

THE COUNCIL OF STATE: INSTITUTION ON THE JUNCTION OF THE THREE TRADITIONAL POWERS OF THE STATE

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Chapter 1. Introduction

1. The Council of State is the highest administrative court of law in Belgium, established by the Act of 23 December 1946. Contrary to similar institutions in some neighbouring countries, the Belgian Council of State is a relatively young institution that was founded over a century after the country's independence.

The reason for this is historic. Prior to Belgium's independence in 1830, its territory formed part of the United Kingdom of the Netherlands, which also had its own Council of State. In practice, however, the current Council of State was not so much a judicial body, but sooner a compliant instrument in the hands of King William I.

The Dutch example reinforced the opinion of the Belgian constitutionalists that it is better not to sanction power abuse by means of an administrative judge appointed within the framework of the executive power. They thought that the best guarantees for the citizens for an objective and independent administration of the law are provided by the traditional courts and tribunals, dependent on the judicial power.

In addition, at the time of Belgian independence the French Conseil d'Etat - whose later jurisprudence would greatly influence administrative jurisprudence in Belgium - was faced with a serious crisis. Certain authors campaigned for its abolishment and in 1829 its budget was nearly rejected¹.

2. Ultimately, in 1831, the Constituent Assembly opted for a compromise system to ensure the legal protection of the citizen against the administration. Initially, they started from a monistic system of legal protection by principally authorising judges belonging to the Judiciary, i.e. normal or ordinary courts and tribunals, to also settle any administrative disputes. The founders of the constitution did not however, wish to exclude definitively the possibility of establishing administrative courts in Belgium, which would handle administrative disputes.

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¹ MAST, A., DUJARDIN J., VAN DAMME, M. and VANDE LANOTTE, J., *Overzicht van het Belgisch Administratief Recht*, Antwerp, Kluwer Rechtswetenschappen, 1999, n/ 742.

The subtle convergence of the present articles 144, 145 and 146 of the in 1994 co-ordinated Constitution², meant that in practice, the Belgian system of legal protection in administrative disputes has developed into something between the Anglo-Saxon monistic model and the French dualistic model.

The thus developed mixed system of legal protection has led to the fact that at present, certain disputes in Belgium involving the administration can only be heard by ordinary courts³, that other disputes can be submitted only to a specific administrative court and that in certain cases, albeit infrequent, both the judicial and the administrative courts are involved in the jurisdictional procedure⁴.

3. The fact that at the time of the Belgian independence the Constituent Assembly did not already opt for an effective functioning of administrative courts undoubtedly is related to contemporary attitudes and the discouraging historical precedents of legal administrative bodies linked to the executive power. It is also related, however, to the fact that in the 19th century administrative disputes did not have the quantitative relevance they assumed in the following century.

With the change from the 19th century "night-watchman state" to the "welfare state" in the 20th century, the activities of the state have grown tremendously, thus significantly increasing the number of potential conflicts between the citizen and the state.

Paralleling this growth, government has been "demystified", i.e. the state is seen increasingly as being vulnerable and its actions are considered less self-evident. The growing awareness and self-confidence of citizens accelerated this trend. The old adage "The King can do no wrong" has long since been rejected.

A combination of factors meant that ordinary courts more frequently needed to settle disputes involving the government and that, gradually, certain

² In general, the Constituent Assembly has, by means of exclusion, authorised judges belonging to the Judiciary, to settle all matters pertaining to "civil rights". These judges have also been authorised to settle disputes over so-called "political rights". With the understanding, however, that the Constitution authorises the formation of specific administrative courts to settle the latter category of disputes. The legislator used this authority in 1946 to set up the Council of State. As regards the delineation between the terms "civil" and "political" rights, together forming the "subjective" rights, we (among other) refer to MAST, A., DUJARDIN, J., VAN DAMME, M. and VANDE LANOTTE, J. *o.c.*, 703 ff., n/ 751-755; VANDE LANOTTE, J. and GOEDERTIER, G., *Overzicht van het Publiek recht*, Bruges, Die Kcure, 1997, 521-524; BLERO, B., "Les droits subjectifs, les droits civils et les droits politiques dans la Constitution, Observations relatives à l'arrêt de la Cour d'Arbitration no. 14/97 du 18 mars 1997", *Administration Publique Trimestriel*, 1997, 233-279. In disputes about "subjective rights", the citizen's right to demand a specific attitude or decision by the administration is central; "objective disputes", however, are not concerned with the subjective rights of the citizen, but instead concern the legality of standards of objective law. If the Council of State, as the highest administrative judge, is authorised to decide on certain disputes regarding subjective rights (i.e. those concerning the political rights indicated by the legislator, then the Council of State is exclusively authorised to decide disputes over objective rights and to pronounce rescissions in these matters.

³ A typical example of this is the contention of government liability. In principle, the latter is assessed by judges belonging to the Judiciary, based on normal civil rules.

