

RESEARCH ARTICLE

The Many Faces of Procedural Formalism and Their Compliance with the Rule of Law—Lessons from the French and Polish Administrative Judiciaries

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Abstract

This article investigates selected contradictory procedural arrangements in France and Poland to establish how they can all operate under the same European rule-of-law standards. Building on the theoretical framework of procedural formalism and on the Polish and French highest administrative courts' case law on the procedural question of whether court staff can produce certain documents and copies thereof in place of a party to court administrative proceedings, the authors portray diversified, and sometimes even contradictory, approaches to procedural formalism, which testifies to inconsistent understanding and implementation of rule-of-law standards in proceedings before administrative courts in both countries.

Keywords: procedural formalism; rule of law; administrative courts; formal deficiencies

Introduction

'The rule of law is about form.'¹ Without procedural rules and formalisation of procedural acts, intrinsic rule-of-law values such as access to a court, predictability of proceedings, equality of arms, and, more generally, equality before the law would be unobtainable.² At the same time, the relation between procedural formalism and the rule of law is two-sided. On the one hand, the rule of law needs procedural formalism as an instrument of its realisation and protection. On the other hand, procedural formalism requires the rule of law to serve the good administration of justice, rather than transforming into a set of hollow formalities that impede the realisation of rights and freedoms.

However, procedural formalities can be arranged by lawmakers differently depending on the types of procedure in question and their vision of what procedures should be like. Moreover, adopted legal provisions can be interpreted differently by domestic courts, depending on factors such as the wording of the law, the interpretation methods applied by the courts, or the constitutional context in which the courts operate. These differences suggest that procedural formalism varies across countries. Yet,

¹ A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), p 25.

² We address rule of law as a set of principles, standards, and rights that are relevant in a procedural context. We are therefore not interested in discussions about rule-of-law backsliding, notably on the examples of Poland and Hungary. Instead, we concentrate on fundamental characteristics of modern court procedures that must be preserved to guarantee the rule of law, and not that of men (W Sadurski, 'Rule of Law v the Rule of Men and Women: What's in the Distinction? A Very Short Essay for Martin Krygier' (2019) 11 *Hague Journal on the Rule of Law* 377), in a courtroom. We address these procedurally relevant rule-of-law components in [Section III](#).

each EU Member State and State Party to the ECHR is bound by the same rule-of-law principle,³ which is a fruit of common European constitutional traditions. If procedural formalism is deeply connected with the rule of law, how can European states adhere to the same rule-of-law idea, all the while having different, sometimes even contradictory, procedural arrangements?

To solve this puzzle, we propose a comparative analysis of the interrelations between procedural formalism and the rule of law, focusing on the example of the functioning of similar formal requirements in procedures before Polish and French administrative courts.⁴ We have decided to narrow our analysis to the question of whether court staff can produce certain documents and copies thereof in place of a party to procedures before an administrative court. We chose this procedural issue because the solutions existing in Poland and France differ significantly, which enables us to demonstrate the varied faces of procedural formalism and assess how they can coexist under the same rule-of-law framework. We aim to demonstrate the differences in reasoning between the French Council of State (*Conseil d'État*) and the Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*), which led to them prioritising different rule-of-law procedural components and adopting contrary solutions.⁵ This will enable us to highlight the diversity in how the French and Polish highest administrative courts understand, weigh, and implement the same procedural standards and principles. The selection of Poland and France for the study is also justified by the different backgrounds of both administrative judiciaries, which, as we will argue, influenced their respective solutions. Whereas France has one of the oldest and, particularly, most powerful administrative judiciaries in Europe,⁶ Polish administrative courts have shorter traditions, were inspired more by Austrian rather than French thought,⁷ and operate in a post-communist legal tradition⁸ known for its formalistic approach, all within a different institutional context.⁹

The article is structured as follows. We start by outlining the theoretical framework of procedural formalism. Then, we present the French and Polish case law regarding the possibility for the court staff to produce documents or copies thereof in place of a party to the proceeding. The cases we bring up are not exhaustive on the matter, but are, rather, representative of the approach taken by both courts. In the final section, we compare existing solutions in Poland and France, juxtaposing them with procedural imperatives derived from the rule of law. This discussion is followed by conclusions

³L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague Journal on the Rule of Law* 107, pp 122–23.

⁴Throughout the article, we cite Polish and French legal acts, case law, and doctrinal views. As the reader can find legal acts and judicial decisions of both countries in open access, we do not invoke citations from them in original languages. In turn, as scholarly writings could be more difficult to access, we provide these citations also in the language of origin.

⁵The legal problem we selected concerns traditional analogous, and not digitalised, procedures. It should, however, be clarified that in France representation by an attorney (*avocat*) before administrative courts is mandatory in many cases, such as when bringing an appeal in an administrative court of appeal (Article R. 431-11 of the Code of Administrative Justice; *Code de justice administrative*) and attorneys are obliged to file their letters via the website application *Télérecours* (see Decree No. 2016-1481 of 2 November 2016). Nevertheless, the French legal order is still noteworthy for our study as our goal is not to solve a specific problem existing in French law but to study different weighings of rule-of-law procedural imperatives. From this perspective, comparison of the reasoning of the French and Polish highest administrative courts offers a valuable insight into understanding how the same rule-of-law procedural imperatives are understood, weighed, and implemented in domestic legal orders.

⁶See J. Chevallier, 'Le Conseil d'État, au cœur de l'État' (2007) 123 (4) *Pouvoirs* 5.

⁷See W. Piątek, 'The Polish Legislation on Administrative Procedure' in G. della Cananea, A. Ferrari Zumbini, and O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion (1920–1970)* (Oxford University Press, 2023), pp 117–18. This explains why Polish administrative courts do not exercise advisory functions, why they are not recruited from among administrative officials as French judges are, as well as why these courts cannot, as a matter of principle, replace an administrative decision with their own ruling.

⁸Å. B. Grødeland and W. L. Miller, *European Legal Cultures in Transition* (Cambridge University Press, 2015), pp 9–15. See also the chapters about the French and Polish legal cultures in S. Koch and M. M. Kjølstad (eds), *Handbook on Legal Cultures: A Selection of the World's Legal Cultures* (Springer, 2023).

⁹See Section III.E.

regarding the compliance of diversified approaches to procedural formalism with procedural rule-of-law imperatives.

I. Procedural formalism—theoretical framework

As Jhering put it, ‘Form is the sworn enemy of arbitrariness, the twin sister of liberty’.¹⁰ In that sense, formalities are conceived of not as restraining human freedom but as allowing people to make use of it. In the context of court proceedings, formalism determines how procedural acts should be performed. On the one hand, it guarantees that those acts will be recognised within proceedings if they are performed in accordance with all formal requirements. On the other hand, it also determines the conduct of other procedural actors, including the court itself, ensuring high predictability of proceedings and enabling acts performed in breach of these requirements to be contested. Understood in this way, procedural formalism must, by its very nature, pursue a socially useful function. Indeed, formal requirements of all kinds introduce order to the proceedings, determining when and how acts are to be performed, and what will happen if someone fails to observe these rules. Thus, the primary function of procedural formalism is to arrange, structure, and order legal proceedings,¹¹ enabling both individuals to assert their subjective rights and the opposing party to defend their interests,¹² as well as courts to lawfully decide cases without straying outside their judicial duties.¹³ Thus, all procedural formalities must be justified and serve pragmatic purposes, making procedural formalism an integral part of the right to a fair trial.¹⁴

