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# Access to justice in French Environmental law

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# 1. INTRODUCTION

## 1.1. BACKGROUND

During the last half century, the world has seen a dawning realisation of the importance of the environment and the possible effects of overexploitation of natural resources and the recently discovered implications of unrestrained green house gas emissions. Consequently, the policy wheels on all political levels, from local to global, have been set in motion. As people with a stake in legislative matters – lawyers, scholars and other legal professionals and amateurs – we find ourselves in a quickly changing landscape.

Some trends are becoming more and more clear: perspectives are changing from local and/or sectorial problems with corresponding local and sectorial solutions to a global, cross-disciplinary perspective, better equipped to take into account modern environmental problems such as air pollution, fish stock depletion and green house gas emissions with ensuing global warming.

The shift to a global and cross-disciplinary perspective is a direct result of the scientific discoveries made during the last half century, which has brought attention to the complexity of the global ecosystem. The main problem of today is not only to ensure an efficient exploitation of the environment, but also to ensure coming generations the same possibility, thus promoting sustainable development. The complexity of the matter is likely to reduce the scope for simple solutions, and this urges us to acknowledge the need to involve the greatest number possible of parties and stakeholders into the considerations at hand.

From a, n international human rights perspective, a substantial right to a healthy environment has been debated and attempts to formulate such a right has been made. The Stockholm Declaration of 1972 made an "…environment of a quality that permits a life of dignity and well-being" into a fundamental right in its first principle. International political processes has substantiated this declaratory right by enacting treaties, conventions and agreements that affect different, sectorial, aspects of the environment: air quality, international bodies of water, transboundary environmental assessments and liability for industrial accidents with transboundary effects among other things. Other major steps have been taken in the creation of a multitude of fundamental principles all aiming to preserve the environment: the precautionary principle, the principle of prevention and the polluter pays principle.

Important progress was made with the signing of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This Convention links the right to a healthy environment with procedural rights, illuminating the necessary connection between them. The Convention also ensures that the procedural rights are respected and thus enables them to be used towards environmental protection.

## 1.2. PROJECT OUTLINE AND LIMITATIONS

The object of this study is to present modern day French environmental law. The study's general purpose is to serve as an introduction to French law, enabling lawyers, scholars and other legal professionals and amateurs to get a quick overview of the legal system, and the different solutions to questions relevant to environmental issues. The principal goal of the study is to examine how the French legal system complies with the Aarhus Convention in general and access to justice-related issues in particular.

With this goal in mind, the study starts with a short introduction to the Aarhus convention, describing the pillars and introducing the requirements of access to justice as prescribed by Article 9. After this, focus is shifted to the French legal system. The French legal system is presented in a summary manner, introducing the reader to the general concepts governing the system, with a chapter consecrated to French administration and administrative law.

With the ground laid, the study introduces the French environmental law, giving a general introduction to the legislative and institutional framework.

The study is concluded with a chapter analysing the French system in light of the requirements of the Aarhus Convention.

## 1.3. METHODOLOGY

This work is a traditional Swedish legal study as practiced at Uppsala University: a legal dogmatic study. Traditional legal sources serve as source material. The work is based on an analysis of the relevant French legislation, jurisprudence and doctrine, including some English-language sources.

Sources of international origin have made their way into the material, including relevant judgments from the European Court of Justice and findings adopted by the Aarhus Conventions Compliance Committee.

# 2. THE AARHUS CONVENTION

## 2.1. INTRODUCTION

The Aarhus Convention serves as a shining example of procedural rights being employed as measures for environmental protection. The Convention pronounces three important rights aimed at reinforcing environmental protection and strengthening environmental democracy. These rights are enshrined in the three pillars of the Convention: Access to information, Public Participation in Environmental Decision-Making and Access to Justice.

The conception and adoption of the Aarhus Convention was preceded by a number of international political procedures in several international bodies aiming to codify a right to a healthy environment in the form of a legally binding international treaty. The issue was discussed in the Council of Europe during the 1970s, and consensus was seemingly reached on the existence of the right. However, the process failed when it came to the wording of the right. After the failure of this procedure, focus shifted from enshrining an explicit right to a healthy environment to creating and reinforcing mechanisms aimed to protect the environment.

The subsequent discussions on the international level focused on the role of the administration in environmental protection, as the administration has an immense possibility to influence the environment by acting or choosing not to act. However, the environment at large cannot be considered as the property of the administration but rather as belonging to the administered – the individuals of the present and of future generations. Therefore, a possibility for individuals and environmental organisations to participate in the administrative decision-making affecting the environment is an absolute necessity in terms of democracy.

To enable such participation, and to guarantee its effectiveness, the concerned parties must have the same amount of information on the environment as the administration. Furthermore, the individuals and the administration might be in disagreement on the level of protection necessary for the environment, or the administration might not act where, in the opinion of individuals, it should take action. For these reasons, the courts must be able to act as arbiters between the administration and individuals in cases of controversy.

The political process that finally lead up to the codification of environmental procedural rights was named ”Environment for Europe”, and consisted of a series of ministerial conferences organised by the United Nations’ Economic Commission for Europe (UNECE). During the Aarhus conference of 1998, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed.[1]

As of the 6 July 2011, the Convention counts 44 parties.

[1] For a more in-depth history of the international agreements and processes preceding the Aarhus Convention, please see the Implementation Guide to the Aarhus Convention, page 1 and forward.

The vigilance and proactivity of the civil society is from now on a crucial element in ensuring environmental protection. This rests on the notion that the environment cannot defend itself; it needs an active party to protect it and to promote its interests. Consequently, the Convention gives an important role to the public as the control of authorities by individuals is ensured at the international level with the possibility for individuals to address complaints directly to a subsidiary body to the Convention, the Compliance Committee.

## 2.2. The Compliance Committee

Article 15 of the Convention requires the creation of a mechanism to examine the implementation of the provisions of the Convention. During the first Meeting of the Parties to the Convention, Decision I/7 on the control of the respect of the provisions was adopted and the first Compliance Committee (hereafter referred to as the AACC) vested with this mission was elected in 2002.

The principal missions of the Committee are to examine communications submitted by the interested public, to control the implementation of the Convention and to draft recommendations on its application. The findings adopted by the Committee are subsequently presented at the Meeting of the Parties, where the Parties may choose to endorse the findings in the form of Declarations of non-compliance. The Meeting of the Parties may then, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention.[2]

This kind of legal mechanism is not uncommon on the international scene. However, the AACC demonstrates some particularities, which perhaps even gives it an unusual effectiveness in comparison with similar organs.

The members of the committee are nominated by the Parties to the Convention and participating NGOs and elected in public sessions during meetings of the Parties. The committee is independent: the members participate in their personal capacity and not as representatives of the Parties to the Convention.

The compliance mechanism includes a public trigger – the committee may examine complaints submitted by individuals or NGOs. Normally, only other state parties to a convention may submit complaints. The AACC holds meetings in open session and received communications are made available to the public.[3]

The Committee has also proven to be rapid in delivering findings. Since the AACC started receiving communications and submissions in 2004, it has received 55 communications from the public and one submission from one member state regarding another member. Of the communications received, the Committee has finished 43 cases, with findings delivered in 38 cases and 15 cases declared as non-admissible.

[2] For more information see Decision I/7of the First Meeting of the Parties.
[3] For more information, please see http://www.unece.org/env/pp/pubcom.htm to access the communications received by the AACC

Even if the findings of the Committee lack legal binding effect on their own, they contribute to the general understanding of the convention, and thus, its correct application by its Parties. This is doubly so if the Meeting of the Parties to the Convention adopt the findings as formulated by the Committee, in which case the findings and interpretation of the Convention becomes building blocks in international standards for environmental democracy.[4] This, on the other hand shines a light on the quasi-judicial character of the Committee – if the Meeting of the Parties decides to refuse to adopt the findings of the Committee, the legal value of interpretation of the Convention as formulated in the findings becomes questionable. The committee is dependent on the good will of the Parties for its findings to gain legal binding effects.

## 2.3. The Structure of the Convention, the Three Pillars

The Aarhus Convention consists of three pillars: access to information, public participation in decision-making and access to justice. These pillars will be presented in further detail below, but it should already be mentioned that the access to justice-pillar is the ultimate guarantee of the effectiveness of the other two pillars. If the provisions of the other pillars are breached, the access to justice-pillar offers remedies.

### *2.3.1. Access to information*

Access to information is the first of the three pillars, and it is the first one in a chronological order: effective public participation in decision-making procedures requires that the stakeholders have access to complete, accurate and current information, which is also important from an "equality of arms"-perspective. Without full knowledge of the cause, public participation is seriously stunted and will by necessity be of a limited character.

The pillar also has an autonomous importance in that it allows for the public to access information for any and all reasons and not only for the purpose of participating in decision-making procedures.

The pillar has two components; first, the public has the right to access information held by the public authorities and the latter has an obligation to hand out information upon request. This is the "passive"[5] access to information and is set out in Article 4 of the convention.

The other element of the pillar is the obligation for the public authorities to gather and disseminate information of general interest without previous request. This is the "active" duty as set out in Article 5 of the convention.

[4] Koestler, V, Århus-konventionens "Compliance Mechanism" – en introduktion. MAD 2008.1243 (2009). MAD, p. 3 and forward.
[5] From the authorities' point of view

### 2.3.2. *Public Participation in Decision-Making*

The second pillar of the convention concerns public participation and is dependent on the other two pillars. As guarantees for the efficiency of public participation, the access to information pillar must enable the public to participate in full knowledge of the matter at hand, and the access to justice pillar serves to ensure that the participation is effective and not just theoretic, in the sense that the public can direct complaint relating to substantial or procedural issues to independent arbitration by courts or tribunals.

The public participation pillar consists of three components. The first one is set out in Article 6 and relates to the participation of the public at risk of being affected by decisions relating to a certain activity or those who are interested for other reasons. This right is limited to activities which are set out in Annex I to the Convention and activities with a significant effect on the environment (with a certain margin of appreciation given to the parties regarding the scope).

The second component relates to participation in the elaboration of plans, programmes and policies relating to the environment and is set out in Article 7.

Finally, Article 8 concerns public participation in the elaboration of executive regulations and/or generally applicable legally binding normative instruments.

