several times by the United Nations Organisation for acts that were likely to be described as war crimes. As the Syrian military penal code prescribes the death sentence for desertion during a period of war, the Court considered that in this case the fear of persecution on grounds of ethical conscience was well-founded and recognised the person concerned as a refugee.

Le Défenseur des droits [The Defender of Rights]
The Defender of Rights is a completely independent institution of the State. Its competence is wider than that of the Defender in the Czech Republic. We were very warmly welcomed by Mrs J., director at the Direction Protection des droits-affaires publiques [Directorate of Protection of public affairs-rights] at the new head-office of the Defender. She explained to us the history of this institution and the four domains of operation of the Defender.

The Defender of rights is a result of the coming together of four institutions: the Mediator of the French Republic, the Defender of children, The French Equal Opportunities and Anti-Discrimination Commission (HALDE) and the National Commission on Security Ethics (CNDS). It is in charge of defending individual rights and freedom in the context of defending the rights of children, security ethics, fight against discrimination and the right of users of public services. This institution comprises close to 250 persons working at the head-office of the Defender in Paris, Metropolitan France and overseas; 397 delegates work here. The people discriminated against can have a problem with the private or public security forces, and there could be difficulties in their relationship with the public services. There can be discrimination in everyday life, e.g. with respect to jobs, housing, education, family situation, physical appearance, assumed or actual belonging or non-belonging to a religion, age bracket, political opinions, etc.

As regards the rights of children, the Defender is competent to examine the situations of French and foreign children living in France, and French children living abroad. All the children that are less than 18 years of age have fundamental rights that are guaranteed by the International Convention on the Rights of the Child with respect to care; education, justice, social protection, emancipation; freedom of expression. The Defender is involved in the domains of adoption and accommodation of children (e.g. adopted children blocked in their native country because they do not have an exit visa), criminal justice, foreign minors (children placed with their parents in detention centre, access to schooling for certain children, etc.), child welfare (referring a matter to the competent departments, e.g. youth welfare), health and disability (medical treatment of handicapped children, etc.), education (early childhood, schooling, extracurricular).
The defender has extensive powers. It can carry out an investigation, propose amicable settlement, make recommendations, present observations before the judge, request disciplinary proceedings, make proposals about reforms.

As it was the 23/10/2016, the day before the planned evacuation of the Calais “jungle”, we talked about this subject in detail during our discussion. There were 6,400 migrants that had to be relocated to 280 centres in all the regions of France, except Corsica. The migrants were to be separated into 4 lines: adult males only, unaccompanied minors, families and vulnerable persons. Each person would have to go to a counter operated by the French Office of Immigration and Integration, where he/she would choose between two regions and would then get a bracelet that was colour coded to his/her destination. Before this, each migrant had to provide his/her identity, date of birth and nationality.

The 1291 unaccompanied minors won’t be taking the bus. Since the beginning of the week, 98 minors had been authorised to cross the Channel to join a member of their family settled in the United Kingdom and 102 would leave later. The President of the Defender Mr J. T. was personally present in Calais on those days. We talked about what would happen should the United Kingdom refuse to take them in. They would then probably become a part of the French system where the youth welfare would take charge of them and they will then be spread out in the departments. This situation, so full of frustration and despair, would require mobilising the specialised agents of the Defender.

Even after my training, I stay informed about the fate of the migrants, especially the young abandoned ones. According to the press information, more than 4,000 persons have been finally taken by bus to reception and counselling centres across France between Monday, 24 October 2016 and Wednesday, 26 October 2016. A month after the evacuation of the Calais “jungle”, the United Kingdom agreed to take in only about 330 minors. The French State has already opened two reception and counselling centres for unaccompanied foreign minors (Caomie) in Meurthe-et-Moselle and Charente-Maritime. A third of the 179 minors monitored in the reception centres cannot be located today. This situation is obviously not limited to France and other States too show deep instability and uncertainty in the world today.

My training was a great experience and I am extremely grateful for it. I would like to conclude by once again expressing my gratitude to the ACA and the Council of State of France.

Barbara Pořízková
Le 29. 11. 2016 à Brno