However, formalising a party’s procedural act inherently entails a restriction of access to a court. This is because formalism limits the freedom of procedural action of some to ensure the security of legal transactions for all. It should therefore benefit both the one whose will it restricts (because it guarantees the validity of their act) and other participants in the proceedings (because it ensures the predictability of procedures). From this perspective, formalism serves as an instrument for guaranteeing social equilibrium, requiring a fair balance between the imposed restrictions and the security that it offers. Violation of this proportion in either direction is undesirable. While an insufficiently rigorous formalism leads to the over-flexibility of law, resulting in a decreased predictability of procedures, excessive formalism over-complicates procedural acts or sometimes even renders them impossible to perform.¹⁵ Naturally, there is no universal balance between these values. Instead, ‘Their respective proportions vary from one legal system to another and, within each system, from one field to another. But it is generally by adjusting the sanctions of formalism depending on its various functions that we can achieve satisfactory solutions’.¹⁶

In practice, consequences for non-compliance with formal rules vary. They depend not only on the formality in question (what is required and for what purpose) and the degree of its violation but also on the nature of the procedural act in question. What is interesting for us here is that some sanctions, irrespective of how they are labelled in domestic legal systems, prevent a party from re-performing their defective act. At the same time, the consequences of such sanctions will be more severe if they concern procedural acts that are particularly important for the exercise of the right to a fair trial. This is the case of letters that initiate (first or higher-instance) court proceedings, and of letters that support the main claim. Indeed, their deficiencies may result in a refusal to hear the case

¹⁰ *Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit*, see R von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Part 2* (Breitkopf und Härtel, 1858), p 497.

¹¹ A Ciaudo, *Droit du contentieux administratif* (Lefebvre Dalloz, 2023), p 3.

¹² G Couchez and X Lagarde, *Procédure civile* (Sirey, 2014), p 4.

¹³ C Saiman, ‘The Law Wants to Be Formal’ (2021) 96 *Notre Dame Law Review* 1067, p 1100.

¹⁴ *Dos Santos Calado and Others v Portugal* (Application Nos. 55997/14, 68143/16, 78841/16, and 3706/17), 31 March 2020, para 116.

¹⁵ JL Bergel, *Méthodologie juridique. Fondamentale et appliquée*, 3rd ed (Presses Universitaires de France, 2018), p 63.

¹⁶ *Leur dosage respectif varie selon les systèmes de droit et, dans chaque système, selon les matières. Mais c’est généralement par une modulation des sanctions du formalisme selon ses diverses fonctions que l’on peut parvenir à d’heureuses solutions*, see *ibid.*

or losing it. Failure to comply with formal requirements may therefore determine the outcome of proceedings. To prevent an excessive restriction on access to a court (which would violate the right to a fair trial), if formal deficiencies are rectifiable, domestic lawmakers tend to oblige public authorities either to inform parties of the formal requirements they need to fulfil to perform procedural acts or to invite parties to bring a remedy to their defective letters. However, in the end, if these precautions do not work and judges end up with letters vitiated by some serious deficiencies, they may ask themselves whether the court may come to the party's rescue and fulfil those requirements in their place. As we will demonstrate in the next section, while in the case of Polish administrative courts this is strictly forbidden, in France there are situations in which the staff of administrative courts can take such measures. Nevertheless, when determining the consequences of violating formal rules, domestic lawmakers must do so within the limits of a fair trial. The legal system must therefore be able to detect and neutralise symptoms of excessive formalism. From the court's perspective, the solution would especially be (1) to change the interpretation of provisions expressing formal requirements or sanctions for their non-compliance, (2) to refuse to apply these provisions, or (3) to eliminate them from the legal system.

Setting excessively severe formal requirements, or sanctions for their violation, leads to upsetting the proper balance between the pragmatic need to efficiently arrange proceedings and the inherent necessity of constraining the freedom of its participants. This phenomenon is referred to in legal writings in various ways, for example as *excessive* or *artificial* formalism.¹⁷ Nevertheless, these denominations point to the same flaw of such formalities—the right proportion between benefits and burdens of procedural formalism is disturbed; thus, formalism ceases to perform its functions (or performs them to a lesser extent than it should). In such a situation, a reaction from the courts or the legislator is needed to restore the balance between the rigour of formalism and the advantages that (should) arise from it. The question is—how can courts distinguish natural formalism from its artificial or excessive manifestations, and how should they react when facing the latter? The comparison of the Polish and French administrative courts' case law reveals that this may pose significant challenges.

II. Contradictory procedural arrangements—examples

Administrative courts need access to certain documents that they will, for the sake of the adversarial procedure, send to other parties, and on which they can base their judgment. For this reason, laws regulating procedures before administrative courts ensure that courts have them at their disposal, because, if missing, their lack could prevent the court from delivering them to other parties or from judging the case at all. However, legal solutions in this regard and their judicial interpretations may vary from one country to another. Indeed, this is the case in Poland and France, where differences pertain to the possibility for the second-instance court staff to make a copy of the contested judgment, as well as of the party's action and letters supporting the main claim.

A. The possibility for the second-instance court to make a copy of the contested judgment not supplied by the appellant

When reviewing a judgment of the first-instance court, the second-instance court needs access to its content and a written statement of reasons. As courts cannot, as a matter of principle, initiate court proceedings *ex officio*,¹⁸ it would seem logical that it is the party lodging an appeal who should

¹⁷ See C Meurant, 'La bienveillance du juge administratif à l'égard des parties' in N Charrol et al (eds), *La bienveillance en droit public* (Mare & Martin, 2020), p 124.

¹⁸ Regarding France, see Constitutional Council decision of 1 July 2016, *Société Famille Michaud Apiculteurs SA et autre*, No. 2016-548 QPC; as for Poland, see A Matan, 'Zasada skargowości' in G Łaszczyca and W Piątek (eds), *System Prawa Sądownictwa Administracyjnego. Zagadnienia ogólne. Tom I* (Wolters Kluwer, 2023), p 913.

supply the court with a copy of the contested judgment. On the one hand, this solution was adopted in France, which has raised the question of whether a court can remedy this deficiency in place of the appellant. On the other hand, the procedure can also be arranged differently, which, as is the case in Poland, may eliminate altogether the possibility of such a legal problem arising during proceedings.

This question was addressed by the French Council of State (CE) in the judgment of 3 December 2004, *Commune de Rots*, No. 261577. The legal issue in this case arose before the Administrative Court of Appeal of Nantes, to which the Municipality of Rots appealed the judgment of the Administrative Tribunal of Caen. The problem in the second instance was that the Municipality's appeal was not accompanied by a copy of the contested judgment as required by Articles R. 412-1, R. 411-3, and R. 811-13 of the Code of Administrative Justice under penalty of inadmissibility. Moreover, the Municipality of Rots was informed of this duty along with notification of the first-instance judgment. The president of the Administrative Court of Appeal of Nantes, under the combined Articles R. 222-1 and R. 612-1 of the Code, could therefore declare this appeal inadmissible without inviting the Municipality to remedy this formal deficiency. However, in this case, a court clerk from Nantes requested that the Administrative Tribunal of Caen send over a file of the first-instance case, along with a copy of the missing judgment, and then attached it to the appeal case file. The court clerk, therefore, remedied the formal deficiency. Nevertheless, it did not stop the president of the Court of Appeal of Nantes from declaring the appeal inadmissible owing to the lack of a copy of the contested judgment. This decision was challenged by the Municipality of Rots before the CS, asking for its annulment. The CE held that the president of the Court of Appeal of Nantes had erroneously considered that the first-instance judgment had not been produced, as it was attached to the appeal case file by the court clerk.