### 2.3.3. *Access to Justice*

The third pillar of the Aarhus convention is Access to Justice. It gives legal effect to the two other pillars within the national legal systems and reinforces the application of national environmental law by requiring that courts receive competency to review environmental matters, substantial as well as procedural ones. Access to justice is defined in Article 9, and its subparagraphs cover a range of access to justice-issues.

Article 9.1 deals with access to justice in matters concerning requests to access environmental information as provided for under Article 4.

Article 9.2 states that the "public concerned" shall have the right to have the substantial and formal correctness of a decision covered by Article 6 reviewed by a court or another impartial and independent organ created by law. This requirement does not exclude that the complainant must first exhaust administrative recourses.

Article 9.3 deals with access to justice more generally: It provides for members of the public fulfilling criteria set out in national legislation to be able to access judicial or administrative procedures for contesting acts or omissions by the public authorities in breach with national environmental legislation. This provision appears to be the most complicated element to implement, for the EU[6] as well as for other Parties to the Convention. Difficulties are abundant

[6] Which actually made a reservation with regards to this paragraph – more on that under 2.4. Access to Justice and the European Union.

regarding the interpretation of the provision, and so is the diversity of systems where the provision is supposed to apply.

In addition, compliance with Article 9.3 of the Convention requires the implementation of other relevant provisions of the Convention, in particular Articles 9.4. This paragraph concerns the characteristics of the procedures required by paragraphs 2 and 3 (administrative and/or judicial), and stipulates that the procedures must offer sufficient and effective recourse, including the possibility of awarding injunctive relief. They must also be fair, equitable and timely without entailing prohibitive costs.

The third pillar reinforces the role of the public in protecting the environment by guaranteeing legal action in front of national courts. In effect, it serves as a guarantee for the enforcement of the provisions of the Convention. The Articles covers a range of especially interesting issues - of which the issue of legal standing and effective remedies deserves extra attention.

#### 2.3.3.1. Legal Standing

For the requirements of legal standing for the public and NGOs, three different types of qualified interests can be availed by an analysis of Article 9.2:

First, the Article requires that legal standing be awarded to the citizens that have a “sufficient interest”. This is a traditional approach to awarding legal standing, and is reflected in the French system that uses this formula. This means that one has to show an individual interest to be allowed to act, for instance by being a neighbour to the physical activity in question. The notion implies that a legal consideration needs to be made: a qualified, legal, interest is needed.

The second category addressed by the Convention concerns those who claim the impediment of a right. More precisely, the interest to act manifests itself in the violation of a right. These two concepts of legal standing rest on the notion of representation from individual interests, citizens that wish to act and defend him- or herself against an act or decision affecting his life in whatever fashion.

If these two notions can be considered as traditional and conservative, leaning heavily on existing legal notions, the third concept introduced by the Convention is all the more revolutionizing concerning the legal standing of NGOs. According to Article 9.2 read in conjunction with Article 2.5 of the Convention: “non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.” Once an NGO qualifies as an organization under national law with environmental protection as purpose, a sufficient interest is awarded.

In virtue of this provision, public associations shall have the opportunity to act without requiring that their interests have been directly affected. These organisations are equally considered to have rights that can be damaged or infringed upon. As a consequence, the NGOs can bring litigation in front of a judicial instance and/or another independent and impartial organ established by law to contest the legality of administrative decisions relating to the environment.

Article 9.3 of the Convention introduces yet another requirement to grant access to justice: in cases of actions and omissions by private persons and public authorities that contravene national law relating to the environment. Difficulties arise regarding the interpretation of the provision – the provision has a certain "catch-all" character, and the diversity of systems where the provision is supposed to apply together with the margin of appreciation offered to the parties (both in terms of legal standing and substantial national environmental law) make the extent of the requirements of the provision a bit vague.

The provision has been given an interpretation by the Compliance Committee in the findings on a Communication regarding Belgium from 2005.[7] The communication concerned the national notion of interest to act, particularly concerning the interest required for legal standing before the *Conseil d'Etat* (CE), the highest administrative court instance in Belgium.

The communicant made reference to two cases before the CE. The cases concerned a "technical landfill facility" and a local land use plan. In both cases, the associations' complaints were dismissed due to an absence of interest to act. The condition for standing before the *Conseil d'Etat* is that the interested party have to justify a direct, personal and legitimate interest – the "*qualité requise"*. Environmental NGOs as well as other natural or legal persons were all subject to this requirement to be granted legal standing.

The AACC found that parties cannot benefit from the expression "responding to criteria set out in national legislation" in Article 9.3 to introduce or retain criteria that limit to the point of exclusion the possibilities of the totality or quasi-totality of environmental associations to contest acts or omissions violating national environmental legislation.[8] Furthermore, the AACC then went on to confirm that the expression must be interpreted as imposing upon the Parties an interdiction of fixing excessively strict criteria. Access to proceedings must be the rule and not the exception.[9]

#### 2.3.3.2. Adequate and effective remedies

As mentioned, Article 9.4 of the convention addresses the characteristics of the required procedures, ensuring the quality and efficiency of procedures. For the interpretation of Article 9.4, a few cases from the Compliance committee can be mentioned.

In a communication concerning Spain,[10] the AACC had the opportunity to examine what "effective remedies" entail in conjunction with the requirements of providing for legal aid of Article 9.5.

The communicant claimed that NGOs had to support excessive fees for being able to obtain suspensions of administrative decisions in the planning and permitting procedures before the Spanish authorities, and this was exacerbated by not being entitled legal aid.

[7] C/2005/11.
[8] See paragraph 35 of the findings.
[9] See paragraph 36 of the findings.
[10] C/2009/36.

In the Spanish system, legal aid was only available to NGOs qualifying as "public utility entities" – a qualification requiring the meeting of certain financial criteria of a demanding nature. These criteria were of such a character that small NGOs had very slim chances of being awarded legal aid.

With this background, the Committee considered that the Spanish system failed to establish appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. The Committee went on to say that this also constituted a failure to provide for fair and equitable remedies as required by Article 9.4. Also, the Committee noted that the Spanish requirements of two lawyers in appeal proceedings and the risk of bearing the winning party's costs in such proceedings could potentially constitute non-compliance with the requirements of Article 9.4, meaning that the procedures must not be prohibitively expensive.

The issue of prohibitive costs was, although mentioned, not examined thoroughly in the Spanish case above. However, the Committee has addressed the question of costs in a series of findings regarding United Kingdom.

The AACC examined in one of the cases[11] the alleged failure to provide access to justice to challenge a government license allowing for the disposal of sludge material, partly by not alleviating prohibitive costs which could arise due to the "costs follow the event"-rule and the potential compensational costs to be carried by the claimant for damages caused by an injunction.

The AACC's review of the system is undertaken in a systematic manner – the different costs are examined with the system as a whole used as backdrop. This means that the AACC does not consider the "costs follow the event"-rule inherently as a violation of the convention, but it may nevertheless be in contravention with the requirements of Article 9.4 depending on circumstances of the case and in absence of rules that limit prohibitive costs.

In its review of the British system the Committee took note of the somewhat limited criteria for awarding Protective cost orders (PCO). A PCO involves the Court ordering in advance that the claimant will not be responsible for opponents' costs, or only to a specified amount that is considered affordable or at least not "prohibitively expensive". Also, PCOs may include reciprocal cost caps which limit the legal aid to solicitors fees and fees of one junior counsel that are "no more than modest".

The AACC took note of the potential costs related to requests for injunctive relief. For these reasons, the AACC went on to consider that the system as a whole did not ensure that procedures under Article 9 were not prohibitively expensive, and, in addition, that the party had not taken the measures necessary under Article 9.5. It should be noted that the Court of Justice of the European Union (CJEU) reached a similar conclusion in a case against Ireland.[12]

[11] Communication C/2008/33
[12] C-427/07

## 2.4. ACCESS TO JUSTICE AND THE EUROPEAN UNION

As France is a member state of the European Union, the implementation of the Aarhus Convention on the European level has substantial effects on the French implementation. This motivates a short introduction to the European Union's relationship to the Aarhus Convention.

The European Union became a party to the Aarhus Convention by the decision 2005/370[13] of the Council. At this approval of the Convention, the EU made a reservation concerning the effects of Article 9.3 of the Convention: 'Member States are responsible for the performance of these obligations (…) unless and until the Community,(…), adopts provisions of Community law covering the implementation of those obligations.'

This reservation has been elaborated upon in the case law of the CJEU. In the VLK-case (C-240/09) the Court states that the provision lacks direct effect. The Court then acknowledged that the provision is intended to ensure efficient environmental protection. Furthermore, the member states are under an obligation to lay down necessary procedural rules governing actions for safeguarding rights that individuals derive from EU law. Thus, the national court must interpret, to the fullest extent possible, its national law in accordance with the objectives of the provision – if possible "in order to enable an environmental protection organisation, such as the VLK, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."[14] [15]

For the implementation of the Convention within the EU, a number of legislative acts have been adopted. Directive 2003/4[16] of the Parliament and the Council concerning public access to information in environmental matters, Directive 2003/35[17] concerning public participation in the elaboration of certain plans and programmes related to the environment and Regulation 1367/2006,[18] concerning the application of the provisions of the Aarhus Convention with regards to the organs and institutions of the union.

The Compliance Committee has recently delivered findings on a case concerning the European Union.[19] The communicant alleged non-compliance with Articles 9.2, 9.3, 9.4 and 9.5 of the convention. The main critical point of the communication is the CJEU jurisprudence on legal standing for challenging decisions of the EU institutions as expressed by the "Plaumann"-test. The communicant alleges that the test results in an excessively narrow interpretation of the provisions on standing for NGO – limiting standing to cases where individual concern can be proven. After reviewing the case law of the CJEU the Compliance Committee stated that the established

[13] JO L 124 of 17.05.2005, page 1.
[14] C-240/09, paragraph 51.
[15] See also the http://www.unece.org/env/pp/a.to.j.htm under #database for a more thorough summary of the judgment provided by the Task Force on Access to Justice.
[16] JO L41 of 14.02.2003, page 26.
[17] JO L156 of 25.06.2003, page 17.
[18] JO L264 of 25.09.2006, page 13.
[19] C/2008/32, available at: http://www.unece.org/env/pp/pubcom.htm

jurisprudence was indeed too strict.[20] However, the Committee refrains from making a finding to the effect that the EU is in non-compliance with the requirements of Article 9, since their review did not take into account the entry into force of the Lisbon treaty or the Aarhus Regulation 1367/2006.

