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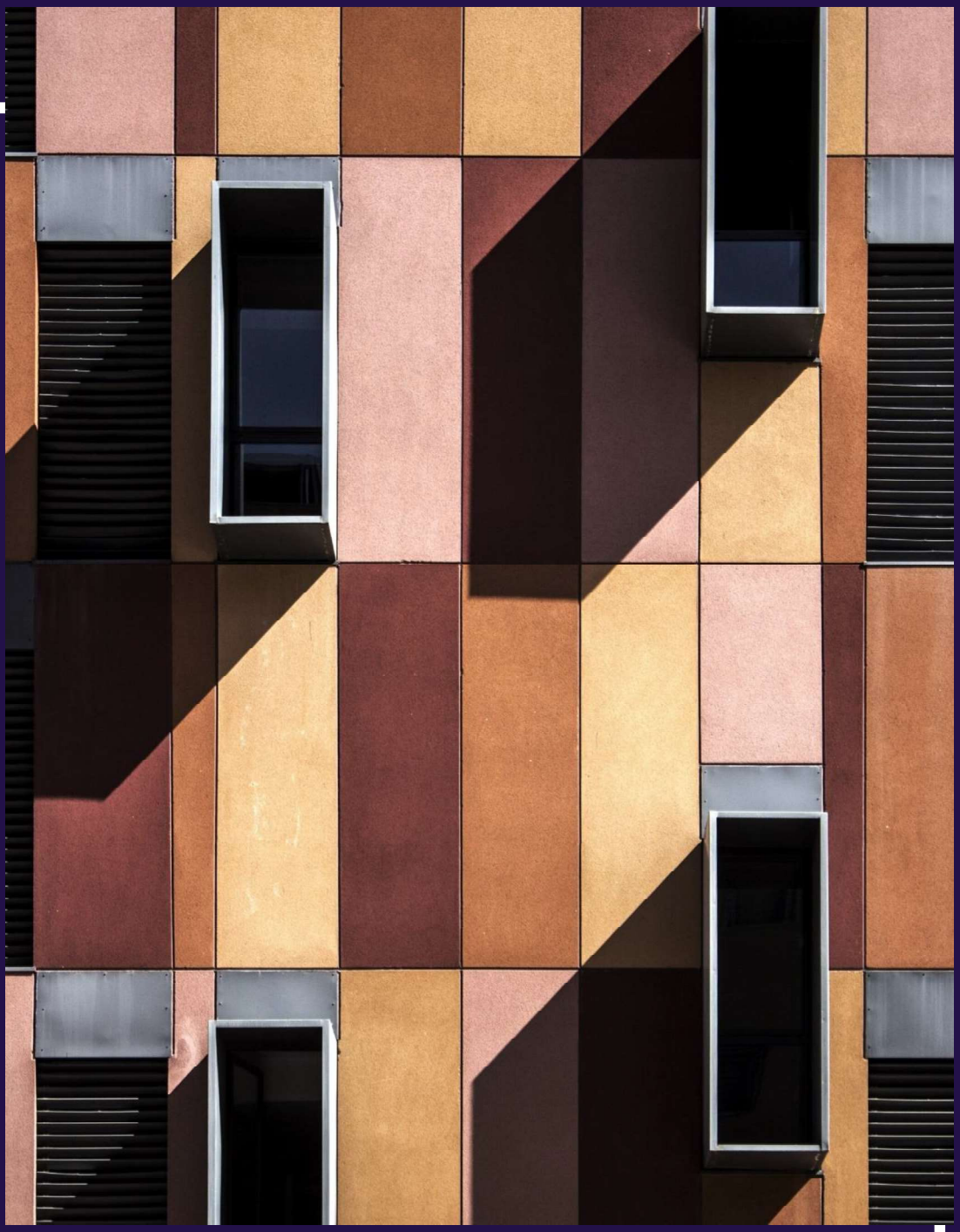

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SUMÁRIO

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THE AARHUS CONVENTION - THE LEGAL CULTURAL PICTURE: COUNTRY REPORT FOR FRANCE

A CONVENÇÃO DE AARHUS – A IMAGEM CULTURAL JURÍDICA: RELATÓRIO DE PAÍS PARA A FRANÇA

Giulia Parola[I]

ABSTRACT

The Aarhus Convention was ratified in France on the 8th July 2002 and came into force on the 6th October 2002 by the Law n° 2002-285 of 28 February 2002. The Convention was then applied by the Decree of 12 September 2002. Generally speaking, the Convention did not bring about many legislative changes. Even before the Convention was adopted France had some provisions on what are known as the three pillars. This notwithstanding, the rights provided in the Convention are still not fully enforceable in France and the report will outline some of the reasons for this.