In the Polish legal order, it would not be possible for this legal problem to occur. This is because, while contesting a ruling of the first-instance administrative court, Article 176 § 1 (1) of the law on proceedings before administrative courts (*Prawo o postępowaniu przed sądami administracyjnymi*) requires that the cassation complaint¹⁹ shall include an indication of the contested ruling. It therefore suffices to provide a date and reference number of the judgment without attaching it. However, the second-instance court naturally needs access to the judgment of the first-instance court to conduct a judicial review. This is guaranteed by Articles 177 § 1 and 179 of said law. While the first of these provisions requires that all cassation complaints shall be submitted to the court that issued the contested judgment, the second obliges this court to send the cassation complaint, along with the responses of other parties to the cassation complaint and its own case file, to the Supreme Administrative Court (SAC), which is the second-instance court. In this way, the latter obtains the entire case file, including the cassation complaint and the contested judgment from the first-instance court. It is therefore not the cassation applicant that needs to submit a copy of the contested judgment but the court whose judgment has been challenged. This solution relieves cassation applicants from the necessity of producing a copy of the judgment. Moreover, even if the first-instance court's judgment were missing, from a legal standpoint, it would be a matter of communication between courts. Thus, cassation applicants would not be disturbed.

B. The possibility for the court to make a copy of the party's action and letters supporting the main claim

In the second group of examples, it is not a copy of the public authority's act (judgment) that is missing in a case file but a copy of one of the parties' letters. Therefore, if they intend to communicate their will to the court, be it through actions initiating the proceeding or some statements within an already started proceeding, they need to supply the court with enough copies of their letter and its appendices so that the court can, to guarantee the adversarial (*contradictoire*) character of the proceeding, deliver

¹⁹ In the Polish procedures before administrative courts, the ordinary legal measure to contest judgments of the first-instance administrative courts is called a cassation complaint, and not an appeal.

it to other parties. The legal problem of making copies of these documents by the court itself in place of the party is therefore more likely to occur here. Indeed, this issue arose before both the Polish and the French administrative courts. However, the solutions provided by judges from these countries differ significantly. While the Polish SAC has forbidden administrative courts to make copies of parties' letters, the French CE accepts this possibility. Given the fact that the solution adopted by the SAC applies in practice to all kinds of parties' missing documents, we will present only the decision that enshrined this general rule. Yet, as the reasoning of the CE is more embedded in the context of particular formal requirements, to outline its interpretative approach properly we will refer to two cases.

In Poland, the possibility for an administrative judge to replace the applicant in making copies of their letter or its appendices was extensively discussed based on Articles 47 § 1, 49 § 1, and 58 § 1 (1) of the law on proceedings before administrative courts. The first of these requires that each letter produced by a party should be accompanied by copies thereof and of its appendices. In turn, the second one provides that the president of the court section shall decide whether formal deficiencies of submitted letters prevent further examination of the case, and therefore the party should be invited to remedy this situation, or whether they do not have any effect on the proceedings and, as such, can be ignored. According to the third one, the court rejects (declares inadmissible) actions that their authors did not rectify within the period prescribed by the court. At the same time, the statute does not contain any provisions regarding the court's ability to remedy formal deficiencies on behalf of the party. Owing to the absence of clear guidelines in this regard, the administrative courts' case law was divided. Some judges considered that the lack of a copy of an action (or its appendices) requires inviting the party to remedy this deficiency within seven days, failing which the action will be declared inadmissible. According to them, as there is no provision allowing courts to make copies in place of parties, such practices are forbidden. However, other judges noted that the law only states that the parties' letters must be accompanied by their copies, without specifying who can make those copies. Thus, they argued that if administrative courts have the necessary material capabilities to make copies themselves, they should do so for the sake of procedural economy and to ensure access to the court.

Owing to these case law discrepancies, the SAC issued a resolution of 18 December 2013, No. I OPS 13/13, thereby ending the dispute. The Court ruled that 'The failure of the complainant to attach the required number of copies of the action and copies of its appendices ... is a formal deficiency ... preventing the action from being given proper course, and which cannot be rectified by having the court make copies of the application.' The SAC explained that the statute neither obliges nor even allows courts to remedy formal deficiencies. Doing so would lead to a violation of equality of arms and the court's impartiality, as it consists, in fact, of acting in favour of one of the parties. Subsequently, the SAC stressed that the duty to make copies of procedural letters is a consequence of procedural formalism that obliges parties to perform procedural activities in the appropriate time, form, and sequence. Thanks to that, the procedure is structured and clear.

The French CE had the opportunity to address the issue of making copies of a party's letter in the context of different legal provisions. This is notably the case with judgments of 12 February 2003, *CCAS de la Commune de Castanet-Tolosan*, No. 249205 and of 19 June 2015, *Consorts Dziedzic*, No. 374140.

In the first case, Mrs Ginette X contested an implicit decision of the president of the Community Social Action Centre of the Municipality of Castanet-Tolosan and requested its suspension. In French interim relief proceedings, parties wishing to obtain a suspension of an administrative decision (*référé-suspension*) must present a separate request in this regard, which must be accompanied by a copy of the request on the merits, failing which the interim relief request will be inadmissible (Article R. 522-1 of the Code of Administrative Justice). The Administrative Court of Toulouse granted Mrs Ginette X a suspension of the contested decision, even though the Municipality of Castanet-Tolosan argued that she had not produced a copy of the request on the merits, owing to which the Municipality did not receive this document. In the Municipality's opinion, the request in the interim

should have been declared inadmissible. Hence, the Municipality contested this ruling before the CS, asking for its annulment. The problem was to determine whether the court president could declare such an interim request inadmissible if the original request on the merits had indeed been sent to the court registry office and the judge was aware of it. Formally, such an application should be considered as burdened with a formal deficiency (leading to its rejection). Still, in practice, the court staff could make a copy of it on their own (leading to its admission). The CE held that if the interim relief judge notes that the original version of the request on the merits has been sent to the court registry office, he may abstain from declaring the suspension request inadmissible owing to the non-production of its copy but, in such a case, he must add the missing request to the case file, so that the adversarial nature of the investigation is respected.²⁰ As a result, in such cases, judges have the liberty to decide whether they will consider interim requests inadmissible or admissible,²¹ but if they choose the latter, they are obliged to make a copy of the request on the merits and deliver it to the other party.²²

When it comes to the *Consorts Dziedzic* case, the problem arose before the Administrative Court of Appeal in Versailles, which was to hear an appeal from the judgment of the Administrative Court in Cergy-Pontoise. The president of the former court rejected the appeal owing to non-submission, by the appellant, of copies of documents attached to the appeal (not the appeal itself), which was required by Article R. 412-2 paragraph 1 of the said Code, and which made it impossible for the court to deliver them to other parties to the proceedings. The CE disagreed. It noted that the obligation expressed in Article R. 412-2 of the Code is not prescribed under penalty of inadmissibility, but only under exclusion of such documents from the proceedings. The risk of inadmissibility is only present in cases of failing to accompany an action with (1) its copy (Article R. 411-3) and, as a matter of principle, (2) the contested act or other document along with its copy (Article R. 412-1). In turn, under Article R. 412-2 of the Code, 'the judge is free to invite the party concerned to add these copies to the case file and to inform them that, if they fail to do so, the documents in question may be excluded from the proceedings; if the judge nevertheless intends to rely on all or part of these documents, he can only do so after ensuring that the parties have received them'. The CE did not explicitly state that judges can make copies of these documents on their own, but its position does not exclude this possibility. Owing to such open wording, some authors believe that the CE 'seems to imply that the judge can make the copies himself'.²³ This would not be surprising as such a solution follows a similar reasoning to the one presented in the *Commune de Rots* and *CCAS de la Commune de Castanet-Tolosan* cases, where this possibility was openly admitted.

