REPORT

Identification of the participant

Nationality: French
Roles: Auditor at the Council of State
Experience: 18 months

Identification of the exchange

Host institution/court: Supreme Administrative Court and Administrative Court
City: Warsaw and Krakow
Country: Poland
Dates of the exchange: 7/07-17/07

1/ Exchange programme

In Warsaw:

Meetings with:

- Prof. Roman Hauser, Joanna Kabat, Artur Mudrecki: European Law Office;
- Ryszard Pęk, Judge at the Financial Chamber, President of the Wroclaw Administrative Court;
- Jacek Chlebny, Vice-President of the Supreme Administrative Court, President of the General Administration Chamber;
- Anna Dumas, Judge at the Financial Chamber, Vice-President of the Krakow Administrative Court;
- Lesrek Bosek, Judge at the commercial chamber of the court of cassation;
- Justyn Piskorski, Judge at the constitutional court;
- Miroslaw Wroblewski, Director of the Constitutional, International and European Law Department;
- Andrzej Kuba, judge at the commercial chamber.

I also attended a hearing of the tax chamber.

In Krakow:

Meeting with the President of the Court, the Vice-President, presentation to the judges of the functioning of the Council of State (conference).

I also attended a hearing of the commercial chamber.
The Polish system is inspired more by the Austrian model than by the French model (despite the creation of a “Council of State” during the Napoleonic period). In addition to ordinary applicants, petitions may be filed by the public prosecutor or the defender. It should be noted that the latter, created in 1987, is one of the largest in Europe, with 300 officials (not the same as children's ombudsman) and 55,000 to 70,000 petitions per year (which is mainly due to the poor legal aid until recently).

There are only two levels of courts: the regional courts and the supreme court. The resolution of conflicts by the administration is highly evolved: apart from the widespread use of the mandatory prior administrative appeal, if the latter is not enough to solve the dispute, the petition is submitted to a second level within the administration. This filtering role is very effective: 30 million petitions are studied by the administration, and only 80,000 cases are brought before the administrative courts.

The jurisdiction of the administrative court is narrower than ours: public procurement or liability falls under civil courts, as do civil service disputes, apart from uniformed officials. A provision of the constitution provides that in case of serious violation of the law, the limitation may be lifted. This is why the administrative court is currently receiving many petitions against the nationalisation of private property dating from the communist era.

The organisation of the hearing can be very surprising for a Frenchman: the lawyer’s obligation exists only for written procedures, but the applicant can appear alone at the hearing. This hearing is used to ask the applicants or their lawyers a final question, and results in a judgment after a short deliberation. The judge-rapporteur explains the decision to the applicants at the end of the deliberation, in terms that make it as comprehensible as possible, without citing numerous precedents. The reasoning of the judgment is published in the month following the hearing, as well as any dissenting opinions. In general, there is minimal collegiality: the judges draft their judgments and reasoning alone. Most of the hearings are held in camera today. The in camera is granted as long as the parties agree. They often ask for it because the hearing is then faster.

The judges of the administrative courts are very proud of the average time taken to deliver judgments of four months (three for some courts, six for the largest: that of Warsaw, which also rules in the first instance on all disputes relating to ministerial actions). The Supreme Court, however, rues taking more than one year, or even two years, to rule on matters, which is mainly due to the number of vacant seats of judges (20 today). The time taken is sometimes slowed down by the cases brought by a hundred applicants (especially when the construction of a road is challenged), and when one of them dies.
3/ Reforms of the Polish justice system

3.1. Reasoning behind the reforms

In terms of the theory of law, the reforms are justified by a political philosophy detailed in the proceedings of conferences held in 2017-2018 in the Constitutional Court, which can be summarised by the intervention on the power of judges and judicial power, according to Zbigniew Stawrowski (professor of Political Science at the university in Warsaw, he is the author of *The Clash of Civilizations or Civil War* in 2013). He opposes two models of the justice system: the Anglo-Saxon one, which is based on the judge's personal knowledge of the case and his own sense of justice (without the need to refer to jurisprudential precedents) and another model in which it is assumed that the courts do not have sufficient competence – moral or intellectual – to resolve cases by themselves. In this continental, administrative-bureaucratic model, the judges must be instructed as precisely as possible about what they must do, while the former is based on what the Old Testament has called justice: courage, conscience of personal independence, a sense of justice and wisdom in life. He then explains that Montesquieu's thought was twisted: he only pointed out that the executive power had two branches, including the one that enforces the law. The tripartite separation of powers is an overinterpretation of Montesquieu's thought inherited from the founding fathers of American democracy. He concludes that the independence of judges is an essential condition, only understood as a virtue, a personal trait of the character of the judges, and does not mean corporations being given guarantees of no inspections of impunity. The separation of powers is a mode of organisation but by no means an inviolable dogma (…) the judiciary is not an institution that is necessary and essential for the state, as shown in particular by the United Kingdom, whose judicial system is in accordance with the rule of law.