KEYWORDS

Aarhus Convention. Access to information. Public participation. Access to Environmental Justice. Implementation of Environmental Access Rights in France.

RESUMO

A Convenção de Aarhus foi ratificada na França em 8 de julho de 2002 e entrou em vigor em 6 de outubro de 2002 pela Lei n ° 2002-285 de 28 de fevereiro de 2002. A Convenção foi então aplicada pelo Decreto de 12 de setembro de 2002. De um modo geral, a Convenção não trouxe muitas mudanças legislativas. Mesmo antes da adoção da Convenção, a França já dispunha de algumas disposições sobre os três pilares. Não obstante, os direitos previstos na Convenção ainda não são totalmente aplicáveis na França e o relatório descreverá algumas das razões para isso.

PALAVRAS-CHAVE

Convenção de Aarhus. Acesso à informação. Participação pública. Acesso à Justiça. Implementação dos Direitos Ambientais de Acesso na França.

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1 INTRODUCTION

The Aarhus Convention was ratified in France on the 8th July 2002 and came into force on the 6th October 2002 by the Law n° 2002-285 of 28 February 2002.[1] The Convention was then applied by the Decree of 12 September 2002.[2] Generally speaking, the Convention did not bring about many legislative changes. Even before the Convention was adopted France had some provisions on what are known as the three pillars.[3] This notwithstanding, the rights provided in the Convention are still not fully enforceable in France and the report will outline some of the reasons for this.

One peculiarity of the French situation is that the courts had an important role to play. Indeed, citizens and NGOs have seen the Convention as an opportunity to improve their rights and since the ratification they started to invoke it before the French courts. (PRIEUR, 1999, p. 22)

The *Conseil d'Etat* (State Council, the highest administrative court) plays an important role in terms of integration of both EU and international law into the domestic law.[4] The administrative courts have laid down the conditions under which an international provision is to be given direct effect, with a mechanism that resembles to the "direct effect" principle in EU.

Since the 1989 *Nicolo* case,[5] the *Conseil d'Etat* changed its position and ruled that it was allowed to check the compliance of a measure with an international treaty, even if this measure was posterior to the treaty[6]. This offered the courts the occasion to interpret the Aarhus Convention and to define its legal impact on domestic law[7].

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[1] Loi n° 2002 285, 28 February 2002 autorisant l'approbation de la convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement. (JORF, 2002, p. 3904)

[2] Décret n° 2002-1187, 12 September 2002 portant publication de la Convention d'Aarhus. (JORF, 2002, p. 15563). 'Décret' is a regulation adopted by the government.

[3] See the 1978 law on the access to administrative documents, the 1983 law of the democratisation of public enquiries and the 1995 law on the reinforcement of environmental protection "that implemented an approval procedure ('agrément') for nongovernmental organisations, notably to give them opportunities to accede to justice" (BÉTAILLE, 2009, p. 64)

[4] See Dubouis (2009, p. 391).

[5] CE, Ass., 20 October 1989, Nicolo, Rec. Lebon, p. 190.

[6] CE, Sect., 1 March 1968, Arrêt Syndicat général des fabricants de semoules de France, *Rec. Lebon*, p. 149.

[7] Art. 55 of the French Constitution determines the conditions for an international treaty to be integrated in the domestic legal system and the AC fulfils the Art. 55 conditions of ratification and publication. As the French legal system is monistic, the AC is supposed to be part of domestic law and have direct effect. In

The Convention is a mixed agreement because it is an international law instrument but it is also – to some extent – part of EU law. Without going into details, this basically means that many among its provisions are to be applied by the French courts, whether or not the legislation has been transposed and implemented (WIKLUND, 2011, p. 22). As a consequence, according to the *Conseil d'Etat*, the provisions in the first and second pillars, which have been implemented by the EU Directive, can be invoked by individuals. On the contrary, individuals cannot avail themselves of the rights bestowed in the third pillar as long as the Directive on access to justice proposed by the European Commission is not enacted[8].