In case C-263/08 concerning Sweden, the CJEU had the opportunity to review a national requirement limiting legal standing of environmental NGOs to such associations with a minimum of 2000 members. The case did, however, not concern the implementation of the Aarhus Convention directly, but rather Directive 85/337 (the EIA directive) on the assessment of the effects of certain public and private projects on the environment, which was amended by Directive 2003/35 and thereby was furnished with provisions on legal standing in appeals identical to the ones in the Aarhus Convention.

The case concerned Article 10a of the directive which, by reference to Article 1(2) of the same directive, left the task of determining the conditions under which an NGO which promotes environmental protection has a right to appeal to the national legislatures. Even so, the court went on to say, national legislation must not risk rendering the provisions of the directive meaningless: parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental NGOs, are to be entitled to bring actions before the competent courts.

The CJEU recently delivered a judgment on the conditions for legal standing as prescribed in the EIA directive[21] The case concerned the German requirement for legal standing as developed in case law, the *Schutznormtheorie*, which limits standing to parties relying on the infringement of an individual right.

The court pronounced that the requirements of the EIA directive were clear: national legislation may require that an "individual public-law right" of an individual is infringed for that individual to be granted legal standing. However, such a limitation cannot be applied as such to environmental protection organisations.[22] The "rights capable of being infringed" must, for NGOs, necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.[23]

The court concluded that article 10a of the EIA directive precludes legislation which does not permit NGOs to rely on the infringement of a rule flowing from EU environment law, intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.[24]

[20] See para. 87 of the findings.
[21] C/115-09, *Trianel Kohlekraftwerk Lünen*
[22] Para. 44.
[23] Para. 48.
[24] Para. 50.

Truly, the Aarhus Convention poses some challenges to the legal system of the European Union. It would be interesting to see the ramifications if the AACC was to find that the EU is, in fact, in non-compliance with the Convention. How would the European Commission respond to such an allegation? Could a finding of non-compliance be accepted by the Meeting of the Parties? Politically this seems rather unlikely, given the strong position that the European Union has among the parties to the Convention and the intricate legal hierarchy between national legislations, international conventions and EU law. Also, if the CJEU were to make a narrow interpretation of the standing criteria, how will the AACC react to this? Will they accept the interpretation made by this, in many ways, authoritative source? This falls outside the scope of this work, and I will not elaborate any further on the matter.

# 3. THE FRENCH LEGAL SYSTEM

## 3.1. INTRODUCTION

The French legal system belongs to the family commonly referred to as civil law systems, in contrast to common law systems. One of the particular features of the French legal system (and civil law systems) is the strong reliance on codified law. As a famous example of the French codifications, the *Code Civil* was adopted in 1804 and remains one of the world's oldest legislations still in force.

Another important characteristic of the French legal system is the clear division between the spheres of public and private law. This divide has historical explanations, and its roots go back to the Revolution of 1789 and the attempted break with the institutions of the *Ancien Regime*. This division between the legal spheres also carries a particularity that makes codification as a defining characteristic of the French legal system only half a truth: The sphere of public law, and particularly the law concerning the administrative branch of government, has been, and to some extent still is, heavily dependant on case law for the development of rules on good governance.

## 3.2. SOURCES OF LAW AND THE LEGAL HIERARCHY

The French legal hierarchy consists of three normative levels: the supra-legislative block (Constitutional provisions and international conventions and agreements), the legislative block (most importantly, parliamentary acts) and the infra-legislative block (governmental regulations and acts from bodies delegated with normative prerogatives).

### *3.2.1. THE CONSTITUTIONAL BLOCK*

The Constitution long remained an instrument for which the ordinary courts lacked interpretive power. The judges cannot defy the acts of parliament; only the *Conseil Constitutionnel* is vested with that power according to the high courts of the administrative and civil jurisdictions. In fact, no court of the administrative or civil court orders is yet habilitated to examine the compatibility of a law with the constitution. However, the high court of the administrative jurisdiction, the *Conseil d'Etat*, may annul an administrative act that is not compatible with a constitutional provision or principle. In a hypothetical case where the administration has taken action in full compliance with the law, but in disregard of a constitutional provision, the administrative courts are unable to censor the act – this is called the theory of the legislative screen, the *hypothèse de l'écran législatif*.

The Constitution is not the only act at the summit of the French legal hierarchy. The constitutional block consists of the Constitution of 1958, the preamble to the constitution of 1946, the Foundational Principles Recognized by the Laws of the Republic (*Principes Fondamentaux reconnus par les lois de la République*), the Environmental Charter and the Declaration of Human Rights and the Rights of the Citizen of 1789. The hierarchical position of these provisions value requires that

all inferior acts have to comply with them under the control of the Constitutional Council, *the Conseil Constitutionnel*.

### *3.2.2. THE "CONVENTIONAL" BLOCK*

Under the constitutional block, one finds the conventional block, the *Bloc de Conventionnalité*. The French legal order can be described as monistic – after an international agreement has been regularly signed, ratified and published the courts of the two jurisdictional branches give full effect to the provisions of the convention in question.

Both the high administrative and judicial courts have considered that international agreements take precedence over any legislative or regulatory act, even if the legal norm is adopted after the entry into force of the convention.[25] However, the legal effect of a conventional provision is largely (and naturally) dependent on its wording, and in many cases a legislative transposition is required to give legal effect to a vague provision.

The legal effect of international conventions is subject to two conditions: first, the constitution contains a requirement of reciprocal application by the other parties to the convention.[26] Second, and more importantly, the provisions of the Constitutional block take precedence over international agreements.[27] With regards to derivative EU law however, the Constitutional Council has held that these provisions adhere to their own rules and that the Council cannot control their compliance with the constitution.[28]

### *3.2.3. THE LEGISLATIVE BLOCK*

In France, there are a number of acts that share the same hierarchical value. Ordinary laws are adopted by the Parliament (the National Assembly and the Senate).[29] Both the Prime minister and members of Parliament may initiate the legislative procedure.[30] Besides the *loi*, some other acts have the same legislative value: Emergency acts such as ordinances[31] and certain acts of the President.[32] Also, the system allows for dispensary measures, a temporary authorisation for the government to enact ordinances affecting issues normally covered by the Parliaments legislative competence.[33]

### *3.2.4. THE INFRA-LEGISLATIVE BLOCK*

All matters not covered by the legislative competence are of a regulatory character.[34] When the government exercises its regulatory competence in form of *règlements autonomes* it is bound to respect the provisions of the constitutional block and international conventions. The government

[25] CE, Nicolo, 20 octobre 1989 ; Ch. Mixte, Société des cafés Jaques Vabre, 24 mai 1975.
[26] See art. 55.
[27] Conseil d'État, *Sarran, Levacher et autres*, 30 octobre 1998.
[28] Décision n° 2004-496 DC du 10 juin 2004 *loi pour la confiance dans l'économie numérique*.
[29] See art. 34 of the Constitution.
[30] See art. 39 of the Constitution.
[31] See art. 92 of the Constitution.
[32] See art. 16 of the Constitution.
[33] See art. 38 of the Constitution.
[34] See art. 37 of the Constitution

may also issue *Règlements d'application d'une loi* and *arrêtés d'application d'une loi,* which are subordinated to the *règlements autonomes*.

### 3.3. LEGAL INSTANCES AND THE COURT SYSTEM

The French judiciary order is divided into branches of civil and administrative jurisdictions. This division was enacted by the laws (still in force!) of 16-24 August 1790 and 16 Fructidor Year III (1795).

On one hand, France has courts of ordinary jurisdiction that hear both civil and criminal matters, and on the other hand administrative courts that hear only administrative matters. Each jurisdiction has three levels of adjudication. A jurisdictional court, the *Tribunal des Conflits*, decides to which court a matter belongs in if the issue is unclear.

The civil court order makes an internal distinction between civil and criminal courts. For civil cases, the first instance is either *Juge de proximité* or the *Tribunal d'Instance* or the *Tribunal de Grande Instance*, depending on the circumstances of the case (the size of the litigious sum, for instance). For Criminal cases, the first instance is either the *Juge de proximité* or the *Tribunal de Police* for petty offences, the *Tribunal Correctionnel* for delicts or the *Cour d'Assises* that handles crimes.[35] Appeals are brought before the *Cours d'Appel*, which handles the cases in different chambers (*Chambre Civil* or *Chambre* Criminel) depending on the substance. The last instance is the *Cour de Cassation*, which limits its review to points of law and guarantees the correct application of the law by lower jurisdictions.

The administrative courts are in charge of settling disputes between citizens and the administration. They have jurisdiction in relation to administrative actions: orders, decisions or sanctions can all be subjected to court review. Omissions can also be challenged, albeit under certain conditions. Questions relating to the validity of an administrative act or the consequences of that decision, such as damages resulting from an administrative act, also fall under the jurisdiction of the administrative judges.

The first instance of the administrative court order are the *Tribunaux Administratifs*, and each of these administrative courts has jurisdiction over a determined geographical area. The *Cours Administratives d'Appel* addresses any Administrative Court judgments brought to its attention by one or both of the parties. It was created in 1987 to guarantee respect for the right to appeal.[36] The *Conseil d'Etat* is the last resort and highest instance in the administrative court order. Like the high court for judicial matters, the CE provides case law on a national level. It addresses points of law as a cassation court in cases decided by the Administrative appeal courts. Also, as a first and

[35] Other, specialised courts like the *Conseil des Prud'hommes* exist, but since they are out of the scope of this thesis they will not be touched upon.
[36] By *Loi du 31 décembre 1987*

final instance court, it hears requests against decrees,[37] ministerial regulatory acts, and decisions taken by collegial bodies of national competence as well as regional or European electoral cases.

As was touched upon earlier, the French system can be described as legicentric – the legislation is in some sense the supreme normative act in the system: The high courts of the two branches are unable to censor legislation in cases of non-compliance with the constitution. However, nothing prohibits the courts from censoring legislation in face of provisions in international agreements.