⁴ Such cases are known as "gemengd contentieux".

disadvantages of a monistic system of legal protection were revealed, e.g. the fact that traditionally, judges belonging to the Judiciary are inspired more by private law and usually are less familiar with procedures involving the government.⁵

Whatever the cause, the judges belonging to the Judiciary displayed a certain temerity vis-à-vis the state in administrative disputes, meaning that the citizen's legal protection was less extensive than in disputes governed by private law.

Finally, all these reasons led to the creation of the Council of State by the Act of 23 December 1946⁶. This was preceded by many decades of extensive discussions, both by legal theoreticians, in government-sponsored working groups and in parliament⁷.

In these discussions it soon became clear that the envisaged Council of State essentially would be given two tasks. On the one hand, as the highest administrative court it had to decide administrative disputes. On the other hand it had to ensure a better quality of normative texts. Thus the specific nature of the Council of State gradually gained shape: the combination within a single institution of a judicial body (the Administration Section) and an advisory body (the Legislative Section).

4. When the Council of State was founded in 1946, it was traditionally described as part of the executive power. Nonetheless, the Council was in no way dependent on the executive power to fulfil its task. Quite the contrary. Right from the start the Council displayed great impartiality and independence, and almost immediately grew into the highest independent court in the administration.

Nonetheless, it would take until 1993 before the Council of State received constitutional recognition. The new article 160 of the Belgian constitution stipulates that there is a Council of State for all of Belgium, whose composition, authority and functioning is determined by law, with the understanding that the law can grant the King the power to organise jurisdiction in accordance with its given principles⁸. This article also refers to the two tasks of the Council of State, i.e. giving judgment by means of an *arrest / arrêt* in its role as administrative court and the giving of advice by means of an *advisory opinion*.

⁵ Although this was an argument for jurisdictional dualism, there are number of alternative arguments in modern Belgian legal literature that argue for the application of monistic legal protection system. Among other, we refer to VAN ORSHOVEN, P., *Ontwikkelingen in de beslechting van bestuursrechtelijke geschillen in België. Preadvies voor de vergelijkende studie van het recht van België en Nederland*, W.E.J. Tjeenk Willenk, 1990, 43-46 and by the same author, "Administratieve rechtbanken? Ja en neen. Pleidooi voor juridictioneel monisme", *Rechtskundig Weekblad*, 1994-1995, 897-908.

⁶ The Basic Act of 23 December 1946 was amended so often that its text and all modifying acts were co-ordinated by Royal Decree on 12 January 1973.

⁷ A good overview of these discussions can be found in LAMBOTTE, CHR., *Le Conseil d'Etat*, Heule, U.G.A., 1982, 31-45.

⁸ For a discussion of Article 160 of the Belgian Constitution see (among other) SEUTIN, B., *De Grondwet, Bruges*, Die Keure, 1998, 214-215.

Therefore it is only since 1993 that the Council of State has a constitutional status, as courts and tribunals have always had, and like the Court of Arbitration since its creation⁹.

Following its incorporation into the Constitution, it was emphasised that the Council does not belong to the 'Judiciary', as is the case for the ordinary courts and tribunals, but neither can it simply be considered a part of the executive power, as had been posited in the preceding decades. To the contrary, the Council of State has a *sui generis* status. The Council has a unique position, which takes into account its specific tasks as the highest administrative court and advisor of legislative bodies. The Council has been positioned, quite correctly, on the junction of the three traditional powers of the State¹⁰.

Chapter 2. The Legislative Section: advising on legislation

§1. Which normative texts must be submitted?

5. The Council of State consists of two sections. The Legislative Section, which advises the Belgian federal governments and parliaments on the quality of the legislation they design, and the Administration Section, which in its role of highest administrative judge hears disputes involving the administration.

In principle, whenever federal Acts or Decrees are drawn up by the federal parliaments (communities or regions) or Decrees by the federal government (Royal or Ministerial Decrees) or by a regional government, these must first - i.e. before being published - be to the Legislative Section for its advice¹¹.

Certain normative texts must be submitted for advice in draft form¹², while for other texts such consultation is merely optional¹³. Even if consultation is

⁹ The fact that the Council of State was not constitutionally recognised until 1993 did not prevent the Council's members previously acquiring a status comparable to that of judicial magistrates and the Act of 23 December 1946 from containing stipulations, as do certain articles in the constitution, applying to judicial magistrates, whose purpose was to guarantee the independence of members of the Council of State from the executive power.

¹⁰ ALEN, A. (ed.), *Treatise on Belgian Constitutional Law*, Deventer/Boston, Kluwer Law and Taxation Publishers, 1992, 116.

¹¹ Advising on the drafting of normative texts is by far the most important task of the Legislative Section, although not the only one. For instance, this Section can be tasked by the Prime Minister or President of a regional government with drafting normative texts, after being appraised of their content and object. Also, the Legislative Section may be involved in co-ordinating, codifying or simplifying legislation. For a more detailed discussion of the organisation and different powers of the Legislative Section see VAN DAMME, M., *Raad van State. Afdeling wetgeving*, Bruges, Die Keure, 1988, XI - 268 ff.