Moreover, the *Conseil d'Etat* has recognised direct effects to a few provisions of the Aarhus Convention only, having chosen "a soft interpretation of this treaty's requirements" (LEFLOCH, 2008, p. 4). More specifically, the *Conseil d'Etat* recognises direct effect on the basis of the analysis of each individual paragraph in any of the Convention articles rather than taking any article as a whole.[9] So far, the *Conseil d'Etat* has held that the provisions of Article 6, paragraphs 1, 2, 3 and 7, of the Convention are directly applicable in the domestic legal order. The provisions of Article 6, paragraphs 4, 6, 8, and 9, and of Articles 7, 8, and 9, paragraphs 3 and 5, instead were held to merely establish obligations between the Member States. In other words, the provisions last listed have no direct effect in the domestic legal order and they can thus be invoked only by the claimant or by the defender.[10]

Finally, it has to be noted that French environmental policy has been strengthened thanks to a political process called the "*Grenelle de l'Environnement*" (Environment Roundtable). Among the outcomes from these environment roundtables are that the *Grenelle* I and *Grenelle* II statutes, each containing provisions collecting, modifying and, to some extent, strengthening the French Environment Code and addressing compliance with the Aarhus Convention. (WIKLUND, 2011, p. 22).

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fact "treaties shall normally be presumed to produce direct effects in domestic law, which means creating legal rules that individuals are entitled to rely on before domestic courts": AGUILA, 2007, p. 1533.

[8] Proposal for a directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters.

[9] See the table in Bétaille (2009, p. 64).

[10] CE, 28 July 2004, 5 April 2006 and 6 June 2007.

2 RIGHT TO ACCESS TO DOCUMENT/INFORMATION

2.1 Before the implementation of the Aarhus Convention

The first albeit limited recognition of the right of access to information in France has been linked to Article 14 of the 1789 Declaration of the Rights of Man that identifies the access to information with the right to have free access to the information concerning the State budget: "All citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put."[11] Despite that good start, for long the French administration was reluctant to recognise a clear right to access to all relevant information.

A step forward was taken with the 1978 Law on Access to Administrative Documents, which provides the right to access by all persons to administrative documents held by public bodies.[12] This statute refers to documents rather than information.[13] It provides that such documents shall be made available when requested. A request may be refused for a limited number of reasons listed in the same statute. The Commission for Access to Administrative Documents (CADA), analysed below, is in charge of giving legal advice to any person whose request for access to administrative documents has been refused by a public authority.

The commission's advice is however not mandatory for the public authority, whose final decision may in any event be challenged in front of the administrative courts (AGOSTINI, 2008, p. 1). Finally, in April 2002 the Conseil d'Etat held the right of access to administrative documents to be a fundamental right under Article 34 of the Constitution.[14]

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[11] An English translation is available at www.yale.edu/lawweb/avalon/rightsof.htm. Accessed 3July 2013.
[12] Loi n° 78-753 du 17 juillet 1978 de la liberté d'accès aux documents administratifs; Loi n° 79-587 du juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public, available at www.legifrance.gouv.fr/texteconsolide/PPEAV.htm Accessed 3 July 2013. English version (not updated) is available at www.cada.fr/uk/center2.htm Accessed 2 July 2013.
[13] "Documents" means: "files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organisations managing a public service.". They can be in any form. Documents handed over are subject to copyright rules and cannot be reproduced for commercial purposes.
[14] L'arret Ullmann, Conseil d'Etat du 29 avril 2002. See BANISAR, 2006.

2.2 Implementation of Access to Environmental Information

2.2.1 Subject matter of the right to access

The most important document concerning access to environmental information in France is the Environmental Charter, which is part of a statute having the same legal force as the Constitution which entered into force on the 1st March 2005.[15] Article 7 is devoted to access to environmental information and public participation. This provision, which has the same rank as the Constitution itself, states that "everyone has the right, at the conditions and to the extent provided in the law, to access environmental information held by public bodies and to participate in public decisions that affect the environment". This provision has a general applicability; however it is important to refer to it because it is the first time in Europe that the right of access to environmental information held by the public authorities and the right to participate in environmental decision making processes have been recognised in a constitutional provision.