The *Conseil Constitutionnel* is competent to control the compliance of legislation with the provisions of the Constitutional block.[38] The system allows for both abstract review of legislation about to enter into force and review of laws already entered into force. [39]

It cannot be appealed to directly to review a legal act already entered into force. However, if question on the constitutionality of a legislative act is raised in a case presented before the *Conseil d'Etat* or the *Cour de Cassation*, the Council may be called upon to review the act. The mechanism is called Priority Questions of Constitutionality, *Questions Prioritaires de Constitutionnalité*.

The Council is also competent to review the compliance of international agreements with the constitutional block upon request made after the signature of the convention but before its ratification. The Council does not consider itself competent to control the compliance of legislation with provisions of international treaties and conventions.[40]

Some quasi-judicial advisory bodies also exist, such as the French Ombudsman, the *Médiateur de la République*, and the Commission on access to administrative documents (*Commission d'acces aux documents administratives*).

### 3.4. French administration and the Institutional Framework

The French administrative system is heavily rooted in its history, with influences that can be traced to the *Ancien Regime*. Since then, many things have of course been changed, but many basic concepts still live on. Modern day administration in France can be describes as consisting of two branches, general and specialised administration.[41]

The general administration is exercised by the state with its decentralized representatives and the territorial elected bodies, the *collectivités territoriales locales*. The importance of the decentralized authorities should not be exaggerated: Even though these decentralised functions exist, France remains a highly centralised country with the state being the most important public authority.

At the central level, the government and its ministers exercise the executive power. They are vested with power to suggest and promulgate laws, administrative acts, decrees, circulars etc. At

[37] See, for example a decree concerning the creation of a nuclear plant, CE, 27 mai 1991, *Ville Geneve et a.*
[38] See art. 61 of the Constitution.
[39] The latter after the introduction of article 61-1 to the Constitution in 2008.
[40] Conseil Constitutionnel, Décision du 15 janvier 1975
[41] R. Chapus, Droit Administratif General, Tome 1, 15eme edition, Montchrestien, p. 191.

this summit of the administrative system, the government and the administrative authorities are close to identical.

The decentralised[42] administrative structure consists of representatives at the *regional* and the *départemental* (by *préfets*) levels, and also in the municipalities (*maires)*. These representatives are in charge of the national interests, administration and respect of the law.[43]

Metropolitan France is divided into three levels of general administration under the government, with elected bodies and government representatives on each level. First, the country is divided into 22 *regions*. These regions have elected bodies called the *Conseil Regional*, each led by a *Président*. The Government is represented by the *Préfet Régional*.

Under the regions are the *départements*, which France has 96 of. The elected body is called the *Conseil Genéral* and is led by a *Président*. The government is represented by the *Préfet Departemental*, who has great importance for the environmental administration as he or she is the permit authority for classified installations.[44]

At the lowest administrative level, France is divided into 36,800 *communes*, municipalities with an elected *Conseil Municipal* and a *Maire*, mayor, as the government representative.

The specialised administration is exercised by public establishments, *établissements publics*, under the supervision of the ministries. They are legal persons, private and public, and carry out specific tasks in certain fields of public administration.

[42] *Deconcentrée* is perhaps more suited for describing the French system, see the French response to the Milieu Study. Accessible at http://ec.europa.eu/environment/aarhus/comments.htm
[43] Article 72 of the 1958 Constitution.
[44] Article L512-2 *Code de l'environnement*.

# 4. FRENCH ENVIRONMENTAL LAW AND ADMINISTRATION

## 4.1. INTRODUCTION

France, as many other countries around the world, has put the political wheels into motion to deal with the modern day environmental issues, taking on an integrated approach unifying the different issues earlier dealt with on a sectorial basis. The French environmental policy is enacted under the auspices of the political process marketed as the *Grenelle de l'Environnement,* the environmental roundtables. Some results from the project are the laws *Grenelle I* and *Grenelle II*, each containing provisions collecting, modifying and, to some extent, strengthening the French Environmental Code and addressing Aarhus compliance.

Generally speaking, the French system for environmental administration is dependent on the existing administrative structures. For example, there exists no specially designed procedure or instance for challenging violations of environmental legislation by public authorities or individuals or private bodies.

Either a judicial or administrative court is competent depending on the circumstances and the remedy sought. However, some special measures have been taken in order to account for the particular difficulties that environmental issues may present in the different legal contexts.

## 4.2. ENVIRONMENTAL LEGISLATION

Legislative acts and legal norms relevant to environmental issues can be found at all levels of the French legislative hierarchy, from provisions and principles of constitutional valour to municipal regulatory decisions.

### 4.2.1. *CONSTITUTIONAL PROTECTION AND THE ENVIRONMENTAL CHARTER*

The Constitution of 1958 lacks an express mention of a citizens' environmental right. In this legal vacuum, the *Conseil Constitutionnel* dealt with a number of environmental issues by reference to other rights guaranteed by the constitution and the constitutional block.

Some examples of the earlier jurisprudence on the constitutional protection of the environment include judgements on legislative competence: environmental protection was considered as belonging to the legislative sphere, despite not being mentioned in the relevant constitutional provision.[45] In a series of decisions the *Conseil Constitutionnel* stated that legislation voted by parliament was necessary to prohibit the operation of quarries,[46] to authorise temporary use of privately owned lands[47] or to determine conditions for prohibiting deforestation.[48]

[45] Art. 34 of the Constitution
[46] No. 67.43, L. 26 January 1967, Rec. Jur. Const. II 27.
[47] No. 72.71, L. 29 February 1972, Rec. Jur. Const. II 47.
[48] No. 77-98, L. 27 January 1977, Rec. Jur. Const. II 74.

Other constitutional rights have been referred to in relation to environmental protection, such as the right to health [49] and the right to property guaranteed by Article 17 of the Declaration of Rights of 1789.

References to a number of constitutional provisions and principles did, however, not amount to recognition of a constitutional right of the French citizen a healthy environment. As an attempt to remediate this, the Environmental Charter was adopted in 2004 and entered into force on the 1st March 2005.[50]

The Charter can be described as containing a number of 3rd generational rights and principles, many of which already were at least in part protected by legislation or international agreements. The content of the charter has been described as declarative; most of the Articles are formulated in a rather abstract manner, and sometimes explicitly require legislative action for their implementation.

An interesting legal innovation is the introduction of an explicit environmental right – the right of everybody to live in a balanced environment that respects health.[51] Another legal innovation is the notion of a duty, which can be found in a number of the provisions of the charter. A duty to participate in environmental protection is given to every person, public authorities and even to the educational and research sectors.

### *4.2.2. THE ENVIRONMENTAL CODE AND SECTORIAL LEGISLATION*

The most important environmental legislation in France is collected in the Environmental Code. It cover matters such as: Environmental Impact Assessments and Strategic Environmental Assessments, Industrial Activities, Water operations and building in water, Mining and Quarries, Chemicals, Waste, Nature reserves, Species and Fauna protection, Protected species, Hunting, Fishing, Forestry and agricultural activities.

A number of other codes contain provisions related to the Environmental Code: The Town Planning Code, which contains provisions on the right of usage of territory and protection of natural spaces; The Commercial Code, which creates the need for enterprises to create an annual written rapport on the environmental consequences of the activity for the shareholders of the company;[52] The Customs Code, which contains provisions on a tax on polluting activities; and The Rural Code.

As a consequence of the French legal hierarchy, both the environmental code and other codes in relation with it must respect the provisions contained in the constitutional block, including the environmental charter. They also must respect the conventional block, which includes both European directives and provisions found in international agreements.

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[49] as appearing in §11 of the preamble to the 1946 constitution, referred to in decision no. 80-117 of 22 July 1980, Rec. Jur. Const. I 81, *Protection and control of nuclear products.*
[50] See *loi constitutionnel n°2005-205 relative à la charte de l'Environnement.*
[51] Article 1: "*…droit de chacun à vivre dans un environnement équilibré et respectueux de sa santé"*
[52] Articles L.225-100 to 102.

## 4.3. ENVIRONMENTAL ADMINISTRATION

As was mentioned in the general section, French administration is divided into general and specialised administration. For environmental matters, both branches are of importance. Also, France is divided into 4 administrative levels: *municipalités*, *départements, régions*, and the central government with organs for specialised and general administration present on every level.

### *4.3.1. GOVERNMENTAL SERVICES*

French environmental policy is the responsibility of the *Ministre de l'Écologie, du Développement Durable des Transports et du Logement,* MEDDTL. The ministry is responsible for environment, sustainable development and territorial planning among other things.

The specialised *Etablissements Publics* also have tremendous impact on the environmental administration, and some of them make decisions on matters with environmental importance. Some of these bodies are directly supervised by the MEDDTL[53] and others are a joint responsibility between different ministries.[54]

The MEDDTL also organises a number of subsidiary bodies[55] with an important example being the decentralised local environmental directorates, the *directions régionales de l'environnement, de l'aménagement et du logement* (DREAL). These regional planning and environmental directorates operate under the authority of the regional *Préfet*, the governmental representative, and are charged with enforcing laws relating to nature, natural sites and landscapes and help in the preparation of water use and management plans, laws on classified facilities, air pollution, waste and major industrial risks.

On the departmental level (the administrative level below regions), the responsible *Préfet* organises interministerial departmental directorates, DDIs. These organs are in charge of implementing the policies elaborated by the MEDDTL and supporting the activities of the DREALs. Among the most important function of the departmental *Préfet* is the issuing of environmental permits to Classified Installations.[56]

At the municipal level, the Mayor is responsible for implementing and enforcing environmental legislation. He is vested with general police powers and jurisdiction over pollution and nuisances.

[53] For instance, the water agencies, national parks or the National Institute of Industrial Environment and Risk.
[54] For instance the National Hunting and Wildlife Office (ONCFS) and the Agency for Environment and Energy Management (ADEME).
[55] For a summary of the organisation of the Ministry of environment, see http://www.developpement-durable.gouv.fr/IMG/pdf/Organigramme_Ministere.pdf (in french).
[56] Activities regulated by *Code de l'environnement, art L. 511-1 et seq.*

### *4.3.2. TERRITORIAL COLLECTIVITIÉS*

The territorial elected bodies (regional, departmental and municipal) share the responsibility of "protecting the environment and improving the conditions of everyday life" with the government.[57]

The regional *collectivités* play an important role in town and landscape planning. The region may, among other things designate areas as regional natural parks. It may also initiate cross-border cooperation with local authorities of neighbouring countries. Regions are also entitled to develop actions complementary to that of the government in areas such as recycling of waste, inventory of sites, etc.