¹² The Legislative Section of the Council of State must be consulted in regard to draft bills, decrees or ordinances (i.e. legislative initiatives by the government or members thereof) and drafts of regulating decrees (i.e. decrees without individual effect. Appointment decrees, for example, have an individual effect and therefore can not be submitted for advice to the Legislative section)

¹³ Drafts bills or decrees (i.e. legislative initiatives by a member of the parliament in question) optionally can be submitted to the Legislative Section of the Council of State for advice at the request of the Chairman of the parliamentary body in question. The number of requests for advice on proposals for acts and decrees is significantly lower than for requests concerning draft acts, decrees

mandatory, the government can still decide not to ask advice if the norm must be urgently completed and thus leaves no time to await the advisory opinion of the Legislative Section. If the government bases itself on this urgency, it must still justify this decision. Justifications that concern decrees can be verified later by the Council.

§ 2. Sanctions in the event of failure to comply with the obligation for consultation

6. If a normative text was not submitted to the Legislative Section for advice although consultation was mandatory, and not duly motivated on grounds of urgency, or if these grounds are lacking or deemed insufficient, the question of sanctions arises. To answer this question, one must discern the nature of the normative text.

If the consultation obligation has been infringed in regard to a bill, decree or ordinance, the most that can be done is a political sanction, i.e. a possible loss of confidence in the authorities who failed to consult. Neither the bill, decree or ordinance can be destroyed due the infringement of the consultation obligation, because the Court of Arbitration does not consider itself authorised to impose sanctions¹⁴.

Matters are different as regards draft decrees. From the importance that is accorded to the collaboration with the Legislative Section and from the consideration that the law requires the executive power to consult on these matters, we can deduce that the legislator considered the consultation process to be a substantial procedural requirement. The Court of Cassation has therefore pointed out that such infringements lead to the invalidity of the decree in question¹⁵.

Consequently, non-compliance with the consultation obligation can form grounds for the annulment of regulatory decrees by the Legislative Section of the Council of State¹⁶. Moreover, judges (belonging to the Judiciary) must refuse to

or ordinances. In fact, proposals for acts, decrees or ordinances lead to effective legislation much more infrequently than drafts.

¹⁴ Court of Arbitration, n/ 73/95 of 9 November 1995.

¹⁵ Court of Cassation, 10 March 1955, *Pasicrisie*, 1955, I, 760.

¹⁶ ANDERSEN, R. AND VAN DAMME, M., "De affleeling wetgeving van de Raad van State", in *Vijftig jaar Raad van State. Liber Memorialis 1948-1998*, Ghent, Mys & Breesch, 1999, 103-104.

apply such decrees that infringe the consultation requirement, pursuant to article 159 of the Constitution¹⁷.

§ 3. Characteristics of the advisory opinions

7. Advisory opinions by the Legislative Section have three main characteristics. First of all they are legal advisory opinions, i.e. the Legislative Section does not concern itself with policy issues, the expediency of the envisaged regulations, but restricts itself to examining exclusively those legal problems regarding content and form that arise in the presented text¹⁸.

Advisory opinions by the Legislative Section are non-binding, i.e. the authorities requesting the advice are free to follow or reject the advisory opinions without the need to justify their actions in any way whatsoever.

They are not required to consider the advisory opinions, although in practice the Legislative Section's advisory opinions have great moral authority¹⁹. For instance, it would be considered abnormal for the authorities seeking advice to ignore advisory opinions that indicate a conflict with the constitution or a serious illegality.

Finally, the advisory opinions by the Legislative Section are thorough and well considered. In their advisory opinions, the Legislative Section does not only indicate the existence of a problem, but also its background and the possible and legally acceptable solutions.

8. The fact that the Legislative Section only examines the technical and legal aspects of the presented texts and does not discuss their expediency, does not mean that these studies must be purely procedural.

Traditionally, it is pointed out that the advisory opinions of the Legislative Section imply a study that focuses on three main areas, i.e. the legality of the presented normative text, the adaptation of the stipulations of the presented text to the extant legislation, and the legibility of the text²⁰.

¹⁷ Article 159 of the Constitution goes as follows: "*The courts and tribunals will only apply general, provincial and local decrees and ordinances to the extent that they comply with the law.*"

¹⁸ It is in this area that advisory opinions by the Legislative Section of the Council of State differ from those given by Councils of State in neighbouring countries (e.g. the Netherlands). In these countries the Council of State does indeed evaluate policy aspects pertaining to the submitted texts. For an up-to-date study of the organisation and functioning of the Dutch Council of State, see X, *De Raad van State. Een stand van zaken*, Deventer, W.E.J. Tjeenk Willink, 1997, 145 ff.

¹⁹ For a particularly interesting study of the extent to which the branch's advice has been followed in the past concerning constitutional matters, see VELAERS, J., *De Grondwet and de Raad van State, Afdeling Wetgeving*, Antwerp/Apeldoorn, Maklu, 1999, 1034 ff.

²⁰ ALLEN, A., *De afdeling wetgeving van de Raad van State. Enkele kanttekeningen bij haar adviespraktijk*, in *Publiek recht, ruim bekeken. Opstellen aangeboden aan Prof J. Gijssels*, Antwerp/Apeldoorn, Maklu, 1994, 1-28.