The *Conseil Constitutionnel* (Constitutional Council) has ruled that all the rights and duties laid out in the Environmental Charter have constitutional *status* and that they apply to all public and administrative authorities within their respective fields of competence.[16] The *Conseil d'Etat* however has held that the Charter principles applies "at the conditions and to the extent provided in the law" only, and has left it to the Parliament to determine these conditions and the extent to which these rights may be exercised.[17]

Access to environmental information is thus still based on the general framework dating from 1978, with specific provisions in the Environment Code relating to the definition of environmental information[18], the legitimate grounds for refusal and their interpretation,[19] complying with Article 4 of the Aarhus Convention and with the subsequent EU legislation[20]. Those special rules differ from the general provisions

[15] See loi constitutionnel n°2005-205 relative à la Charte de l'Environnement.
[16] Decision n° 2008-564 DC of 19 June 2008.
[17] Appeal n° 297931, 3 October 2008, Commune d'Annecy.
[18] Article L. 110 1 II.4 of the Environment Code refers to the right of access to information on the environment in the general principles.
[19] Articles L. 124-1 et suivants et R. 124-1 et suivants du code de l'environnement available at www.legifrance.gouv.fr. The Environment Code is available in english. See also the « Circulaire du 18 octobre 2007 relative à la mise en œuvre des dispositions régissant le droit d'accès à l'information relative à l'environnement» available at www.developpement-durable.gouv.fr.
[20] Directive 2003/4/EC 2 of 28 January 2003 on public access to environmental information, available at http://eur-lex.europa.eu. See also AGOSTINI, 2008, p. 1.

regarding both environmental information and the grounds for the refusal. Contrary to the 1978 Law, the Environment Code indeed refers to information rather than to documents.

Moreover France has transposed the Directive 2003/4/CE on access to information through the following provisions[21]: Book I, title II of the Environment Code relates to public information and participation. Chapter IV of title II deals with the right to access information relating to the environment.[22] The Code sets forth a number of practical details following from both the Aarhus Convention and Directive 2003/4/EC. There are other provisions in the Code related to access to information on specific subjects such as chemicals, hazards, waste, air and water quality. Furthermore access to environmental information is regulated in decree n° 2005-1755 of December 30 2005 on freedom to access to administrative documents.

Under these provisions the public authorities have to provide the environmental information held by or for them to anyone on simple request. Everyone has this right without having to demonstrate an interest.[23] Article L. 124 1 stipulates that any request for information must receive an explicit response within a month of receipt. In exceptional circumstances where the volume or complexity of the information requested so requires the time limit can be extended to two months. In that case, the public authority shall inform the applicant of the extension, giving reasons, within one month.

The content of 'environmental information' under the Aarhus Convention is broader than in French domestic law. In France this notion refers on the one hand to Article 2(3) subparagraph a) of the Aarhus definition[24], on the other hand to factors, substances, measures and activities which affect or are likely to affect elements of the first category. Information which falls under this categorisation can be dealt with by the governmental agency or other public authorities competent with reference to the requested information. The classification of environmental information in French domestic law does not conform to the distinction found in Article 2(3) subparagraph a), b) and c) of the Aarhus Convention. As a consequence, requests which fit the Aarhus

[21] See the website of the French ministry for the environment: www.toutsurlenvironnement.fr/aarhus/lacces-ducitoyen-linformation accessed 4 July 2013; (LAERNOES, 2011, p. 47)
[22] Arts. L. 124 1 to L. 124 8 and R. 124 1 to R. 124 5.
[23] Book I, Title II, Chapter IV of the Environment Code and Act n° 78 753 of 17 July 1978.
[24] (a) the first category refers to natural elements, 'the state of elements of the environment' which includes things such as the quality of the air, of the soil, the atmosphere, water, land, landscapes, biodiversity, and the interaction of such elements, AC, Article 2.3 (a)(b)(c).

classification will have to be directed to the agency competent in that particular field. So it may be difficult to know in advance which agency deals with any specific information. This situation can lead to some confusion, but does not entail that France is failing in the implementation of the first pillar; on the contrary France is using its institutional autonomy in the implementation of these rules (LAERNOES, 2011, p. 47).