The departemental *collectivités*' authority is relatively limited, however with a decisive role to play in decisions on matters such as urban development or the handling of domestic waste.

The municipalities retain competence with regards to some issues on land-use and urban development, action against various sorts of pollution, protection of natural spaces, etc. Municipalities may also decide to act together and create mixed bodies in charge of waste collection or recycling, measurements of air pollutions or the rehabilitation of sites.[58]

## 4.4. ADMINISTRATIVE RECOURSE AND APPEAL IN ENVIRONMENTAL MATTERS

The administrative procedure is governed by a number of foundational principles of French law, and the principle of "accessibility of law" justifies offering administrative proceedings.[59] As a corollary to this right, the principle of legal certainty holds that citizens have the right to file hierarchical appeals against any decision of a lower authority.[60]

### *4.4.1. TYPES OF ADMINISTRATIVE PROCEDURES*

Two types of administrative appeal can be lodged before the administrative authorities before taking the matter to court. First, there is the *Recours Gracieux* ("non-contentious appeal"), a procedure where the citizen introduces the appeal before the same administrative body that is responsible for the litigious act (or omission). The second procedure is the hierarchical appeal, *Recours Hierarchique,* where the plaintiff lodges the appeal with the hierarchically superior authority. The choice between ways of appeal is entirely in the hands of the claimant, a hierarchical appeal can be made directly after the contested decision or following a non-contentious appeal.

### *4.4.2. CONDITIONS FOR ADMISSIBILITY*

Not all incidents and circumstances that affect the lives of individuals may be addressed through the administrative proceedings – proceedings must be directed against the acts of a public authority. This gives us two criteria to explore: Public authorities and administrative acts.

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[57] Article L1111-2 *Code général des collectivités territoriales*
[58] Law of 2 February 1995, art. 32 provides a regime for regrouping of municipalities.
[59] Milieu study on France, page. 13
[60] CE, 30 juin 1950, *Queralt*.

#### 4.4.2.1. Public Authorities

Administrative authorities are defined as administrations of the State, territorial units, public establishments with an administrative statute, organisms of social security and other organs in charge of the management of administrative public services.[61]

These authorities can have their actions and omissions challenged through the administrative procedures, as long as they act as public persons.

#### 4.4.2.2. Administrative Acts

An important principle justifying administrative procedure is the necessity of a pre-existing decision for the possibility to lodge an appeal – judicial or administrative. For a public authority's act or omission to be challengeable, an administrative decision (explicit or implicit) must first exist.

Only administrative acts can be contested within the administrative system.[62] These can be either decisions or contracts. Administrative decisions are made by public authorities – public institutions and private bodies vested with the prerogatives of public authority (the power to provide public services). These decisions may be of a regulatory nature or directed towards individuals. The regulatory decisions are of general character, addressing one or more persons in an abstract way, not designing the addressee by name. They can be either temporary or definitive and take the form of a regulation or the refusal to enact one. The individual acts are defined by the fact that their addressees are designed by name in the decision. These decisions may be directed to one or more persons, natural or legal, public or private. The form doesn't preclude the act.

If a public authority did not act to prevent a breach of environmental law, a citizen must first contact the administration and demand it to act. The authority's refusal of this request can then be challenged by way of non-contentious or hierarchical appeal or in administrative jurisdictions. A request to review an administrative decision must be answered within two months. If the administration remains silent, it is interpreted as a denial of the request.[63]

### *4.4.3. SOME GENERAL CHARACTERISTICS*

As a general rule and principle, administrative appeals lack suspensive effects.

The time limit to file a judicial appeal stops running with the first administrative appeal, but will not be interrupted if there is a second non-judicial appeal. Thus, a hierarchical appeal following a non-contentious appeal will not prolong the two-month time limit set by law to introduce an appeal before the Court.

As a principle, the initiation of administrative appeal procedures does not entail costs, as the procedure in itself was created in order to facilitate access to justice. Initiation doesn't require any specific formality, except sending the request by registered mail.

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[61] Article 1 of *Loi 2000-321 du 12 avril 2000* on the rights of citizens in their relations with the administration
[62] R. Chapus, Droit Administratif General, Tome 1, Montchrestien, 2001, pp.481-572.
[63] Article 21, *loi 2000-321 du 12 avril 2000* on the rights of citizens in their relations with the administration.

However, in order to have real chances of success, the claimant should present legal arguments in favour of the appeal, which can entail costs for legal advice. On the departmental level, a network of counsels, *Conseils départementaux d'accès au droit,* is available for guidance and assistance in a pre-jurisdictional setting. The goal of the counsels is enhance access to legal information. These *Conseils* offer, among other things, legal assistance during administrative appeals.

### *4.4.4. Legal Effects of Administrative Appeals*

Administrative appeal – whether non-contentious or hierarchical – is as a general rule reformative, and the appellate authority may annul, modify or substitute the original decision. Also, many statutes provide for administrative sanctions, which may be decided by administrative authorities without court proceedings being initiated, when the statute is violated or disregarded. These sanctions typically include temporary or permanent prohibitions to operate all or part of the activity on the site, ordering of remediate works, ordering the posting of financial bonds or guarantees, the obligation to rehabilitate a site, the requirement that certain supervision and reporting obligations be complied with, etc. The law will normally afford an opportunity to submit observations before the sanction is decided.

### *4.4.5. The Ombudsman*

An alternative administrative procedure is available through the French Ombudsman, the *Médiateur de la République.* The Ombudsman is an independent authority, competent to receive complaints from individuals (albeit by proxy of a Parliamentary representative) regarding the function of State administrations, territorial collectivities, *etablissements publics* and other authorities with a public mission.[64]

Any legal or natural person may submit a claim to the Ombudsman if the claimant determines that he is concerned and that an authority has not functioned in accordance with its public service mission. However, the claim must be presented to a Parliamentary representative, who in turn will decide whether or not to submit the claim to the Ombudsman.[65]

All administrative remedies must be exhausted before submitting a claim to the Ombudsman. An inquiry to the Ombudsman does not suspend the statute of limitation for jurisdictional appeal.[66]

The Ombudsman gives advisory statements, *avis*, wherein solutions to administrative disputes are recommended. The decisions made by the Ombudsman are purely advisory, and lack any binding effect. This being the case, the impact of the issued recommendations should not be considered as unimportant.

[64] See article 1 of *loi 73-6 du 3 janvier 1973.*
[65] See article 6 of the mentioned law.
[66] See article 7 of the mentioned law.

# 5. FRENCH ENVIRONMENTAL LAW AND THE AARHUS CONVENTION

## 5.1. INTRODUCTION

International agreements hold a special place in the French legal hierarchy: Treaties or agreements, when ratified and published, prevail over Acts of Parliament.[67] Since international conventions may be more of a declarative and political character than detailed legislative acts, the French courts have elaborated the conditions under which a provision of international pedigree is to be given direct effect - a theory not unlike the direct effect principle of EU legal fame. Without going into details, this basically means that many of the provisions of the Aarhus Convention are to be applied in French courts, no matter whether legislation transposing the provisions has been adopted or not.

## 5.2. ACCESS TO INFORMATION

The French system of access to environmental information rests heavily on the general legal framework to access any information held by the public authorities. For a long time, the French administration was reluctant to recognise a clear right of citizens to access all relevant environmental information. In the 1970s the general principle of a free access of citizens to administrative documents was established.[68] This principle of free access included a right to access information upon request, subject to certain exceptions.

The rules governing access to environmental information are based on the general framework from 1978, with some specific provisions in the environmental code relating to the definition of environmental information, the legitimate grounds for refusal and their interpretation.[69] The special rules on access to environmental information differs from the general rules in the important way that the grounds for refusal are fewer and narrower – particularly with regards to information on emissions to the environment, and a restrictive interpretation of the grounds of refusal is emphasized.

If a person is refused access to any document or information, he or she first has to appeal to an independent administrative agency known as the Committee for access to administrative documents (CADA)[70] before being allowed to pursue judicial review before an administrative court. In recent years, approximately 20 per cent of the cases before the CADA were related to urban development, environmental matters or other daily-life issues.[71]

The French system at large seems to present few uncertainties with regards to compliance with the requirements of the Convention on providing environmental information – both concerning

[67] Art. 55, the Constitution.
[68] By a law adopted 17 July 1978.
[69] Article L124-1 *et seq.*
[70] *Commission d'accès aux documents administratifs.*
[71] Environmental law in Europe, p. 233 (This concerns 1999, so the figure may well have changed)

giving access upon request and collecting and disseminating information on the authorities own accord.

However, some difficulties were pointed out at the Regional Workshop for High-Level Judiciary on Access to Justice in Tirana 2008[72], where Frédérique Agostini, a judge in the *Cour de Cassation*, made some observations on the compliance of the French system. Keeping in mind that she is a judge in the high civil court not directly involved with the issues at hand, her remarks still have some bearing and should be considered. She identified some difficulties that the French system has been confronted by with regards to a few areas; preparatory documents, disclosure of environmental information held by private bodies and the disclosure of information relating to GMOs.[73]

Both the CADA and the administrative jurisdictions have earlier held that requests to access preparatory documents may be refused. This does not, however, not necessarily amount to a non-compliance with the Aarhus Convention, as the exception in Article 4.3 c) holds that requests for material in the course of completion may be refused. However, even if a refusal on this ground is possible, it may not be automatic – the public interest served by disclosure of the information must be taken into consideration. Keeping in mind that other provisions of the Convention require that draft documents be made available for public review, the expression seems to be intended to be interpreted in a restrictive manner, limiting possible refusal of access to documents that actually will have more work done on them within a reasonable time frame.[74]

In 2007 the *Conseil d'Etat* made a decision[75] to the effect that preparatory documents, as long as they are finished in themselves must be disclosed, even if the final decision to which they relate is still in course of completion. The judgment is mainly a reminder of the obligations stemming from the Convention, but it is pointing out a rule that was new to the French administration. The CADA has since then accepted this new principle in an *avis* from 2008, where the local authority had refused to disclose completed environmental information because the review procedure was still open. According to the legal advice, the information had to be disclosed upon request.