III. Discussion

A study of the Polish and French legal regulations and their application in practice by administrative courts has revealed a diversity of legal solutions and reasonings regarding the same procedural questions. The way of interpreting provisions written in the passive voice, access to justice, the vision of judges' role in procedures, the nature (private or public) of the missing document, and that of the legal act introducing formal requirements (statutory or regulatory), as well as concern for the swiftness and rationality of proceedings, predictability of courts procedures, and equality of citizens before the law seem to be the most critical factors that legal scholars and administrative courts take into account when dealing with procedural formalism. A variety of these factors, as well as their differing understandings and balancing in Poland and France, testify to considerable discrepancies in the way of thinking about formalities in procedures before administrative courts.

²⁰See also CE judgments: of 3 March 2004, *Société Ploudalmezeau Breiz Avel*, No. 259001; of 9 November 2005, No. 279601; and of 31 July 2009, No. 295408.

²¹See R Rouquette, *Petit traité du procès administratif. Contentieux administratif, juridictions générales et spéciales*, 9th ed (Dalloz, 2020), p 1152.

²²See Ciaudo, note 11 above, p 458.

²³*Ce qui paraît laisser entendre que le juge peut faire les copies lui-même*, see Rouquette, note 21 above, p 785.

Closer scrutiny of these differences can contribute to a better understanding of how the contradictory reasoning of the CE and the SAC aligns with common procedural imperatives of the rule of law.

A. Interpretation of legal provisions written in the passive voice

When it comes to legal provisions that express formal requirements, both French²⁴ and Polish²⁵ laws governing procedures before administrative courts use the passive voice. From a grammatical perspective, this linguistic construction is used to stress actions that are undertaken over an agent. Passive voice leads to either marginalising the author of the action over the agent in the sentence or entirely eliminating them from it.²⁶ It is therefore clear that the provisions mentioned above underline the necessity to fulfil the formal requirements that they express. Still, the question is whether they determine who must or who can do it. Interestingly, the answer is different in Poland and France.

On the one hand, according to the Polish SAC, it follows from the literal interpretation of the legal provisions²⁷ in question that the applicant should submit to a court a letter with all the necessary copies thereof and its appendices. Thus, administrative courts are neither obliged nor competent to substitute for the applicant in this regard. In other words, the SAC finds that only the person who wishes to submit a letter legally within the proceeding can and must fulfil the formalities related to it.

On the other hand, in the eyes of the French CS, the lack of any indication of the agent responsible for submitting some documents or their copies means that anyone can do so.²⁸ Indeed, in the cases mentioned earlier, the CE appears to distinguish between who is *required* to produce certain documents and who is *permitted* to do so. Even though only the author of a procedural letter can be requested to remedy the letter's deficiencies, the court's role is only to verify whether missing items were submitted, and not by whom.

The reasoning of the Polish and French highest administrative courts differs considerably. Despite there being similar legal and factual circumstances, the adopted solutions are contrary. At the same time, however, they can both be perceived as respecting the wording of applicable legal provisions (or, more precisely, their passive voice).²⁹ After all, if legal provisions do not determine who must produce some documents, it is up to courts to clarify this issue. Nevertheless, the consequences of these two approaches are entirely different. While the Polish SAC has strengthened procedural formalism, thereby restricting access to courts, the French CE has moderated these requirements, rendering

²⁴Paragraph 1 of Article R. 412-1 of the Code of Administrative Justice states: 'The application ... must be accompanied by ... the contested act'; its paragraph 2 states: 'This act or document must ... be accompanied by a copy'; its Article R. 411-3 states: 'Applications must ... be accompanied by a copy'; and its Article R. 522-1 states: 'claims seeking the suspension of an administrative decision or of certain of its effects must be presented by a request separate from the request for annulment or reformation and accompanied by a copy of the latter'.

²⁵Article 47 § 1 of the law on procedures before administrative courts states: 'A party's letter must be accompanied by copies thereof and of copies of the appendices for their service on the parties, and in addition ... one copy of each appendix to the court file'. This is also true for other provisions of this law that were not invoked in this article owing to the fact that they cover other formal requirements, such as Article 46 § 1 according to which 'Each party's letter should contain ...' and Article 57 § 1, which states: 'The application should meet the requirements of a letter in a court proceeding and, in addition, include ...'.

²⁶For example, both of the following sentences—'A cat was seen in the street' and 'A cat was seen in the street by pedestrians'—emphasise the action of seeing a cat in the street, but in the first sentence it is not known who has seen the cat, while in the second it is clear that pedestrians have seen the cat.

²⁷SAC resolution of 18 December 2013, No. I OPS 13/13.

²⁸D Pouyaud, 'La recevabilité de l'appel malgré la non-production, par le requérant, du jugement de première instance' (2005) 2 *Revue française de droit administratif* 322, p 326.

²⁹For Poland, this was admitted by the SAC in its resolution. When it comes to the French CS, as was noted in the context of the *Commune de Rots* case, 'The Council of State adopts a pragmatic stance that may stray from the spirit of the decree but is in no way contrary to its wording. The decree does not require the applicant to have transmitted the contested judgment to the court'. See Pouyaud, note 28 above, p 326.

administrative courts more sensitive to the needs and interests of individuals.³⁰ It is therefore essential to understand the reasoning that led both courts to their respective conclusions.

To solve this puzzle, it is worth noting that the problem resides in the interpretation of the lawmaker's silence. Both the Polish and the French legal provisions determine what needs to be done (producing certain documents or copies thereof) without specifying who must or can do it. Moreover, in both legal orders, there is no provision explicitly enabling the courts to substitute for the party in doing so. Hence, the lawmaker's silence in this regard can be interpreted in two ways: it means either that the legislator deliberately did not limit the scope of actors that can fulfil this requirement, or that he did, but this limitation has another source than the letter of the law. This dilemma cannot be solved solely through the literary interpretation of laws.³¹ Both courts must have applied two different approaches.

When it comes to the French CS, the *CCAS de la Commune de Castanet-Tolosan*, *Commune de Rots*, and *Consorts Dziedzic* cases are a significant part of a broader evolution of procedures before the French administrative courts. Indeed, the CE has for a long time systematically criticised what it judged to be excessive formalism, thereby reducing the rigidity of procedural formalities. As Dominique Pouyaud summarised it, 'Common sense prevails over formalism'.³² It therefore seems that the French solution was guided by the concern not to pose unnecessary obstacles for those seeking judicial protection.

In turn, the Polish SAC considers that 'Making copies of a letter by the court to remedy deficiencies in place of one of the parties to the proceedings ... is not within the scope of permissible procedural acts of the court' as 'the legislator did not provide for any legal possibilities for the court to bring a remedy to formal deficiencies of procedural letters'.³³ The Court carefully tries not to go beyond the competencies conferred upon it by law. It therefore seems to apply (without, however, admitting it explicitly) one of the principles of the Polish constitutional law, namely the prohibition of presumption of competence.³⁴ According to this principle, public authorities, including courts, can exercise their mission using only those competencies that they have been explicitly granted in the law.³⁵ If no legal rule provides a possibility for an authority to perform certain actions, it cannot be presumed that this competence was granted implicitly.

Reasons put forward by both courts are essential for the realisation of the rule of law. On the one hand, courts should not pose artificial obstacles to citizens seeking judicial protection. Instead, they should maintain a proper balance between procedural formalism and rights and freedoms, so that the former does not annihilate the latter, but, on the contrary, helps to exercise those rights and freedoms properly. On the other hand, no public authorities, including the courts, can act without a proper legal basis—this principle is the very heart of the rule of law. It therefore seems that both the Polish SAC and the French CE based their decisions on some imperatives derived from the rule of law. The problem is that they chose to privilege different imperatives, which led them to different conclusions. We consider the reasoning of the CE to be more convincing. Even though the SAC is right to hold that the courts cannot arbitrarily grant themselves any power and that it is up to the lawmaker to decide what powers the courts will have, the literal interpretation of legal provisions written in the passive voice, as we have seen, does not prohibit per se the possibility for the court to make copies of missing

³⁰C Landais and F Lenica, 'Le pouvoir du juge d'appel de rejeter par ordonnance les requêtes non accompagnées de la décision attaquée est vaste, mais pas illimité' (2005) 4 *L'Actualité juridique. Droit administratif* 191, at p 193.