The three aforementioned focus areas lets one infer that the Legislative Section of the Council of State plays an important preventive role as regards the protection of the citizen against the administration. Through its advisory opinions, the Legislative Section will help improve the quality of normative texts. This in itself will lead to a reduction in the number of disputes when the texts are applied later. The higher the legal quality of the normative texts, the fewer problems that will result from the application.

9. The legality study by the Legislative Section of the Council of State means that it will check whether the submitted regulation was issued by the proper authorities, i.e. whether the rules allocating authority, as incorporated into the Constitution and derived legislation, have been respected²¹. This aspect of the branch's authority explains its considerable input in the federalisation process.

Firstly, the Legislative Section is involved in the creation of the texts that allocate authority, as all these texts were submitted for advice. In addition, the Legislative Section issues advisory opinions on normative texts that apply these authority-allocating laws. The advisory opinions of the Legislative Section have thus become an important tool for interpreting those laws that divide authority between the federal government and the different regions²². Consequently, it is not surprising that in its judgements, the Court of Arbitration regularly refers to these advisory opinions.

Legality studies by the Legislative Section also entail checks whether the submitted texts conflict with certain conventional or constitutional principles, such as equality. The Legislative Section will assess the application of the latter principle while using the jurisprudence developed by the Court of Arbitration in this area.

Another aspect of the legality study is that of the legal basis. For instance, the King can only issue a decree if authorised by the legislator²³.

10. In its advisory opinion, the Legislative Section points out any stylistic errors, omissions, inconsistencies or ambiguities. The Section regularly notes discrepancies between Flemish and French versions in drafts of federal norms submitted to it²⁴.

11. The Legislative Section will also determine whether the administrative procedure that normally proceeds the drafting of the submitted normative text

²¹ Are the federal legislators authorised or does the submitted regulation concern an issue that is allocated to the regions or communities?

²² Persons who intend to lodge an appeal for annulment with the Court of Arbitration may find useful arguments on which to base their appeal.

²³ In certain cases the King may obtain his authority directly from the Constitution (e.g. when establishing an administrative department or an advisory committee).

²⁴ In principle, any texts that are issued by one of the regions are drawn up in a single language and are accompanied by an unofficial translation. Exceptions to this are: texts from the Brussels Capital Region, which are drawn up in two official languages, i.e. Flemish and French.

was duly respected, i.e. whether the prescribed advisory opinions or agreements were sought from advisory or other institutions²⁵. If not, the branch can refrain from any further examination of the text in question.

§ 4. The term within which the advisory opinions are given

12. In principle, the Legislative Section sets itself a term within which it will present its advisory opinions. There are a number of exceptions to this rule, however, that in practice are applied so often that it has become habitual for the advisory opinion to be given within a certain period²⁶.

First of all, the legislator has provided the possibility to request the advice of the Legislative Section within three days at the latest²⁷. In this case the advisory opinions can be restricted exclusively to a study of the legal basis, the authority of the body drafting the norm and compliance with procedural requirements.

Such urgent requests for advice within three days were conceived by the legislator as exceptions, limited to instances when the normative text in question needed to be published without delay. In practice, though, this possibility has seen more frequent use. Therefore the legislator has instituted two measures to temper the use of urgent requests for advice.

First, since 1996 the legislator requires that authorities making such urgent requests for advice must state the grounds for the urgency²⁸.

Second, also in 1996, the legislator provided the possibility of requesting that such advice be given within one month at the latest²⁹.

²⁵ This aspect of the Legislative Section's examination explains why, in principle, it is the last to give its advisory opinions, i.e. after those of all other advisory bodies. At this point we again emphasise that the Legislative Section's advisory opinion is strictly legalistic, while other advisory opinions are usually more concerned with policy.

²⁶ The government can only request that the Legislative Section give its advisory opinions within one of the terms stipulated by law and therefore not within a term determined by the government itself.

²⁷ Compared to Councils of State in neighbouring countries, this possibility can be considered unique.

²⁸ The judge can verify these grounds. Particularly for normative texts of a regulatory nature (decrees) this can have extensive consequences (e.g. annulment by the Administration Section of the Council of State).

²⁹ This possibility almost immediately became the most frequently applied option. For example, between 16 September 1997 and 30 June 1998, no less than 522 of the 1068 requests were for advice within one month at the latest. The explanation for this is twofold: such requests need not be motivated and, differently to requests for advice within three days at the latest, do not lead to examinations that are limited only to specific aspects.

§ 5. Who issues the advisory opinions?

13. The advisory opinion of the Legislative Section is issued by a monolingual chamber³⁰ consisting of three members of the Council of State who can be assisted by one or more assessors, i.e. persons from outside the Council of State who have great scientific or practical expertise in a particular field of law and who are appointed for a limited, albeit renewable, period of time (cf. professors or high-ranking civil servants)³¹.

Requests that give rise to problems regarding the distribution of authority between the federal government and the communities or regions are examined by the "combined chambers", i.e. a joint meeting of one French-speaking and one Flemish-speaking chamber.

Contrary to the Administration Section of the Council of State, which acts as an administrative court, the meetings of the Legislative Section are not open to the public.