Even if the case law on the matter is up to date with the requirements of the convention, administrative practice seems to be lagging behind in applying it. This should not, in my view, be considered as a major issue in French law, as at least the courts and the CADA has clearly adopted a correct interpretation of the rules and remediates wrongful refusals of access to information.

When it comes to the disclosure of environmental information held by private bodies, the issue stems from the definition of "public authorities" under art. 2.2.c) of the Aarhus convention, which provides that environmental information may be requested from a private body operating on a

[72] See the Aarhus secretariats website at http://www.unece.org/env/pp/a.to.j.htm for presentation material.
[73] Here should be noted that the CJEU considers certain information relating to GMOs to fall outside the scope of "environmental information" and the requirements of the legislation implementing the Aarhus Convention in the EU, see case C-316/01.
[74] See the Aarhus Implementation Guide, p. 58.
[75] CE, 7 august 2007, n° 266668

competitive market if the concerned body is providing public services in relation with the environment under the control of a public body.

In France, this has earlier caused problems regarding nuclear facilities. In 2006 the CADA expressed the view that producing energy was not providing a public service.[76] A law that imposed specific obligations of transparency on the legal person running a nuclear power plant solved the issue.[77]

Another refusal that was approved by the CADA concerned information relating to the environmental certification of a wood boiler company producing heat for a town. The information requested was the full environmental study prior to the establishment of an environmental management system (ISO 14001) and the last three environmental reports. The CADA expressed the view that the information did not have to be disclosed, not under the general legal framework on access to information, nor under the provisions on access to environmental information, despite the fact that the company was providing heat as a public service under the control of a public authority. Regarding the general legal framework, there was no obligation to divulge the information since the company had taken the steps toward environmental improvement on its own accord without a previous demand from the public authorities, and furthermore, the documentation contained protected industrial and commercial information, conferring the information to the grounds for refusal. For the environmental information-provisions, the CADA considered that providing heat was not a public service in relation with the environment.

However, the refusal could also have been challenged in front of a judicial court, as these have jurisdiction for disputes between private parties and may order legally appropriate investigation measures, either before the initiation of a regular process or by way of summary procedure. Such a procedure has been used by NGOs to challenge presumably illegal waste treatments[78] or transfers.[79]

In both administrative and civil jurisdictions the possible confidentiality of commercial and industrial information provided for under Article 4.4.d) of the Convention may be of issue. The existence of such information is, not sufficient grounds for refusal of the entire request. The public authority must, under the control of the judge, decide which information is to be censored. This may require the help of the company concerned or even an expert opinion.

France relies to a somewhat large extent on *entreprises publics*, private bodies publicly controlled which operate under a special legal regime and often provide public services with an environmental impact. The interpretation by CADA of what is considered as a public service with

[76] CADA, avis n° 20062388
[77] Loi n° 2006-686 du 13 juin 2006 relative à la transparence et la sécurité nucleaire.
[78] TGI Cherbourg, 15 mars 2001, n° RG 01/00037: communication of a contract relating to nuclear waste treatment.
[79] CA Paris, 22 april 2005: n° RG 05/06407: Communication of a contract through which the French State and a private company decided on the removal of asbestos fireproofing and the dismanteling of a military boat prior to sending it to India. NGOs wanted to prove that the boat was still dangerous waste.

an environmental impact may pose a problem for access to environmental information. However, procedures to challenge defaults are available, both in administrative and civil courts and through regular and summary proceedings.

## 5.3. Public Participation in Environmental Decision-Making

With regards to public participation in environmental decision-making, the French legal system provides for three types of participatory procedures: *Enquête public*, *Débat public* and *Concerted action.*

### *5.3.1. Débat public*

The Environmental code provides for the establishment a National Commission for Public Debate, *Commission nationale du débat public*, for activities with an estimated cost of 150 Millions € or more.[80] The commission is an independent administrative authority responsible for ensuring public participation in the process of preparation and development of infrastructure projects of national importance relating to certain categories of operations, whenever substantial socio-economic interests are at stake or the impact on the environment or land use is likely to be significant. In such cases, public participation may take the form of a public debate on the desirability, objectives and main characteristics of the project. Another important factor is the timing: the debates are to be organised at the same stage as the earliest, preliminary, impact assessments.

### *5.3.2. Enquête public - Public inquiries*

The public inquiry is mandatory for activities subject to an environmental impact assessment.[81] The procedure is opened and organised by the authority responsible for the later decision, which in general is the departmental *Préfet.* The public inquiry is led by an inspector (*Commissaire enquêteur*) or an inspection committee (*Commission d'enquête*) and lasts at least one month. The inspector is in charge of informing the public and gathering comments and additional information as he deems fit. The information that is provided to the public during the public enquiry period must be carefully organised, as incomplete information can give ground for challenge in court by third parties.

The work of the inspector or committee is concluded by him or her sending a file on the procedure to the *Préfet* with two reports, one summarising the steps of the public enquiry and the public comments and the other setting out his own opinion on the basis of precise justifications and indicating whether he approves or disapproves of the project. An unfavourable opinion of the inspector does not prevent the *Préfet* from granting the authorisation. Nevertheless, an unfavourable opinion makes a suspension of the decision easier to obtain from an administrative court.[82]

[80] Décret n°2002-1275 du 22 octobre 2002 relatif à l'organisation du débat public
[81] Articles L123-1 *et seq* and L122-1 of the Code de l'Environnement.
[82] Article L123-12 *Code de l'environnement*.

### 5.3.3. *CONCERTATION*

The third mechanism for providing for public participation in environmental decision-making is a procedure largely uncodified named *concertation*. It is a voluntary procedure initiated by the proponent of a proposed activity that is not subject to a *débat public* or *enquete public*. Many territorial collectivites have elaborated internally binding rules on organising *concertations* when elaborating plans and programmes with environmental effects.[83] These bodies of rules often seem to be of more political than legal relevance, but nonetheless indicate an interesting development.

### 5.3.4. *THE FRENCH SYSTEM AND THE REQUIREMENTS OF THE AARHUS CONVENTION*

The French system for public participation at large offers many opportunities to participate in the procedures required by the Convention. However, certain of the mechanisms provided seem to be lacking with regard to the efficiency of the participation – when all options are open – as required by Article 6.4 of the convention.

This was illustrated in a case in the Aarhus Conventions Compliance Committee, where the Committee had the opportunity to evaluate the *enquête public* as practiced in the permitting process of a waste incinerator in communication C/2007/22. The project in question was subject to an authorization procedure, requiring a public inquiry. The project was not considered to be important enough for a *débat public* to be organised by the CNDP. The final permit delivered by the *Préfet* was preceded by a series of decisions taken by the municipality of Marseille, *Communauté Urbaine Marseille Provence Métropole* (CUMPM).

The key issue in the case was to decide which, if any, in a series of decisions was to be qualified as decisions as set out in Article 6. The Compliance Committee considered that only the decision on whether to deliver the permit or not was a decision covered by the requirements of the Convention. The Compliance Committee considered that France was not in non-compliance with the Convention.

However, before the Préfet made the permit decision, the municipality had made a number of decisions on the method of waste disposal, the location of the installation, the choice to use a concessionaire and choice of the individual concessionaire. The Compliance Committee found that these municipal resolutions were not to be considered as decisions under Article 6 as they did not bind the *Préfet* in his or her decision on the permit. According to the Compliance Committee, when public participation took place in the case all options were open.

Mr. Julien Bétaille, has made some comments with regards to the findings adopted by the Compliance Committee in an article.[84] The article analyses the findings of the committee in the light of the French doctrine on the question of the effectiveness of the public participation in *enquête public* procedures. According to Michel Prieur, another French author and professor of environmental law, the *enquête public* procedure has a late character, and it would be better to

[83] See http://www.comedie.org/chartes.php for more information and some adopted charters on concertations.
[84] Julien Betaille, Le droit français de la participation du public au regard de la convention d'Aarhus, AJDA, 2010, p. 2083.

arrange for public participation at an earlier stage in the procedure at a moment where the project can still be changed. General consensus among French legal scholars seems to be that the *enquête public* comes into play at such a late stage in the procedure that it does not provide for effective public participation. Consequently, Mr. Bétaille seems to be of the opinion that French doctrine considers the French system to be in non-compliance with the requirements of the Aarhus Convention on effective public participation.

However, a political procedure aimed at improving the *enquête public* is under way, and the defaults vis-à-vis timely participation are somewhat likely to be addressed and remediated.

### 5.4. Access to Justice

As has been indicated earlier, the Access to justice pillar is the most complex pillar of the Aarhus Convention, and has implications for legal instruments in many of the contracting parties. Furthermore, some of its provisions present more difficulties than others, and consequently, they become more interesting for this study.

At large, the French system provides for mechanisms satisfying the requirements on access to justice of the Convention. Challenging refusals to access environmental information is relatively straightforward, even though the CADA must be addressed before court review is allowed. However, the issue of legal standing in the French legal system needs to be elaborated upon. Other important topics that deserve special attentions are the length of procedures and costs.

Environmental matters can be addressed through the three court orders: civil, criminal and administrative. The competent jurisdiction depends on the nature of the claim and, in general, ordinary rules of French procedural law apply to litigation in the area of the environment.

As an example, discharges into a salt water marsh by an industrial plants can be challenged in administrative courts through administrative action. The relevant administrative court is competent to review the content of an authorization, and to pronounce its inadequacy, its deficiency or its non-existence. Civil courts may be addressed on the matter through preliminary or summary proceedings allowing for injunctions or by normal procedure lodged by an individual or NGO asking for the interruption of the plant's activities.[85] Criminal courts may be called upon through criminal proceedings that may be concluded by a judgment both sentencing the offender for pollution (fine, jail or other remedies) and granting the victim compensation.

Civil cases are submitted by the concerned individuals. Public prosecutors are in charge of prosecution for criminal offenses. However, prosecution can also be initiated by a private person who has personally and directly suffered a damage resulting from a criminal offense, or by certain NGOs if the collective interests that they promote are affected.[86]

[85] CC civ 1, 6 mai 2003, bull. I, n°103 ; 8 mars 2005, bull. I, n°112.
[86] Cour de Cassation, 2nd Civil Chamber, N° 05-20297, 7 December 2006.