The various reforms were politically justified by Prime Minister Mateusz Morawiecki, referring in particular to the Vichy government and claiming the legacy of General de Gaulle after the collaboration: “100% of the judges remained incumbent (…) the perpetrators of the crimes committed in the 1980s were therefore not tried” (speech dated 17 April 2019 as part of the “Transatlantic Dialogue” at the University of New York). Poland, like Germany for example, did not renew the administrative and judicial staff at the time of the democratic transition. But, “the communist regime disappeared thirty years ago (…) the average age of a judge is slightly over 40 years (…) the criminal chamber has only one judge who was active in the 1980s, and the other courts have barely more than a few out of a total of nearly a hundred magistrates and chamber presidents” (opinion column published by a collective of Polish judges in *Le Monde*, 10 May 2019). The judges who are now close to retirement are rather those who supported the advent of the Third Republic by the Solidarity movement in June 1989. However, according to the Law and Justice party, this Republic is the result of a “plot of the elites” between the Communists and a part of the members of Solidarnosc.
3.2. Challenging of reforms

Reforms of the judicial system are challenged by Polish judges through preliminary questions and by the European Commission in the context of appeals for breaches:

- Infringement proceedings launched by the Commission on 3 April 2019 on the grounds that the new disciplinary regime undermines the judicial independence of Polish judges and does not provide the necessary guarantees to protect judges from political control.

- Judgment of 24 June 2019 of the CJEU in the Commission's application for breach of the law which set a retirement age of 65 for judges, including those whose terms of office were in progress;

- Pending judgment of the CJEU answering the preliminary question concerning the reform of the national council of the judiciary (two hearings have already taken place, the government has asked for an additional hearing);

- New preliminary ruling by the Supreme Administrative Court on 26 June 2019 on the possibility of challenging decisions of the national council of the judiciary before the Supreme Administrative Court.

The reform of the method of appointment of judges is justified in the eyes of some judges that I met because it puts an end to a practice that finds few equivalents in Europe, whereby the judges appointed each other without any outside intervention. From now on, it is the parliament that elects judges to the National Council of the Judiciary, as is the case in Spain in particular. However, the list of candidates proposed to Parliament does not come, as is usually the case, from proposals evaluated by the judges. Thus, for the first election, the parliamentarians received from the Minister of Justice a list of 18 candidates for 15 posts, which had been signed by 25 magistrates, but, despite requests, the list of signatories was not made public. For other positions, the new NCJ chose to appoint candidates who scored the least as graded by their peers. Thus, the appointment of the president of the Supreme Court, who is close to the leader of the PIS, is considered illegitimate because of her background and training by many of her peers.

The judges of the Constitutional Court are also challenged: the appointment of the last three elected judges has not been published in the official journal. After the elections, three other judges were appointed in their place. This is why the defender believes that they are not legitimate and withdraws all the cases entrusted to them.

In disciplinary matters, the law now allows ordinary courts to be subject to investigations, proceedings and disciplinary sanctions on the basis of their judicial decisions. In addition, the new disciplinary chamber of the Supreme Court exclusively comprises judges selected by the NCJ. The president of the disciplinary chamber may determine, on an ad hoc basis and with almost absolute discretion, the first-instance disciplinary court that will hear a particular case.
While no questionable sanction was pronounced by the new disciplinary chamber of the Supreme Court, many of the judges were summoned for a disciplinary interview, for having demonstrated wearing a T-shirt bearing the word ‘Constitution’, taken positions against the government or given judgements contrary to the government’s policies. Some were transferred or saw their department dismantled. These cases have been identified in a report by Amnesty International “Poland: Free Courts, Free People”, published in May 2019. At the end of my exchange, on 17 July 2019, the European Commission decided to move to the next stage of the infringement procedure by sending a reasoned opinion on the new disciplinary regime.

There are other measures that affect the judicial system. It is now forbidden to perform this role for persons with dual nationality, including European (my points of contact were not able to explain to me the reasons for this measure). The assets of judges are published every year, including all their property worth more than €2,500. The budget for the defender has been reduced and an SME defender has been created. This responsibility was assumed by the former earlier.

3.3. Prospects

The administrative judges are not affected for the moment by these reforms, except their recruitment, which is blocked owing to the risks of decisions made by illegally appointed judges being challenged. The judges are very hopeful of the CJEU’s judgments. On the other hand, the “new judges” hope that the next elections will give them enough majority to amend the constitution.

The economic health (the highest growth in the EU, 3.6%, and unemployment at 3.6%) should be favourable to the PIS. The issues of independence of judges and the media are mainly discussed in Warsaw and the big cities, but it is not certain that this is a concern for the rest of the population, especially as the media fuels nationalistic impulses, resulting in hate crimes against Muslims, Jews and people of African descent having overtaken for the past two years those against the Roma, which were traditionally very high.

4/ Benefits from the exchange

This exchange allowed me to realise that some of the Council of State’s practices that seemed universal to me were actually not. This objectivity is invaluable.

It also allowed me to get to know the Polish context better, to measure the fragility of the rule of law and the narrow leeway available to the European institutions in the face of a great diversity of judicial systems.