³¹Thus, the Polish SAC was wrong to claim that its decision results from the literary interpretation of the law.

³²*Le bon sens emporte sur le formalisme*, see Pouyaud, note 28 above, p 326.

³³SAC resolution of 18 December 2013, No. I OPS 13/13.

³⁴According to Article 7 of the Polish Constitution, the public authorities shall function based on and within the limits of the law. See P Tuleja, 'Komentarz do art. 7' in M Safjan and L Bosek (eds), *Konstytucja RP. Tom I. Komentarz do art. 1-86* (CH Beck, 2016), p 303.

³⁵W Chróścielewski and Z Kmiecik, 'Kierunki wykładni prawa w działalności orzeczniczej Naczelnego Sądu Administracyjnego' in J Góral et al (eds), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005* (Naczelny Sąd Administracyjny, 2005), pp 79–80.

documents. While dealing with such an interpretative dilemma and having two possible solutions—the first resulting in granting wider access to courts and the second restricting it—the court should have chosen the former, as it is the only solution that prevents the formal requirement in question from becoming a hollow procedural obstacle.

B. Role of the judge within proceedings

The title of this section may seem surprising. After all, judges are responsible for ensuring the good conduct of proceedings. In both Poland and France, they must verify whether the submitted letters comply with existing formal requirements. If so, these letters produce legal effects. If not, judges usually must invite parties to bring a remedy for rectifiable deficiencies and, if this is not done, reject such letters. Although things seem straightforward and similar in Poland and France, the discrepancy between the CS's and the SAC's case law demonstrates that these courts have differing understandings of their true role in this regard.

The French legal system is particularly known for the significant role of judges in the investigation of cases (*instruction*). This role was clarified in the judgment of 20 February 2012, *Ministre de la défense*, No. 350382, in which the CE considered that 'It is incumbent upon the administrative court, in exercising its general powers to conduct proceedings, to take all appropriate measures to obtain, through legal channels, the information necessary to enable it to form an opinion on the points at issue.' This active role of judges is particularly visible in the inquisitorial character of procedures before French administrative courts.³⁶ These responsibilities incline French administrative judges to seek *ex officio* all pieces that will enable the court duly to hear the case. If courts must actively participate in clarifying the case, then producing a copy of a document supporting the main claim of one of the parties, as suggested by the *Consorts Dziedzic* case, can be one of such methods. From this perspective, bringing a remedy by a judge to a deficient procedural letter is not an aid offered to a party but rather an instrument at judges' disposal for investigating the case (*mesure d'instruction*). However, an active role of French judges is also visible at the initial stage of proceedings, namely when they verify the compliance of parties' main demands with formal requirements. In the *CCAS de la Commune de Castanet-Tolosan* case, concerning the demand for the suspension of an administrative decision, the CE considered that 'if, in the absence of a copy of the request on the merits, the interim relief judge may decide not to declare the application for interim relief inadmissible if he finds that the application on the merits has been filed with the court registry, he must in that case include that application in the file so that the adversarial nature of the investigation [*instruction*] is respected'. This paragraph suggests that the active role of French judges within proceedings is not limited to clarifying the merits of the case, as in the *Consorts Dziedzic* decision, but also encompasses efforts to ensure that the case is heard at all. The CE appears to be guided in this regard by the need to secure access to justice and effective judicial protection.

When it comes to the Polish SAC, it seems to consider that the courts' only role in the initial stage of proceedings is to ensure that parties comply with existing procedural rules. Indeed, judges cannot replace parties in making copies of their letters because this 'could suggest that the court is acting in the interest of one of the parties, and this, in turn, would undermine the principle of impartiality of the court'.³⁷ The SAC discerns a link between judicial impartiality and equality of arms, as it considers that one of the ways in which judicial impartiality is achieved consists of 'equal formal requirements imposed on both parties to the proceeding'.³⁸ According to the SAC, equality of arms means that 'each litigant is granted equal means of protection in the proceedings and equal opportunities to use them

³⁶ See Bergel, note 15 above, pp 404–5.

³⁷ SAC resolution of 18 December 2013, No. I OPS 13/13.

³⁸ *Ibid.*

by taking appropriate procedural steps.³⁹ It suggests that the courts should remain entirely neutral in all aspects of their procedural activities—not only when adjudicating but also when verifying whether a party has complied with the formal requirements imposed on them by law. Especially, they should not substitute parties in fulfilling their procedural obligations, as this would mean that the legal protection offered by courts to parties is not equal, leading to a breach of equality of arms and casting a shadow on judges' impartiality.

The CE and the SAC appear to have differing understandings of the administrative courts' duty to actively verify compliance with the formal requirements of procedural letters. Whereas the CE did not consider at all issues of impartiality and equality of arms, the SAC did not address the active role of judges, including the inquisitorial aspects of proceedings. The only common point is that both courts seem to have addressed the issue of access to justice, but, even in this aspect, they did it differently. These differences in reasoning raise three questions. Firstly, does impartiality play any role in the verification of compliance by parties with formal requirements, as the SAC claims, or was the CE right to omit this issue? Secondly, does an active role of judges within proceedings justify fulfilling procedural requirements in place of parties, as the CE has accepted, or is it irrelevant, as the SAC's silence suggests? Thirdly, is the refusal to produce copies of documents in place of parties a sign of excessive formalism that hinders access to justice, as the CE seems to imply?

Firstly, impartiality, 'the absence of prejudice or bias',⁴⁰ is traditionally studied in relation to the exercise of judicial functions, specifically whether judges are impartial when forming an opinion on a case and delivering a decision.⁴¹ In turn, the issue of courts producing documents in place of parties concerns assessment of the admissibility of the submitted letters, rather than their merits. From this perspective, the SAC's concern for preserving objective impartiality is somewhat premature and misplaced. In the initial stage of proceedings, Polish and French administrative courts are not yet concerned with whether parties are right or wrong, but rather with whether their letters can be taken into account at all. We believe that the reduction of formal barriers should not be considered a breach of impartiality, especially if this does not determine the outcome of the proceeding but only removes procedural obstacles, allowing the case to be heard. After all, even if the court produces some documents in place of a party, this party may still lose the case. Moreover, assisting parties in producing documents is also justified by the specific architecture of procedures before administrative courts. In those proceedings, as a matter of principle, private persons challenge acts adopted by the public administration.⁴² The former acts as the attacking party and the latter as the defending party. This arrangement results in transferring most of the burden of formal requirements to private individuals, as formalities usually play the largest role in initiating court proceedings.⁴³ Furthermore, the lack of equilibrium is all the more striking if one considers that public administration traditionally exercises its administrative competencies unilaterally, and proceedings before the first-instance administrative court are the first legal situation in which private and public persons meet as equals. If it is accurate to consider that there exists equality of arms in procedures before administrative courts, which the SAC claimed to defend, this equality is limited. This distorted balance is one of the reasons for restrained

³⁹ Ibid. The Court has also noted a similar view expressed by Polish scholars. See JP Tarno, 'Zasada równości stron' in R Hauser et al (eds), *System Prawa Administracyjnego. Tom 10. Sądowa kontrola administracji publicznej* (CH Beck, 2016), pp 220–21 and M Romańska, 'Zasada równości' in T Woś (ed), *Postępowanie sądowoadministracyjne* (Wolters Kluwer, 2017), p 196.