### *5.4.1. ADMINISTRATIVE JUDICIAL PROCEDURES*

Administrative legal action can either be directed against a decision, the goal being that it be cancelled by the court, or against an administrative body with a view to obtain damages for a prejudice. Constitutional issues may be referred to the *Conseil Constitutionnel*. In many administrative environmental disputes, the courts are not limited to the annulment of the decision, but may also take a decision with direct effects on the environmental obligations of a private individual or company.

Following statutes enacted during the 19th century, administrative courts have special jurisdiction for cases involving damage to the public domain. This has some bearing on environmental matters, for instance when harbours, canals or rivers are concerned. In such cases the administrative courts may issue fines and rehabilitative measures. Administrative case law holds that when the maritime public domain suffers an environmental damage, the *Préfet* has an obligation to initiate proceedings.[87] As was mentioned in relation to administrative non-judicial appeal, a case is only admissible if the administration has made a decision.[88]

This rule presents no difficulty if the contested decision is a regulatory or individual act. That being said, the situation may become more difficult if the litigation concerns an action of the public authority that does not take the form of a decision. In that case, the plaintiff must first lodge a complaint with the original authority, and the judge may subsequently review the decision resulting from that claim. This preliminary decision may be oral or written, express or implicit,[89] and doesn't require any formal conditions.

The time limit for introducing a case before an administrative court once a decision has been issued is one of the principal elements of procedure regarding the judicial appeal. The general time limit is within two months, running either from the notification (for individual decisions) or from the publication of the contested decision (for regulatory decisions).[90]

#### 5.4.1.1. Types of procedures

First, it must then be decided which type of proceedings are applicable. The general classification of legal action in front of the administrative jurisdiction includes 4 types of proceedings, classified by the nature and extent of the powers of the judge:[91] full jurisdiction proceedings, annulment proceedings, interpretation proceedings and repression proceedings.

Of these procedures, full jurisdiction and annulment proceedings are by far the most important for environmental matters, and will be elaborated upon. Interpretation proceedings (*contentieux de l'interpretation*) require that the judge give an interpretation if an administrative act is unclear,

[87] CE 23 February 1979, *Association des amis des chemins de ronde,* Rp 75.
[88] Article R421-1 *Code de justice administrative.*
[89] As was mentioned earlier, two months of silence on the part of the administration is equivalent to a refusal, see art. R421-2 CJA
[90] Art. R421-1 CJA
[91] In accordance with one of two major typologies. This one is Laferrière's, as presented in R. Chapus, Droit Administratif Général, Tome I, p. 749.

and includes the possibility to declare its illegality. There are a number of repression proceedings (*contentieux de la repression*) where the judge has the possibility to levy penalties for contraventions of an administrative nature. The most important type of repressive administrative procedure is called *Contraventions de grande voirie*, and concerns damage to the public domain.

### *Full jurisdiction procedures*

In full jurisdiction proceedings (*Contentieux de pleine jurisdiction*) the judge can annul or reform decisions and award damages. The full jurisdiction proceedings are used when a question is raised regarding the existence of an situation affecting an individual. The claimant wishes to remedy the consequences of an administrative decision or action, seeking to modify a situation and/or to allocate monetary compensation. As long as the judge's decision is justified, the judge is free to approach the contested act as he wishes. He or she may cancel the decision on the basis that it is illegal or substitute it by one of his or her own, and modify or impose new technical standards for an activity that the operator will have to comply with. Thus, in these cases, the procedure is reformatory. Finally, courts may afford damages to plaintiffs having suffered damage.

For environmental matters, this procedure is applicable for any legal action related to the liability of public authorities (State, *Départements*, *Regions*, municipalities and public establishments) and for litigation on classified installations. Special rules apply to appeals brought before French administrative courts against administrative orders (*arrêtés*) authorising or denying a Classified Installation,[92] as well as against other related administrative decisions.[93]

These decisions may be appealed by the applicant/operator within two months of the date when the decision is notified or publicised. For third parties, legal persons or individuals, interest groups or societies and municipalities, the time limit is one year after notification or publication of the relevant decision.[94]

### *Annulment proceedings*

Some administrative decisions in the area of environmental permits for installations and many concerning the environment at large fall under the normal legal review procedure by administrative courts: annulment (or illegality) proceedings.

Annulment proceedings (*Contentieux de l'annulation*) entails that the judge can annul administrative decisions. The most common, and important, illegality proceeding is known as the claim for abusive use of authority, or *recours pour excès de pouvoir*. Such a claim can generally be brought against any administrative decision with the view to obtain the cancellation of a decision due to lack of legal basis.

After a declaration of illegality the judge can either annul the decision or send it back to the original authority for a new decision. Being the default procedure in administrative courts

[92] The rules on classified installations (installations classées pour la protection de l'environnement) include the activities listed in the IPPC directive (2008/01/EC).
[93] As listed under article L514-6 of the Environmental Code.
[94] Article R514-3-1 Code de l'Environnement.

("cassatory procedure"), it is applicable in many environment-related fields: administrative acts relating to the management of forests, urban development, environmental impact assessments, water, public works *etc.*

*Summary Proceedings*

A principle of French administrative law is that administrative judicial proceedings lack suspensive effect.[95] This is the corollary of another principle: the presumption of legality of administrative acts. The legal system allows for some procedures to grant injunctions, both in general and specific procedures for environmental matters. Also, the claimant may request the suspension of the decision's execution through a specific procedure.

In urgent cases, and if serious doubt with regards to the lawfulness of the contested decision is observed, the judge for summary procedures can suspend a decision's enforcement or some of its effects. This suspension is also available for negative decisions. Three conditions must be fulfilled: An appeal shall have already been initiated before the administrative judge under ordinary proceedings, the contested decision's execution would cause the claimant grave and immediate prejudice and the legality of the decision raises serious doubts.[96]

A judge must also suspend permits granted without the proper environmental impact assessment,[97] or planning decisions made without the required prior public inquiry.[98] Also, if a decision has been made in a sense contrary to the conclusions of the appointed experts (the *commissaire enquêteur* or *commission d'enquête*), serious doubts on the decision's legality is sufficient for the judge to issue a suspension.[99]

#### 5.4.1.2. Legal Standing

In accordance with principles of French law, any natural or legal person (with legal personality) including non-French citizens,[100] environmental groups and territorial *collectivités*[101] has the capacity to initiate proceedings before the administrative jurisdictions. NGOs may introduce a claim as long as it is formed in accordance with the legal requirements.[102] The French system of awarding legal standing is founded on a notion of interest in bringing legal action.

In general, the admissibility of a claim depends upon the nature of the contested act and the interest of the claimant. As was mentioned in connection with administrative non-judicial appeal, the contested decision must be an administrative act. This act must in turn must be of such a nature that it can damage the claimant's material or moral interests - the decision should be have

[95] R. Chapus, Droit du Contentieux Administratif, p. 379
[96] Article L521-1 *Code de Justice Administrative*.
[97] Article L122-2 *Code de l'environnement.*
[98] Article L 554-13 *Code de Justice Administrative*.
[99] Article L123-12 *Code de l'environnement.*
[100] In CE, sect. 18 avril 1986 *Mines Potasses Alsace*, the foreign province of Norhtern Holland, the City of Amsterdam and a Dutch environmental protection association initiated proceedings against a decree authorizing a mine to dump waste into Rhine waters.
[101] article L142-1 of the Environmental Code.
[102] CE 31 octobre 1969, *Syndicat de défense des Eaux de la Durance,* Rp 462.

legal effects (*décision faisant grief*). The claimant must thus show that his or her interest is direct, certain and current.[103]

For individual decisions, the addressees of the decision are automatically granted legal standing. For third parties to an individual decision, and in the case of a regulatory act, the court interprets the applicants' interest in seeking annulment broadly. The interest is considered sufficient if the damage is not excessively uncertain or excessively indirect.

In some cases, the law requires that administrative recourses have been exhausted before allowing admissibility to the administrative courts. This is for example – as mentioned above – the situation regarding complaints relating to access to information, where the *Commission d'Access aux Documents Administratifs* (CADA) has to be addressed before the Administrative courts can examine a complaint.

With regards to *actio popularis,* the French system offers no special procedure allowing for any and all to act, collectively or individually, against environmental contraventions. However, this is not an absolute requirement of the Aarhus Convention.

### *Legal standing of Individuals*

For individuals, the criteria as set out in the *Code de Justice Administrative* and the case law elaborated by the administrative courts apply, meaning that the plaintiff must justify an interest to act against the administrative act.

### *Legal standing of NGOs*

French courts in general, both administrative and judicial, have a broad view of NGO standing. A body of special rules affects the legal standing of NGOs. Case law has since long considered appeals brought on behalf of a collective interest as admissible.[104] Since the 1970s, stronger emphasis has been given to the role of interest groups active in the field of environmental protection.[105]

The Environmental code has introduced a system of accredited associations for environmental protection – *associations agréées de protection de l'environnement* – which entails certain benefits. These associations have a privileged status for participation in environmental decision-making as the accreditation makes them a party that must be consulted in certain procedures. Also, and more relevant for this section, the accredited associations benefit from a presumption of legal standing to appeal any administrative decision that is directly related to their objectives and statutes and entails damageable effects for the environment. They also benefit from a specific regime concerning the geographical scale of action – a national association can contest an act that

[103] CE 21 décembre 1906 - *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey - Tivoli - Rec. Lebon p. 962*
[104] CE, 28 décembre 1906, *Syndicat des Patrons Coiffeurs de Limoges.*
[105] See for example Decree No. 71-45 of 2 April 1971, article 61.

applies to any part of the national territory, and a regional association an act concerning a part of the regional territory, including municipal decisions.[106]

However, not only accredited associations but also any "normal" association for the protection of the environment may initiate a case before the administrative judge for any complaint relating to the association's purpose.[107] These associations do not benefit from any kind of presumption of interest, and must prove a qualified interest in accordance with the normal criteria.