Chapter 3. The Administration Section: the settling of administrative disputes

§ 1. A unique responsibility: the annulment of administrative acts

14. Besides its advisory role in regard to legislation, the Council of State also has a jurisdictional role in regard to governmental actions. The Administration Section of the Council of State performs the latter task.

To fulfil this task, the Council of State has an authority that ordinary courts and tribunals do not possess, namely the authority to annul governmental actions, i.e. to nullify them both in the past and in the future: annulled actions are considered to have never existed, as it were.

Anybody who has an interest in the annulment of an administrative action can petition the Administration Section of the Council of State, no matter whether one is a private individual, a legal entity or - under certain circumstances - an association³².

³⁰ Requests for advice on federal normative texts are allocated to a Flemish or French-speaking chamber according to the ministerial department from whence the request was submitted. Thus, all requests concerning texts submitted by the ministry of Justice are always handled by one chamber, while a different chamber always examines texts from the ministry of economic affairs. This promotes specialisation within the Legislative Section.

³¹ There are two Flemish-speaking and two French-speaking legislative chambers in the Council of State.

³² Associations can validly petition the Administration Section of the Council of State if they are legally or administratively acknowledged and are involved in the functioning of the civil service (BAERT, J. and DEBERSAQUES, G, *Ontvankelijkheid, Raad van State. Afdeling Administratie*. Bruges, Die Keure,

15. The power of annulment is by far the most important and most exercised of the Council of State's powers, and that are listed in the Council of State Act, as co-ordinated by the King on 12 January 1973³³. The Administration Section has types of power of annulment, depending on the object³⁴. The appellant either requests the annulment of an administrative act, i.e. an act performed by an organ of the current administration³⁵, or the appellant requests the annulment of a verdict given by a lower-ranking administrative court or - on occasion - by a administrative body that, besides its administrative task, also performs a jurisdictional task in regard to a particular matter³⁶. In the latter case, the Administration Section acts as the Supreme Judge for administrative matters.

Its power of annulment allow it to sanction an extremely wide variety of illegalities, ranging from conflicts between the act and a higher norm (e.g. with the law, or also with the constitution or international treaties, or even with general principles of good administration), over non-compliance with certain administrative procedures, the lack of proper authority by the perpetrator, to cases where the government has failed in its responsibility to protect the public welfare³⁷.

16. The Administration Section can only exert its powers of annulment if no other judges, i.e. conventional judicial judges, are competent. We wish to remind the reader of what we previously stated under point 2 above, concerning the

1996, 140-146, it' 130-136)

³³ Occasionally, as an institution of appeal, the Administration Section will conduct a completely new investigation of a matter and exchange its verdict for that of the disputed verdict (this is the power termed "unlimited jurisdiction" ("in volle rechtsmacht"), for instance, it is applied to disputes pertaining to local elections). Sometimes the Administration Section will award a financial compensation for the damages suffered due to an administrative act. Another responsibility of the Administration Section is an advisory one: the Prime Minister or Chairman of a regional or community government can seek its advice on administrative issues that are not in dispute. Finally, the Administration Section also has a series of purely administrative tasks, such as those concerning the ratification of articles of association. For a more detailed discussion of all these powers of the Administration Section of the Council of State, see, among other: MAST, A., DUJARDIN, J., VAN DAMME, M. and VANDE LANOTTE, J., *o.c.*, 811 ff., n/ 821 ff.

³⁴ The powers of annulment are described in article 14 of the Co-ordinated Council of State Act.

³⁵ In this case it concerns Royal or other Decrees: solely the Court of Arbitration is authorised to annul bills, decrees or ordinances.

³⁶ A perfect example of such an administrative body is the Standing Delegation of the Provincial Council, which not only is responsible for the "daily management" of the province, but also occasionally has a jurisdictional role (e.g. concerning disputes about the validity of local elections).

³⁷ Traditionally, one differentiates between external illegalities (incompetency, non-compliance with specific procedures) and internal illegalities (infringement of a higher norm, failure to fulfil responsibilities). Here we refer to VRANKS, A., *Administratieve rechtshandelingen*, Bruges, Die Ketire, Administratief Lexicon, 1961. Due to the recent Act of 25 May 1999, a difference was made in article 14 of the Co-ordinated Council of State Act, describing the powers of annulment of the Administration Section. It differentiates between annulment appeals against acts of government and cassation appeals, as regards the listed forms of illegality. For the reasons for this differentiation and its concrete effects, see VAN DAMME, M., "De Raad van State als administratieve cassatierechter", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 2000, 76-78.

manner in which authority is distributed between judicial and administrative judges.

The distribution of authority between judicial and administrative judges is based on general constitutional principles. Nonetheless, since the founding of the Council of State in 1946, there have been relatively few competency conflicts between both jurisdictions³⁸. The reason for this is that the authority of the Belgian administration is allocated, i.e. the administration has no other powers than those allocated to it by the legislator.

In the event that such attribution conflicts do occur, it is the task of the Court of Cassation³⁹, pursuant to article 158 of the Belgian constitution, to decide on the ultimate competency of such judicial institutions.