2.2.2 The interaction of right of access with duties to make some information generally available and with Directive 2003/98/EC on the re-use of public sector information

The Environment Code provides that public authorities shall make sure that the information collected on the environment by them or on their behalf is precise, up to date and can be used in comparisons. As a consequence, much environmental information is constantly available, in particular over the internet, on websites of public authorities, ministries or local governments.

More specifically Article 5, paragraph 3, Article L. 124-8 of the Environment Code provides that some categories of information relating to the environment must be publicly disseminated. These categories and the conditions for their dissemination are specified in Article R. 124-5 of Environment Code. As a minimum they include reports by public authorities on the state of the environment; international treaties, conventions and agreements; European Community, national, regional or local laws or regulations concerning the environment. The official newsletter of the ministry responsible for the environment and the Official Journal are accessible via the Ministry's website, while the website www.legifrance.gouv.fr offers access to all legislation.

Moreover, the information to be released also includes plans, programmes and documents defining the public policies relating to the environment.[25] The Environment Code provides that these are to be made available to the public in various formats, including the Official Journal, in accordance with the conditions laid down in articles 29 and 33 of Decree n° 2005-1755, and electronically in all other cases. Many other databases on specific topics, including water, air and hazardous materials, which are

[25] For example: the national strategy for sustainable development plans for water resources development and management.

maintained by agencies with specific technical expertise, are accessible on their websites, or through links from websites focusing on specific issues.[26]

In order to facilitate active access to information, Article 52 of Act n° 2009-967 of 3 August 2009 on the programme for the implementation of the Grenelle Environment Roundtable provided for the creation of a portal that would assist internet users to obtain environmental information held by the public authorities.[27]

With regard to the EU Directive on the re-use and commercial exploitation of public sector information (2003/98/EC),[28] a Government ordinance was adopted in June 2005 to amend the 1978 Law and to comply with the directive.[29] The same ordinance also introduced a number of other changes to the law including setting out the structure and composition of the CADA, requiring public law bodies to appoint a person responsible for dealing with request for environmental information, and allowing access in electronic form (BANISAR, 2006).

2.2.3 User friendliness of the environmental information (art. 5(2) AC)

French law provides some rules to improve the effectiveness of the right of access. Environmental data collected by the public authorities may be consulted by the public free of charge, either over the internet or in the documentation issued by the agencies concerned. Brochures are also distributed free of charge.

Article R. 124-2 of the Environment Code requires public authorities to name a person responsible for access to environmental information who is, in particular, responsible for receiving requests for information and appeals. Moreover Articles L. 124-7 and R. 124-4 of the Environment Code provide that public authorities shall establish directories or lists of categories of the environmental information they hold, which can

[26] National Implementation Reports 2011 France, available at: http://apps.unece.org/ehlm/pp/NIR/listnr.aspYearID=2011&wf_Countries=FR&wf_Q=QA&Quer_ID=&LngIDg=EN&YearIDg=2011, accessed 4 July 2013.
[27] Available at www.toutsurlenvironnement.fr since July 2009.
[28] Ordonnance n° 2005-650 du 6 juin 2005 relative à la liberté d'accès aux documents administratifs et à la réutilisation des informations publiques, see http://admi.net/jo/20050607/JUSX0500084R.html.
[29] Décret n° 2005-1755 du 30 décembre 2005 relatif à la liberté d'accès aux documents administratifs et à la réutilisation des informations publiques, pris pour l'application de la loi n° 78-753 du 17 juillet 1978, available at www.legifrance.gouv.fr.

be accessed free of charge, indicating where that information is made available to the public.[30]

To facilitate the access to information France has also developed new bodies such as the '*Service de l'observation et des statistiques*' (SOeS) which has as its principal task the implementation of the first pillar. This body is in charge of statistics in relation to the environment, energy, construction, housing and transportation and is responsible for collecting, producing and diffusing information in the fields of environmental information, sustainable development methods and data, energy statistics, housing and construction statistics, and transport statistics (LAERNOES, 2011, p. 47). The SOeS publishes its results on internet on freely accessible documents.

The collected information is therefore easily accessible to anyone with access to a computer and internet, and in France "this is a relative large portion of the population"(LAERNOES, 2011, p. 47). Nevertheless according to different NGOs[31] there is still much room for improvement in terms of disclosing environmental information on internet and update the information (LAERNOES, 2011, p. 47).