⁴⁰ *Micallef v Malta* (Application No. 17056/06), 15 October 2009, para 93.

⁴¹ M-A Beernaert and F Krenc, *Le droit à un procès équitable dans la jurisprudence de la Cour européenne des droits de l'homme* (Anthemis Editions, 2019), p 114.

⁴² K Pabel, 'Verwaltungsgerichtsbarkeit—Wesen und Wandel' (2012) 67 *Zeitschrift für öffentliches Recht* 61, at pp 62–63. Exceptionally, it is also possible that two public authorities or two private entities (yet one of them endowed with the mission of exercising public powers) will meet in an administrative court.

⁴³ Polish scholars dealing with the civil procedure suggest that, as a matter of principle, it is easier to act as the defending party than the attacking one. See T Wiśniewski, *Przebieg procesu cywilnego* (Wolters Kluwer, 2009), p 69. We think that this remark is valid also within court administrative proceedings.

formalism within procedures before administrative courts,⁴⁴ as well as an active participation of a judge in the conduct and investigation of the case.⁴⁵

Secondly, as for the role of Polish and French administrative judges, it is worth noting that they are both responsible for conducting an active investigation into compliance by parties with formal requirements. When it comes to the model of proceedings they conduct, although procedures in both countries can be labelled as inquisitorial to some extent, this joint qualification is somewhat misleading. The distinction between inquisitorial (*inquisitoire*) and adversarial (*accusatoire*) models of proceedings primarily refers to the role of a judge within evidentiary proceedings, specifically whether a judge actively seeks evidence to clarify the case or whether their role is limited to assessing what parties submit to them. In this sense, French procedures are inquisitorial, while Polish ones are neither inquisitorial nor adversarial, as administrative courts in Poland do not generally admit any evidence. In turn, Polish procedures are more inquisitorial than the French ones in the area of judicial review. Indeed, Article 134 § 1 of the law on proceedings before administrative courts obliges first-instance administrative courts to actively seek and raise all violations of law that lead to the annulment of the contested decision. In contrast, their French counterparts are, as a matter of principle, bound by legal grounds (*moyens*) invoked by parties, and can *ex officio* point out only serious violations of law by the contested act (*moyens d'ordre public*). In other words, whereas French administrative courts must, *ex officio*, clarify factual aspects of the case, their Polish counterparts must, also *ex officio*, examine all legal aspects of the case. As we have seen, the active role of the French administrative judges in proceedings, including their inquisitorial duties, impacts the assessment of compliance by parties with formal requirements. In Poland, this is not the case. Polish scholars clearly distinguish between the initial stage of proceedings, when the court analyses the admissibility of a submitted letter, including verification of compliance with formal requirements, and the stage of examining the merits of the case, where first-instance administrative courts act according to inquisitorial logic.⁴⁶ In other words, French judges understand their active role in proceedings more broadly than their Polish counterparts. It means that, in France, judges can, to some extent, actively participate in the process of submitting procedural letters, whereas their Polish counterparts believe that this is not yet the stage at which a judge can act *ex officio*. This suggests that the answer to the question of whether an active role for judges within proceedings justifies fulfilling procedural requirements in place of parties depends on how this *active role* is understood within the domestic legal tradition. We believe that both visions are acceptable within the procedural framework of the rule of law.

Thirdly, when it comes to whether the refusal to produce copies of documents in place of parties is a sign of excessive formalism, we have already seen in the previous section that the CE considers it to be so. In turn, the Polish SAC claimed that it is not because (1) the duty to submit copies of the action (*recours, skarga*) results explicitly from the letter of the law, (2) the applicant's access to justice is safeguarded by the duty of the court to invite him or her to submit missing copies, (3) if the applicant fails to do it within the prescribed deadline for reasons beyond their control, the law allows them to ask for the reinstatement of the deadline,⁴⁷ as well as, as we mentioned earlier, (4) administrative courts were not granted the power to make copies in place of one of the parties and (5) doing so would breach the principles of judicial impartiality and (6) equality of arms.⁴⁸ The SAC did not explicitly address the reproach that refusal to make copies is excessively formalistic; instead, it concentrated on why courts cannot produce those copies, irrespective of whether this stance is formalistic or not. One

⁴⁴JP Tarno et al, *Sądowa kontrola administracji. Podręcznik akademicki* (Europejska Wyższa Szkoła Prawa i Administracji, 2006), p 21 and F Hufen, *Verwaltungsprozessrecht* (CH Beck, 2021), pp 383–84.

⁴⁵See G Guyomar and B Seiller (with A Meynaud-Zeroual), *Contentieux administratif* (Dalloz, 2021), pp 410–11.

⁴⁶W Piątek, 'Sądowa kontrola administracji publicznej' in R Hauser et al (eds), *Postępowanie administracyjne i sądowoadministracyjne* (Wolters Kluwer, 2021), p 432.

⁴⁷This is a procedure governed by Article 87 of the law on proceedings before administrative courts according to which if a person misses a deadline, they can still accomplish their procedural act if they justify that missing it was not their fault.

⁴⁸SAC resolution of 18 December 2013, No. I OPS 13/13.

might even get the impression that the SAC is aware of the increased (if not excessive) formalism of its standpoint but believes that the problem lies more with existing legislation and should therefore be addressed by lawmakers, rather than being an issue of the role of judges within proceedings.

C. Equality before the law and predictability of proceedings

In a procedural context, equality before the law refers to the equal treatment of people in similar procedural situations within different court administrative proceedings. From the perspective of this article, the concern is to prevent courts from producing documents or copies thereof in place of a party in some cases while abstaining from doing so in other cases. In other words, courts should either help all parties equally in the same procedural situation in different proceedings or refuse to provide such assistance to any party. Accepting that courts are free to decide whether to bring themselves a remedy for procedural deficiencies of the parties diminishes the predictability of procedures, thereby reducing legal certainty. After all, in such cases, the party will never know whether his or her demand will be heard or rejected owing to its formal deficiencies.

The French CE has decided to allow court staff to replace parties in fulfilling certain procedural requirements. Interestingly, in the *Commune de Rots* and *CCAS de la Commune de Castanet-Tolosan* cases this was explicitly acknowledged, whereas in the *Consorts Dziedzic* case this possibility was only implicitly suggested. At the same time, in none of these cases did the CE say that courts are obliged to do it, which suggests that they have discretionary powers in this regard. By doing this, it accepted the risk of unequal treatment of parties facing the same procedural obstacles in different proceedings.⁴⁹ When it comes to court staff making copies of the judgment, even though there are rulings that confirm that this practice has been continued,⁵⁰ unfortunately this was not always the case.⁵¹ Yet, the conduct of proceedings should not depend 'on the judge's mood'.⁵² The problem of unequal treatment is therefore real and, unfortunately, the CE did not suggest any measures to prevent it.

When it comes to the SAC's solution, it can be considered formalistic, but one must admit that it removes all ambiguity, ensuring, therefore, complete equality before the law and a high level of predictability of proceedings. It is the author of the letter and only they who *can* and *must* produce proper documents or their copies if they wish to perform a particular procedural act. Naturally, it can be argued that the SAC was too severe and followed, without having to, the reasoning of the Roman rule *dura lex, sed lex*. Yet, in this case, the court will treat litigants who find themselves in the same procedural situation equally. After all, equality of treatment does not imply that courts must equally relieve all litigants from their procedural duties. It can also mean that courts will equally refuse to assist any of them, especially if this is necessary to eradicate double standards within the justice system.

The French solution gives court staff discretionary powers that cannot be explained in the light of the rule of law. The very essence of this practice is that it is not the law that determines whether a court clerk or a judge will produce a copy of a document on behalf of a party but rather extralegal

⁴⁹See Landais and Lenica, note 30 above, p 193 and Rouquette, note 21 above, p 1233.