§ 2. An important novelty: administrative summary jurisdiction

17. The annulment appeal to the Administration Section does not have a suspensive effect. This means that an administrative act can be carried out although an appeal has been lodged. Consequently, when the Administration Section commences with the annulment it will be impossible for the citizen to obtain redress in kind, and he will have to be satisfied with claiming possible damages before an ordinary court, who can infer from the annulment by the Administration Section that the government has committed an illegality and thus an error.

It is not surprising that legal doctrine pointed out that annulment decisions by the Administration Section were often merely "platonic", as they often did not provide the citizen with true redress.

In response to this criticism, in 1991 the legislator established a complete procedure for summary jurisdiction by the Administration Section of the Council of State. In future, one could not only claim the annulment of an act of governance, but also that its execution be suspended. In addition, it can be requested of the Administration Section that it order various provisional measures against the authorities, with aim of preventing citizen from suffering irreparable damages by the time a verdict is reached on the annulment appeal⁴⁰.

The suspension procedure for the Administration Section is a summary procedure that must be differentiated as such from the annulment procedure,

³⁸ For an overview of these conflicts, termed "attribution conflicts" ("attributie-conflicten"), see MAST, A., DUJARDIN, J, VAN DAMME, M. and VANDE LANOTTE, J., *o.c.*, 953, n/ 924, point 15.

³⁹ The Court of Cassation can be described as the highest judicial court (i.e. belonging to the Judiciary) in Belgium.

⁴⁰ For more information about administrative summary proceedings, see, among other, LANCKSWERDT, E., *Het administratief kort geding*, Antwerp, Kluwer rechtswetenschappen, 1993, 234 ff.

although one cannot request a suspension or provisional measures without simultaneously requesting the annulment of the act in question⁴¹.

Undeniably, the introduction of the summary procedure made the Administration Section more relevant and effective. The suspension decisions, alone, mean that the Administration Section can exert a more direct influence on the implementation of administrative acts and its decisions therefore surpass the often theoretical and sometimes irrelevant nature of annulment decisions.

In any case, the power of suspension rapidly has led to the generation of the most extensive range of disputes involving the civil service. This has made legal protection against the administration even more attractive to the populace.

§ 3. The posing of pre-judicial questions

18. The Administration Section of the Council of State is authorised solely to annul administrative acts or decisions by lower administrative courts or to suspend their execution. It is not authorised to annul or suspend operative norms, such as federal laws, decrees or ordinances. The latter power belongs exclusively to the Court of Arbitration.

Nonetheless, sometimes, in order for the Administration Section to reach a verdict, it needs to determine whether a law, decree or ordinance fully complies with the Constitution. This is the case if the Administration Section is asked to annul an act of governance that aims to implement a law, decree or ordinance, and if the appellant claims the unconstitutionality of the latter in order to more easily obtain the annulment of the administrative act in question.

Because the Administration Section is not authorised to judge the constitutionality of laws, decrees or ordinances, it will suspend such proceedings if such a question arises and is essential to settling the case. It can then put a pre-judicial question to the Court of Arbitration, i.e. a question whose answer is crucial to deciding the dispute⁴².

As soon as the Court of Arbitration has answered the question, the proceedings can continue, taking into account the answer received⁴³.

⁴¹ Administrative summary proceedings can only be invoked against administrative acts, i.e. acts by the current administration, and therefore not vis-à-vis acts by lower administrative or other courts.

⁴² Being the highest administrative court, the Administration Section is, in principle, even required to ask such a pre-judicial question at the request of one of the involved parties. These pre-judicial questions need not necessarily be addressed to the Court of Arbitration, they can also be directed to the European Court of Justice if the question concerns the interpretation of the EU convention.

⁴³ Whether pre-judicial questions must be asked in the course of suspensive procedures that, per definition, require rapid handling, is the subject of a diversified, non-uniform jurisprudence. Among other, we refer to WEYMEERSCH, W., "Prejudiciele vragen aan het Arbitragehof in het raam van het administratief kort geding", *Rechtskundig weekblad*, 1997-1998, 585-598.

§ 4. Characteristics of the procedure

19. Proceedings with the Administration Section consist of summary procedures that are relatively easy to lodge. A written request, sent by the citizen or his lawyer, is sufficient.

Because the disputes before the Administration Section always focus on the actions of the administration and thus on the interests of the general public, and because, in principle, the dispute is conducted between parties that per definition are unequal⁴⁴, the Administration Section itself ensures the proper conduct of the proceedings and does not leave the parties the freedom normally enjoyed in proceedings in judicial courts. For this reason the procedure with the Administration Section is called an inquisitorial procedure⁴⁵.

Furthermore, proceedings with the Administration Section are mainly in writing, implying that, in principle, the court is rarely addressed in person. This, understandably, is different for the summary procedure, as these proceedings are much shorter than annulment proceedings and do not leave any time for extensive exchanges of written documents between the parties. Therefore, in departure to normal proceedings, pleas are frequently made in administrative summary proceedings.

§ 5. The guillotine system in the Council of State

20. The varied tasks of the Administration Section, combined with the introduction of the administrative summary procedure, have led to a rise in the number of cases and a certain amount of backlog.