#### 5.4.1.3. Claims for damages

*…in Administrative judicial proceedings*

Claims for damages are interesting in the present context, as it is one of the defining particularities of the full-jurisdiction procedures in administrative courts. The legal standing is in these cases in a sense connected to the damage caused. Individuals must have had their interests violated by the public authority's decision. The question is whether associations can claim compensation for their own damages or if they are limited to bring claims related to the damages suffered by their constituting members. This has been admitted by case law when the illegal acts of a public authority obstruct the objectives of an association.[108] Traditional case law held that in principle an association couldn't be recognised as having a right to compensation for an ecological damage as such.[109] It could, nevertheless, obtain compensation for moral or material damages, if it can prove expenses owing to the environmental damage.[110]

*…in Criminal law proceedings*

Many environmental provisions provide for criminal sanctions in the event of an infringement. These provisions are generally not found in the Criminal Code, but in specific codes – the Environmental Code as the most relevant example with statutes dealing with sea protection, ground water, air pollution, classified installations, waste, fishing and hunting, national parks and natural reserves, using certain chemical products, noise, etc. Moreover, specific provisions of the Criminal Code provide the basis for criminal liability.

Public prosecutors are in charge of prosecutions for criminal offenses. However, as mentioned above, prosecution can also be initiated by a private person who has personally and directly suffered a damage resulting from a criminal offense. Also, societies and interest groups may claim compensation before criminal courts for indirect damage suffered in relation with the collective interest they defend.[111]

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[106] Article 142-1 *Code de l'environnement.*
[107] Article 142-1 *Code de l'environnement.*
[108] TA Versailles, 21 novembre 1986, *Association de défense de la qualité de vie et du cadre de vie du village de Lésigny,* Revue juridique de l'Environnement 1987, p.79.
[109] TA Bordeaux, 2 octobre 1986, *Sepanso,* RJE 1987, p.367
[110] See for example CE, 18 mai 1979, *Association Judaïque Saint Seurin,* where damages were awarded for clerk fees paid for the reporting of noises.
[111] Article L142-2 *Code de l'environnement.* See also Cour de Cassation, 2nd Civil Chamber, N° 05-20297, 7 December 2006.

It could also be noted that French criminal courts have a limited approach to the standing of local public authorities and local governments, and their right to obtain moral compensation after an environmental damage is limited.[112] The reasoning behind this limitation is that all interference with the social interests that such authorities are in charge of are sufficiently compensated by normal criminal prosecution. Some recent judgments have, nonetheless, been less strict in this respect,[113] and some specific provisions even allow these authorities to take action and claim compensation for loss, damage and moral damage when environmental legislation has been breached.[114]

*… in Civil liability proceedings*

Environmental damages present particular features: they may constitute damages suffered by persons and/or properties as a result of a given pollution, and they may also cover damages suffered by the environment per se, with only indirect consequences upon individuals or private properties and more important consequences on collective interests. Despite this specificity, French civil law deals with environmental damages using the general principles of civil liability found in the Civil Code, with a limited number of environment-specific provisions concerning for instance damages caused by nuclear installations or maritime pollution.

A plaintiff can seek damages caused by polluters through the civil courts. As in any civil case, the claimant must justify that he or she suffered damages, that the defendant committed a fault, and that a link of causality connects the fault to the prejudice suffered. As in criminal and administrative proceedings, the challenge for NGOs has been to prove damages sufficiently connected to the interests they defend.

Recent cases from the civil jurisdiction have shown certain lenience and tend to admit more generous opportunities for NGOs to bring cases to obtain indemnification for damages caused to the public interest they represent.[115] Even if this is the case, it should be noted that the civil procedure involves economic risks not present in the administrative jurisdictions – if the claims of an association are dismissed it runs the risk to bear the costs of the defendant.

### *5.4.2. LENGTH OF PROCEDURES*

One of the more evident issues in French law with regards to Access to Justice is the complexity of the system. The multiple branches of courts may cause extraordinarily lengthy procedures if the jurisdictional court (*Tribunal des Conflits*) comes into play:

In a case, a group of NGOs requested a first instance civil court to order a private company to stop importing nuclear waste from foreign countries. In the face of the claim that the resolution of the dispute required an interpretation and legal review of the company's administrative permits, the

[112] Cass. Crim. 19 décembre 2006, bull. crim. 316.
[113] TGI Paris, 16 janvier 2008, affaire dite de l'Erika – compensation was given to both regional and local government plus compensation given to a natural park for damage to the natural sites.
[114] Art. L. 142-4 *Code de l'environnement*
[115] Cour de Cassation, 2nd Civil Chamber, N° 05-20297, 7 December 2006 and Cour de Cassation, 2nd Civil Chamber, 5 October 2006, N° 05-17602

case was referred to the *Tribunal des Conflits* to reach a decision on where the dispute belonged – in administrative or judicial courts.

The jurisdictional court ruled that the request aimed at stopping the company's international business, and not to challenge the decisions supposedly taken by the company acting as a public authority.[116] Therefore, the civil courts had authority to settle the dispute. If, the Court reminded, the civil courts have to interpret or review any administrative authorizations, they would have to refer the questions to the administrative courts. The procedure to settle the jurisdictional dispute took a year.

This could prove problematic, not only in terms of lengthy procedures but also in providing for effective remedies; only the court that has legal jurisdiction over the case may order adequate remedies, which may necessitate a decision from the jurisdictional court when a question is raised in similar cases. This could very well become common as etablissements publics, bodies of mixed public/private character, exercise many public functions.

The procedure's length in Administrative court from initiation to judgment is between seven months and two years; in the Administrative Courts of Appeal, between one year and two and a half years; in the *Conseil d'État*, one year. A case going through all the instances is settled in about four years.[117]

### *5.4.3. REMEDIES*

As mentioned under 5.2, both civil and administrative courts allow for summary or preliminary procedures.[118] Such procedures provide a fast track for the party challenging an act or an omission, and they may offer an appropriate remedy.

### *5.4.4. COSTS*

All codes on procedure; civil, administrative and criminal, contain provisions on fees, costs and the burden of costs.[119] Presently, there are no fees for initiating administrative judicial procedures.

Certain costs are still connected to the judicial procedure: Costs of investigation by the judge, experts, witnesses. These costs will be borne by the losing party if the judge decides so. The judgment may also require the losing party to pay for the winning party's lawyer (on average 1000 € for the administrative court, 1,500 € for the Administrative Appeal Court and 2000 € for the *Conseil d'Etat* ). The case law of the *Conseil d'Etat* holds that the judge should decide "in equity" if the losing party must pay the costs: this leads to that sometimes associations are exempt from these costs due to their financial situation. The jurisprudence rests uncertain on this position[120].

[116] Tribunal des conflits 1er juillet 2002, n°3323 et 3324.
[117] Milieu report p.23
[118] Nouveau code de procédure civile, art. 808 à 813. Code de justice administrative : art L. 521-1 et svts.
[119] Nouveau code de procédure civile : art. 700 ; Code de procédure pénale : art 457-1 ; code de justice administrative : art L. 761-1.
[120] Milieu report, p. 22.

Furthermore, If the court considers the procedure as abusive and not justified, it can condemn the claimant to a fine of up to 3000 €.

As a general rule, using an attorney (*avocat*) is not compulsory before the courts of first instance. It becomes compulsory, however, during the appeal procedure before the administrative appeal court and before the administrative supreme court, where the plaintiff must hire the services of a special type of barrister qualifying to appear before the supreme courts (*avocat au Conseil d'Etat et à la Cour de Cassation*).

The presence of a lawyer is mandatory in full jurisdiction proceedings[121], which can relate to matters on water, classified facilities or the recognition of environmental associations. A lawyer is also mandatory for appeals before the Administrative Appeal Courts[122] and the *Conseil d'Etat.* The lawyers fees are around 160-200 € per hour.[123] As an illustration: a request before the administrative court for a case on urban development costs around 2000-3000 euro for 10-15 hours of work. In an injunctive relief procedure, the lawyer can cost between 3000 and 3500 euros.

Experts, who are often needed in environmental procedures, are extremely expensive, and must be paid for by the parties, if the expert is at their service. However, the court can decide to assign their own experts. For instance, an expert on noise costs up to 3000 euro. Other expertise can cost up to 15000 euro.[124]

### *5.4.5. ASSISTANCE MECHANISMS AND LEGAL AID*

Claimants with limited means are entitled to legal aid if their financial resources fall under certain thresholds.[125]

The legal aid system is called "jurisdictional aid" and is different from the administrative facilitating "help to access justice". This system is open to natural persons with French or EU citizenship and third country nationals residing in France. Legal aid can be awarded to associations with their head office in France who lack sufficient resources to pay for the procedure, but only in exceptional cases,[126] meaning that aid is granted in very few cases.

When awarded, legal aid Is awarded for all or part of the costs related to the procedure, judicial fees, lawyer and other legal assistance, *etc*. However, the aid does not cover the costs incurred by the winning party in the hypothesis where the beneficiary of jurisdictional aid loses his or her case or is condemned to bear the costs of the adversary.[127]

[121] Article R.432-2 CAJ.
[122] Article R-811-7 CAJ.
[123] Milieu report p.23.
[124] Milieu report p.23.
[125] see *Loi 91-647 du 10 juillet 1991*
[126] Art. 2 of *Loi No°91-647 du 10 juillet 1991.*
[127] Art. 42 of *Loi No°91-647 du 10 juillet 1991.*

### 5.4.6. EVALUATION

From a general point of view, France has been somewhat proactive in ensuring their compliance with the Aarhus Convention by enacting legislation implementing the three pillars. Also, the EU-legislation on the matter further ensures that France complies with the convention. However, some issues still persist with regards to all three pillars.

*For access to information*, the French system has to some extent wrestled with issues relating to information kept by private bodies. As was mentioned earlier, the CADA seems to be reluctant in considering the activities of certain private bodies as providing public services in relation with the environment. As France to a large extent relies on such *entreprises publics*, problems could arise, and an overly strict interpretation by the CADA be at odds with the Convention's requirements.

*For public participation*, the situation is more troublesome, at least from an internal point of view. As has been highlighted by French authors, the procedures available for participation of the elaboration of "medium-sized" projects are lacking with regards to timeliness. The available procedure is often not initiated until after the scope of the project is already set by previous decisions and acts, thus limiting the effectiveness of any opinions brought forward during the participatory process.

*For the access to justice*, the French system as a whole seems satisfactory with relatively generous standing criteria for both individuals and NGOs in the different jurisdictional branches. However, costs seem to be a potential issue. Many (most, if not all) of the procedures available for jurisdictional review require the presence of legal, often expensive, professionals. This, coupled with limited possibilities to receive legal aid for environmental associations could run risk of effectively limiting the possibility to review environmental decisions.

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