⁵⁰See CE judgments: of 10 May 2006, *Commune de Vendays Montalivet*, No. 275885; of 13 July 2006, *Société Soficham*, No. 267758; of 22 August 2007, *Office nationale de la chasse et de la faune sauvage*, No. 263049; and of 7 March 2008, *Société PGA*, No. 304690.

⁵¹See the CE judgment of 26 January 2005, *Madame Lerat et autres*, No. 262365. In this case, a party wanted to contest the judgment of the Administrative Court in Lyon. Although the letter joined to the appeal suggested that a copy of said judgment was attached, the court staff did not find it there. The party argued that it must have been lost by a court clerk. However, as the party did not prove it (and we believe that it is not possible to prove it at all), the President of the Administrative Court of Appeal in Lyon declared the appeal inadmissible. This could have been avoided if the court staff had made a copy of the missing judgment themselves. See also CE judgment of 22 February 2008, *Fauson*, No. 301912.

⁵²*De l'humeur du juge*, see D Chabanol, 'La régularisation des requêtes devant la juridiction administrative' (1993) 5 *L'Actualité juridique. Droit administratif* 331, p 335.

factors such as the goodwill of court staff, their diligence at work, or even a pure accident. Moreover, it should not matter who produces missing documents in place of a party—a judge or a court clerk. From the perspective of legal standards and that of parties to court proceedings, what is relevant is not the division of work and duties among the court staff in technical fields, such as copying documents, but ensuring the predictability of proceedings and equal treatment of litigants (both within a given proceeding and across different proceedings). In contrast, the Polish solution ensures complete equality before the law and a high level of procedural predictability. Although the Polish courts' refusal to produce copies entails negative consequences for applicants, it is a consistent and clear rule, as judges refuse to make copies of documents equally for all parties. Therefore, the latter can predict that courts will under no circumstances replace them in fulfilling their procedural duties.

D. Nature of the missing document

Documents that parties must submit to perform certain procedural acts may be diversified. Especially, they can be of public or private nature, meaning that they are established by public authorities or private individuals. The question is whether the nature of missing documents is a relevant factor court staff should take into account when considering the possibility of producing them or their copies in place of the party, and for higher-instance judges who assess the legality of such activities. This seems to be relevant in both the French and the Polish legal orders, but it leads lawyers from both countries to different conclusions.

French authors considered the nature of the missing document in the context of the *Commune de Rots* case, which involved a court clerk making a copy of the missing judgment on behalf of the party. Although the judgment does not explicitly address this aspect, scholars appear to place great emphasis on it. Even though it is clear that only the author of the letter can be requested to remedy its formal deficiencies, 'the judgment belongs to everyone: inadmissibility based on failure to produce it can therefore be covered by other actors than the applicant'.⁵³ It is, unfortunately, unclear whether other public documents also *belong to everyone*, or whether this is only the case with court rulings. This is particularly important to consider, as some documents originating from public authorities are available in open access. In contrast, others can only be accessed by those entitled by law, and still others are protected by secrecy. Although not every public document really *belongs to everyone*, and it may sometimes be difficult to operate such an assessment, it seems reasonable that courts should take into account the fact that they have facilitated access to some documents (for example the court of the second instance, when it comes to the first-instance case file). However, admitting this possibility questions the very reason for dividing documents into public and private ones. If one were to admit that courts can use the case file for making copies of some public documents, the question arises—why should it not do the same with non-public ones, which are also present in the case file?

The CE itself appears to have noticed this problem. It follows from its judgment in the *Consorts Dziedzic* case that if an appellant does not submit copies of documents attached to the appeal, the judge may invite them to send these copies under penalty of excluding missing pieces from the proceedings, but 'if the judge nevertheless intends to rely on all or part of these documents, he can only do so after ensuring that the parties have received them'.⁵⁴ As we noted, some authors interpret this ambiguous formulation as allowing judges to make copies by themselves.⁵⁵ If this hypothesis is true, it should be noted that documents that parties may bring to support their claim can be of a public or a private nature, and the issued judgment makes no distinction in this regard. Likewise, in the *CCAS de la Commune de Castanet-Tolosan* case the missing document was not public—it was an application on the merits (*requête au fond*), so a document established by an attacking (private) party, which did

⁵³ *Le jugement appartient à tous: l'irrecevabilité tirée du défaut de sa production peut dès lors être couverte par d'autres que le requérant*, see Landais and Lenica, note 30 above, p 192.

⁵⁴ See the CE judgment of 19 June 2015, *Consorts Dziedzic*, No. 374140.

⁵⁵ See Rouquette, note 21 above, p 785.

not stop the CE from considering that judges have the power to decide whether an interim request not accompanied by a copy of such a request on the merits is admissible or not. Admissibility entails the obligation to make a copy and send it to the other party for the sake of the adversarial procedure, whereas inadmissibility must result in rejecting such a defective request. The argument based on the public nature of the document seems, therefore, irrelevant even in the light of the case law of the CE itself.

When it comes to the Polish legal order, a distinction is also recognised between different types of document. However, when it comes to the necessity of submitting certain items to administrative courts, this distinction operates not according to the criterion of the nature of the document (public or private) but according to whether it is in the possession of private or public persons. This division was established on the legislative level and is incarnated by the rule according to which public authorities should transfer between them case files that are necessary to hear a new case—either an administrative authority to an administrative court (Article 54 § 2 of the law on proceedings before administrative courts) or an administrative court of first instance to the SAC (Article 179 of the said law). As a result, administrative courts typically have access to all necessary public documents (and some private ones), making it neither necessary nor legally admissible for them to require parties to produce such documents. Consequently, if a new document should be submitted by a party (such as a copy of his or her application), it is not permissible for a court to remedy its deficiencies. At the same time, in Poland, there is no similar solution to Article R. 522-1 of the French Code of Administrative Justice, which requires applicants to accompany their interim relief request with a copy of the application on the merits. Polish applicants may submit such a request either with their application on the merits or in a separate letter at a later time. In the first case, no additional documents are required concerning the request on the merits. In the second case, the party only needs to provide the court with the reference number of the case [Article 46 § 2 (2) of the law on proceedings before administrative courts], so that the court registry office knows where it can find the case file on its own.

The distinction between private and public documents is crucial for judicial proceedings, especially for their evidentiary stages. Still, it does not appear to be a suitable criterion for determining when court staff *must* produce documents in place of a party, when they *can* do so, or whether they have the authority to do so at all. The French experience demonstrates that this criterion is entirely irrelevant. Applying it could lead to breaching the principle of equality before the law because it differentiates between procedural situations of persons who fail to meet formal requirements without offering in exchange any important advantages either to the court (regarding the good conduct of the proceeding) or to the parties. On the other hand, the Polish experience has shown that the criterion of possessing certain documents can be used to transfer some procedural duties from parties to the proceedings to public authorities (judicial or administrative ones) whose decisions have been contested. This solution enables the elimination of certain problems related to formal deficiencies that had arisen in France. This not only minimises the chances of potential breaches of procedural guarantees but also encourages cooperation between different public authorities within the proceedings.

E. Nature of the act establishing formal requirements

The last aspect related to the selected case law that caught our attention is the type of act that introduces procedural formalities. When it comes to French provisions that we invoked, all of them start with *R* and not *L* (eg Article R. 411-1 of the Code of Administrative Justice), which means that they were adopted by the executive power, and not the legislator, after consulting the CS, the latter acting here as an adviser of the government. In contrast, the Polish provisions in this regard are adopted by the legislative power. Although this difference may seem technical, we believe that it has influenced the reasoning of the Polish SAC and the French CS.