The legislator has instituted various measures to combat this backlog, or at least reduce it to reasonable levels⁴⁶, such as a gradual increase in staffing, the introduction of a four-year plan to remove all backlog and the introduction of single-judge courts⁴⁷.

Furthermore, the legislator started to severely penalise failures to respect certain terms for submitting documents and considered immobility to imply that the appellant no longer possess the legally required interest.

⁴⁴ Because of its task of ensuring the good of the general population, the administration enjoys certain privileges that are unavailable to the citizen

⁴⁵ In addition, proceedings with the Administration Section are autonomous, i.e. the procedure is the object of a separate rules, different to the procedural rules defined by the Civil Code - which applies to judicial courts.

⁴⁶ For a discussion of these measures, see VAN DAMME, M., "Het wegwerken van de achterstand in de rechtsbedeling door de Raad van State", *Rechtskundig Weekblad*, 1998-1999, 1469-1474.

⁴⁷ The traditional handling of cases by a chamber consisting of three judges has become the exception, rather than the rule.

In both cases, the legislator assumes that the appellant collaborates insufficiently with the Legislative Section and therefore must be sanctioned by rejecting the annulment appeal. Consequently, it is insufficient for the appellant to submit an annulment appeal to the Administration Section and then simply let the case run its course. Instead, in the course of the case he will need to present various documents to the Administration Section in a timely manner in order to prevent his appeal from being put aside by the Council.

The Administration Section is extremely strict in its terms for submitting documents. Legal doctrine therefore often refers to this as the "guillotine" system of the Council of State⁴⁸. This system has fulfilled its purpose, namely to achieve rapid settlement of a large number of disputes, solely on procedural grounds and without the need for in-depth investigation⁴⁹.

The guillotine system can be considered a makeshift solution for dealing more swiftly with the flood of cases that have to be handled by the Administration Section. As such, this system has proven its worth in the battle against backlog. For the citizen, however, proceedings with the administrative have become more complicated and less accessible.

Chapter 4. The main departments of the Council of State

§1. The members of the Council of State

21. Both the decrees by the Administration Section and the advisory opinions of the Legislative Section are the result of the collaboration between the different divisions of the Council of State.

Schematically, the Council of State consists mainly of three separate departments, each with their own role in the institution's operations.

First, there is what can be called the consultative and decision-making body. It consists of those members of the Council who make the decrees and give the advisory opinions.

On 1 May 2000, the Council had 38 full-fledged members, half of which are Flemish-speaking and the other half French-speaking. The members are appointed for life by the King from two lists of three candidates that are

⁴⁸ Among other, see LAMBRECHTS, W., "De guillotine in de Raad van State", *Rechtskundig Weekblad*, 1992-1993, 227-229.

⁴⁹ BAETEMAN, G., "De Raad van State op de drempel van de 21ste eeuw", in BAETEMAN, G, DEBERSAQUES, G. and VAN DAMME, M. (eds.), in *50 jaar Raad van State*, Bruges, Die Keure, 1998,25.

submitted alternately by the Council of State⁵⁰, the Chamber of Representatives and the Senate⁵¹.

External persons can be appointed as members of the Council of State if they satisfy the required conditions, e.g. age (minimum 37 years old), legal training and useful legal experience (at least 10 years). In order to ensure a certain amount of continuity within the Council of State, the legislator has determined that at least half of the members must be recruited from the auditors' office of the Council of State. This means that there is a productive combination of internal experience and external expertise.

Once appointed, members of the Council are allocated to a specific department, i.e. the Administration Section or the Legislative Section. In consideration of the large number of cases submitted to the Administration Section, about one-third of the members is allocated to the Legislative Section and two-thirds to the Administration Section.

Work in the Council of State is organised in such a way that members who advised on a certain normative text cannot be involved in annulment appeals against the same text that are lodged with the Administration Section. In other words, there is a true separation between the chambers in both branches of the Council of State and members form part of one of the branches, but never both⁵².

§ 2. The auditors' office

22. The members of the Council of State pronounce the judgments and formulate their advisory opinions on the basis of prior research performed by the auditors, who record the findings of this research in written reports. The auditors are fully independent and objective in their research; i.e. they always assume the position of legality and, for example, do not act in name of or for the

⁵⁰ The members of the Council of State have every interest in proposing only candidates with guaranteed professional competence and independence. This is because such candidates are potential colleagues with whom they will need to collaborate on a permanent basis. Consequently the proposal of candidates by the Council of State is of great practical use.

⁵¹ Due to a recent change in the appointment procedure, the Chamber of Representatives and the Senate no longer need to submit a second list if the Council of State unanimously agrees on the first list. To date, however, such a unanimous proposal has never been achieved.