2.2.4 Information held by some private law entities (e.g. concessionaires)

In France the disclosure of environmental information held by private bodies has raised problems already long ago in the context of companies managing nuclear facilities. In general, 'public authorities' in French law are defined as central State authorities, local government, public establishments with an administrative statute, social security organisms, and other bodies in charge of the management of administrative 'public services' (services of general interest according to EU law).[32] As long as they act as public persons, these authorities can see their actions or omissions challenged in front of the administrative courts (WIKLUND, 2011, p. 22).

In 2006 the CADA ruled that producing energy was not to be treated as the provision of a public service,[33] and the companies generating nuclear power did not therefore qualify as 'public authority'. The issue is now solved because a statute was

[30] National Implementation Reports 2011, see footnote 32.
[31] France Nature Environnement (FNE) explained this point with a press release on February 7th 2011.
[32] Article 1 of Loi 2000-321 du 12 avril 2000 on the rights of citizens in their relations with the administration.
[33] CADA, avis n° 20062388, available at: www.cada.fr.

enacted to impose specific transparency obligations on these companies.[34] However, the intervention of the legislator has not solved the case where a private body refused the request concerning information about the environmental certification of a wood boiler plant providing heat for a town.

The CADA affirmed the refusal and ruled that, despite the fact the company was providing heat as a public service under the control of a public authority, the information did not have to be disclosed. The commission held that the information related to an environmental study done prior to the establishment of an environmental management system was taken by the company itself without any demand from the public authority, as well as the documents regarding industrial and commercial information. The commission concluded that the public service consisting in providing heat was not a public service in relation to the environment.[35]

2.2.5 The exceptions to the right of access (with specific reference to the "confidentiality of the proceedings of public authorities")

As is the case with the Aarhus Convention, French law lists a number of exceptions to access to information. Articles L. 124 4, L. 124 6 and R. 124 1 II and III of the Environment Code as well as Articles 2, 6 and 9 of Act n° 78 753 of 17 July 1978[36], implementing Article 2(3,4), list the grounds for refusal. For example Article L. 124 5, II of the Environment Code provides that if the request relates to information on emissions into the environment, the public authority can reject the request only on grounds of French foreign policy, public security or national defence; judicial proceedings or investigations

[34] Loi n° 2006-686 du 13 juin 2006 on the "tranparence et la sécurité nucléaire".
[35] CADA, avis n° 2007/2789, available at: www.cada.fr. See also:AGOSTINI, 2008, p. 1.
[36] See the law: Loi no. 78-753 du 17 juillet 1978 de la liberté d'accès aux documents administratifs; Loi no 79-587 du juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public, available at http://www.legifrance.gouv.fr/texteconsolide/PPEAV.htm. An English version (not updated) is available at http://www.cada.fr/uk/center2.htm.The 1978 Law on Access to Administrative Documents "provides also that "mandatory exemptions for documents that would harm the secrecy of the proceedings of the government and proper authorities coming under the executive power; national defence secrecy; the conduct of France's foreign policy; the State's security, public safety and security of individuals; the currency and public credit; the proper conduct of proceedings begun before jurisdictions or of operations preliminary to such proceedings, unless authorisation is given by the authority concerned; actions by the proper services to detect tax and customs offences; or secrets protected by the law. Documents that would harm personal privacy, trade or manufacturing secrets, pass a value judgment on an individual, or show behaviour of an individual can only be given to the person principally involved.". BANISAR, 2006.

into offences that might lead to criminal penalties; or intellectual property rights.[37] As noted before in cases of refusal by a public authority, the interested party has the possibility to seize the CADA which rules on the legality of the refusal.

Nevertheless, there have been some problems on the interpretation of the Aarhus Convention's exceptions. A first example refers to the distinction between 'document in the process of being finished' and 'unfinished document'. The CADA and the administrative jurisdictions had earlier held that access to preparatory documents might be refused. In 2007 the *Conseil d'Etat*[38] changed the position and affirmed that preparatory documents, as long as they are completed, are to be disclosed, even when they are preliminary to a public decision that has yet to be taken.[39]

Another problem concerns the possible confidentiality of commercial and industrial information. The Aarhus Convention provides that "the grounds for refusal (...) shall be interpreted in a restrictive way".[40] Nevertheless, several members of the Local Information Commissions report a failure to apply this principle, particularly owing to an overly wide interpretation of confidentiality within the nuclear industry. The National Association of Local Information Commissions has recently started to experiment a system giving confidential access to classified documents of EDF (Électricité de France) and of the Flamanville Local Information Commission[41].