In France, the establishment, modification, or elimination of formal requirements from the Code of Administrative Justice falls under the scope of Article 37 of the French Constitution of 4 October

1958, making it a domain of the executive power. The latter regulates those formal requirements in the form of a decree, the project of which must compulsorily be submitted for the opinion of the CS. Nevertheless, it is already a tradition that reforms of procedures before administrative courts are elaborated within the CE itself on the initiative of its vice-president.⁵⁶ This was also the case with the Code of Administrative Justice.⁵⁷ In general, the Council's power over such decrees is fourfold—it prepares their draft, advises on their content, controls their legality, and, finally, interprets and applies them accordingly. Even though the said Code contains provisions that ensure the separation of advisory and judicial functions of the Council (see Articles R. 122-21-1, R. 122-21-2, and R. 122-21-3), it does not change the fact that the latter's powers in this regard are very extensive.

In Poland, unlike in France, regulatory acts are of limited practical importance. Article 92 (1) of the Constitution of 2 April 1997 provides that regulations shall be issued based on specific authorisation contained in and for the implementation of statutes by the organs specified in the Constitution. However, Article 176 (2) provides that the organisational structure and jurisdiction, as well as the procedures of the courts, shall be specified by statute. Hence, the Parliament has exclusive competence for regulating all aspects of all kinds of court proceedings. Apart from that, it should be noted that statutes have traditionally enjoyed a very high esteem in the eyes of Polish judges. As, according to the Polish Constitution, Parliament is the representative of the supreme power of the Nation [Article 4 (1)] and judges shall be independent and subject only to the Constitution and statutes [Article 178 (1)],⁵⁸ courts are quite reluctant when it comes to the idea of straying away from the letter of statutes or controlling their legality with constitutional or international standards. Moreover, even if a court wants to control the constitutionality of a statute, it must respect the competence of the Constitutional Tribunal regarding adjudication on the conformity of statutes and international agreements with the Constitution [Article 188 (1)]. This traditional high esteem in which statutes are held is even more evident when one considers the Polish formalistic legal culture, which encourages judges to seek solutions to legal problems in the linguistically most precise provisions. In the field of procedural requirements, it means that courts tend to give preference to statutes over constitutional or international acts. Hence, some judges in Poland tend to abstain from considering higher legal standards and values, or they consider them only superficially.⁵⁹ Although this approach is criticised, it still leads, unfortunately, to situations where courts refuse to hear a case owing to minor procedural obstacles.⁶⁰ On the one hand, the power of the Polish courts over statutes is limited, but, on the other hand, they seem reluctant to exercise this power anyway.

The legal context in which the French CE and the Polish SAC interpret and apply provisions on the formal requirements of parties' procedural letters is different. The power of the CE over decrees is much more extensive than that of the SAC over statutes. For this reason, it may be natural for the CE to perform a more pragmatic interpretation, even when it strays away from the *spirit* of the decree.⁶¹ After all, according to Article 6 of the Declaration of 1789, the Law (*loi*) is the expression of the general will. Regulatory acts are not held in such high esteem.⁶² Even though it does not mean that

⁵⁶P Gonod, *Le Conseil d'État et la refondation de la justice administrative* (Dalloz, 2014), pp 27 and 44.

⁵⁷A Zaradny, 'Écrire: l'influence de la légistique sur les caractéristiques du droit administratif' in AFDA (ed), *Les méthodes en droit administratif* (Dalloz, 2018), p 33.

⁵⁸According to some scholars, this means that courts can legally abstain from applying regulatory acts, which are binding only for the public administration. See R Hauser and J Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* (LexisNexis, 2008), p 26.

⁵⁹See M Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa* (Wydawnictwo Naukowe Scholar, 2007).

⁶⁰See P Bystranowski et al, 'Do Formalist Judges Abide by Their Abstract Principles? A Two-Country Study in Adjudication' (2021) 35 (5) *International Journal for the Semiotics of Law—Revue internationale de sémiotique juridique* 1903, at pp 1914–15.

⁶¹See Pouyaud, note 28 above, p 326.

⁶²For example, administrative courts in France can control the conformity of regulatory acts with the Constitution, but the power to verify the conformity of statutes with the Constitution belongs strictly to the Constitutional Council. For this reason, if an administrative act issued on the basis of a statutory rule is incompatible with the Constitution, but stating this incompatibility would lead to admitting that the statute is incompatible with the Constitution, administrative courts must

the CE always respects the letter of statutes⁶³ and strays away from the letter of regulatory acts, their position in the French legal culture differs significantly. The Polish SAC does not have this luxury as its procedure is not governed by regulatory acts but statutory ones. It therefore seems unsurprising that the Court is more cautious in its case law, for example when considering that ‘Exempting a party from performing an activity, especially from remedying the formal deficiency of not attaching copies of the letter and burdening the court with this task ... cannot be implicit, but would have to have a statutory basis’.⁶⁴ The SAC appears to fear that if it were to consider otherwise, it could be accused of replacing the will of the lawmaker with its own, which would be entirely incompatible with the division of powers, an inherent component of the rule of law. From this perspective, the CE can be inclined to interfere with the wording or the spirit of the decree to respect the rule of law, especially its compliance with statutes, as well as international and constitutional standards, but for the SAC the respect of the rule of law means rather respecting the letter and the spirit of the statute itself, and not straying away from them.

IV. Conclusion

The comparison of the case law developed by the Polish SAC and the French CE regarding the possibility of court staff producing copies of procedural documents in place of parties to the proceedings has revealed significant differences in the reasoning of these courts. On the one hand, the CE allows this possibility and therefore adopts a non-formalistic stand. It attempts to make the administrative judiciary more sensitive to the needs of parties, but, unfortunately, this increases the discretionary powers of court staff, thereby compromising the predictability of procedures and equality before the law. On the other hand, the solution adopted by the SAC, which consists of fully excluding this possibility, guarantees a high level of legal certainty and equal treatment before the law, but at the price of limiting access to justice owing to minor procedural obstacles; thus, its position is excessively formalistic. In our opinion, both stances are incompatible with the procedural imperatives of the rule of law. Whereas the CE has liberalised formal requirements to the extent that the outcome of the court proceeding is no longer predicated solely on the law, the SAC’s willingness to respect formal requirements has resulted in it no longer facilitating the conduct of proceedings, but hindering them instead. We believe that the happy medium to solve this problem lies in combining both approaches. If the law does not explicitly settle this issue, to prevent the procedure from transforming into a stumbling block for individuals, court staff should be allowed to make copies of parties’ documents in their place, as the CE ruled. However, to guarantee the conformity of this solution with the imperatives of legal certainty and equality before the law, which the SAC emphasised, this should be not a mere possibility but a legal obligation.

The comparison has shown that domestic courts may balance imperatives deriving from the rule of law differently. Although procedures can be arranged in various ways, lawmakers and courts must consider and balance all fundamental procedural standards and principles in the process. The rule of law applies equally to all national legal orders, and state authorities cannot be ‘selective’, deliberately sacrificing some of its components to give preference to others. These imperatives must all be taken into account, even though the result of such balancing may differ across countries. The existence of the same standards should, in the long run, lead, if not to diminishing differences between European states, at the very least to the elimination of manifestly unfair procedural practices. We believe that comparative analyses of how procedural components of the rule of law are understood, weighed,

abstain from controlling the constitutionality of such an administrative act (see the theory of *loi-écran*, CE judgment of 6 November 1936, *Arrighi*, Lebon 966).

⁶³The most famous example is probably the CE judgment of 17 February 1950, *Dame Lamotte*, No. 86949.

⁶⁴SAC resolution of 18 December 2013, No. I OPS 13/13.

and implemented in judicial practice in different countries could be particularly informative in this regard.

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