⁵² As a result, the Belgian Council of State cannot be confronted with the problem that faced the Luxembourg Council of State pursuant to article 6, section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which led to the Procola-judgment of 28 September 1995. In this judgment the European Court of Human Rights concluded that the Luxembourg Council of State could not be considered an "impartial judge", as the same judges had earlier been involved in advisory opinions on a normative text that was later disputed by an annulment appeal (for the Procola-judgment, among other see SPIELMANN, D., "Le Conseil d'Etat luxembourgeois après l'arrêt Procola de la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, 1996, 289; BOUMANS, E., "Het Procola-arrest... twee jaar later", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 198, 387).

administration whenever it is involved in a dispute before the Administration Section of the Council of State⁵³.

The members of the auditors' office are appointed by the King from a list that orders them according to their results in a comparative exam. The Council of State determines the conditions of this exam and appoints the exam committee. In order to take part in the exam, the candidates must be over 27 years old and have three years of pertinent legal experience.

On 1 May 2000, the auditors' office had 64 members. Some of them - about 15 - exclusively perform research for the Legislative Section, while others work in the Administration Section. One tries to achieve the greatest possible specialisation in the allocation of auditors to either of the two branches of the Council of State, i.e. once allocated to a specific department, the auditors will always handle cases in the same domain. The specialisation of the Council members is thus continued to the level of the auditors.

The reports of the auditors are not binding for the Council members. In practice, however, these reports are valuable and form an important part in the generation of the decree or advice. As regards the Administration Section, it actually so - certainly for annulment appeals⁵⁴ - that the parties can obtain a first important indication of the direction the case is taking and of the Council's final verdict from the auditor's report.

§ 3. The co-ordination office

23. Finally, there is still the "documentation" body of the Council of State, namely the co-ordination office. Its members are called "référendaires" ("senior legal clerks"). The auditors perform the research and the Council members confer and decide with the aid of the documentation provided to them by the members of the co-ordination office⁵⁵.

The documentation stored by the co-ordination office mainly concerns the current state of the legislation. This documentation is made available to all departments of the Council of State and, due to a recent amendment, also to the general public. In practice, though, the co-ordination office mainly works for the Legislative Section⁵⁶. The co-ordination office ensures that the Council of State

⁵³ For more details on the role of the auditors' office in the functioning of the Council of State, see ROELANDT, M., "Vijftig jaar Auditoraat", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 2000, 53-68.

⁵⁴ This is less the case for suspensive appeals, because in these appeals there is greater emphasis on the evaluation of the facts, which more easily leads to different assessments and thus to a different approach by the auditor than by the Council members.

⁵⁵ For more information on the co-ordination office, which on 1 May 2000 had 14 members, see QUINTIN, R., "Het coördinatiebureau", in *Vijftig jaar Raad van State. Liber Memorialis 1948-1998*, Ghent, Mys & Breesch, 1999, 231-239.

⁵⁶ Despite its name, the co-ordination office is only rarely involved in the "co-ordination" of normative texts. This is the integration into one, sequentially numbered text, with a uniform terminology, of e.g. a basic act and later amendments. The reason for this is that there is relatively little demand for the "co-ordination" of such texts (in regard to this see LAMBOTTE, CHR., *Technique législative et codification. Notes et exemples*, Brussels, E. Story-Scientia, 1989, 217).

formulates its advisory opinions in full awareness of all relevant normative texts⁵⁷.

The members of the co-ordination office must fulfil the same conditions for appointment as the auditors. For instance the need to pass the same exam. In practice, those succeeding in the exam usually start their career in the Council of State in the co-ordination office and, after a certain period, move the auditors' office subsequent to the first available opening. The advantage of this is that the personnel have the opportunity of learning every aspect of the Council of State. One drawback, however, is that the continuity of operations in the co-ordination office suffers from all too frequent personnel transfers. Consequently, one can only applaud the recent express decision by a number of magistrates to continue their careers within the co-ordination office.

Chapter 5. Conclusion

24. Since its founding in 1946, the Council of State has played an important and unique role in safeguarding the legal rights of the citizen vis-à-vis the administration. Its role is both preventive (Legislative Section) and repressive (Administration Section), and will grow in future, considering that the state intervenes ever more intensely in our modern society.

The fact that over the years the Council of State was allocated a number of new and additional powers only confirms the significant role in legal protection played by the Council in Belgium.

The question arises, however, whether the "popularity" of the Council will lead to its being overloaded and therefore whether in the long term one needs to provide greater professional articulation in its handling of disputes.

Such a structure might then consist of, for example, provincially-organised administrative courts of first instance for administrative disputes, while the Council of State would then function as a supreme administrative appeals court or as a court of "cassation" for prior verdicts.

This would at least prevent the majority of administrative disputes, irrespective of their content or importance, from being immediately brought before the Council of State, as is presently the situation.

⁵⁷ The members of the co-ordination office will also formulate technical remarks regarding the submitted draft texts. Thus there has developed a distribution of tasks between the co-ordination office and the auditors' office as concerns their collaboration with the Legislative Section: the "référéndaires" formulate technical remarks regarding legislative aspects, while the auditors carry out the more legally oriented research of the content.

Any reorganisation of the legal protection system along these lines would have organisational and budgetary consequences that are so serious that it cannot be implemented without thorough and well-considered preparation. Until this has been accomplished, the Council of State undoubtedly will continue and expand on its already considerable job of providing the citizen with legal protection.