Another way to overcome the difficulties related to the confidentiality is Article 6 III of Act n° 78 753 of 17 July 1978, which lays down a duty to supply partial information: if the information requested contains references that may not be disclosed because they are exempt under Article L. 124 4 I of the Environment Code, on protection of State or private secrets and interests, but it is possible to obscure or remove such references, the information must be supplied to the applicant after obscuring or removing those references. The public authority, under the control of the courts, decides which information may be cancelled and may ask the opinion of the company concerned by the industrial and commercial information (AGOSTINI, 2008, p. 5).

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37 Article L. 124 5, II of the Environment Code.
38 CE, 7 août 2007, n° 266668 available at www.legifrance.gouv.fr or www.conseil-etat.fr.
39 The Council ruled that it was illegal for the prefect of Morbihan to deny the inhabitants of accessing information under the pretext that the document was preliminary.(AGOSTINI, 2008, p. 1)
40 Article 4(3) of the Aarhus Convention.
41 National Implementation Reports 2011 France, see footnote 32.

2.2.6 The costs for exercising the right to access

Consultation of information on site is free of charge, except where it is precluded by considerations relating to preservation of the document. For other information, if copying is technically feasible, it shall be charged to the applicant, provided that this charge shall not exceed the cost of reproduction. It is also possible for the interested party to obtain the requested document by e-mail and without charge if it is available in electronic format.[42]

It has however been noted that the information is only rarely communicated via e-mail.[43] A statute adopted on October 1st 2001 determines the maximum costs of copying administrative documents which may not exceed €0.18 per A4 page for black and white printing, €1.83 for a diskette and €2.75 for a CD-ROM. Moreover Article 35 of Decree n° 2005-1755 of 30 December 2005 sets out the conditions for calculating the cost of reproducing documents to be charged to the applicant, as well as postage costs, where applicable. The applicant is informed of the total charge, and the administration may require payment in advance.

3 PUBLIC PARTICIPATION

3.1 Before the implementation of the Aarhus Convention

Public participation in environmental decision-making was already known in France prior to the ratification of the Aarhus Convention, if only from the 1970s.

France was well known for its centralised tradition of government and a top-down approach characterised administrative action, the only necessary form of public participation being through elections.[44] In the 1970s the system started to change under the pressure of two factors. First environmental and social movements began to ask for more decentralised decision-making. Secondly, representative democracy was in crisis at the time and the development of participative mechanisms was seen as a way of improving relationships between the citizens and the public authorities. As a result, the

[42] Article 4 of Act n° 78 753 of 17 July 1978.
[43] Comments of the "Associations amis de la terre france" and "France Nature Environnement" on the project of the French Report (Convention D'Aarhus-COP4-2011) p.4 par. 3.
[44] MULLER1984; J.-P. LE BOURHIS,2003, pp. 147-159.

period which lasted from the 1970s to the late 1980s saw the opening of some public decision-making spaces in the environmental field, although the only mechanisms were public inquiries on projects affecting the environment or participation in the planning decisions, which took place in the advanced stages of the decision-making process.

During the 1980s the only improvement in participation was a reform of public inquiry which recognised the right of members of the general public to submit written comments on the environmental impacts of proposed projects. Since the 1990's, the scenario has changed: participatory tools have started to develop and participation has become the model for decision-making when the environment is at stake (MERMET, 2008). Local environmental action plans[45] were negotiated involving the general public, and laws were adopted to set up new procedures including public participation and stakeholder negotiation for planning programs.[46] Moreover, new bodies and mechanisms were created, such as the *Commission Nationale du Débat Public*.[47]

Today, there are three principal mechanisms of public participation in France: *débat public*, *enquête public*, and *concertation.*

The *débat public* (Public Debate) (BLATRIX, 1997, p. 7792; PAOLETTI, 1997, p. 235) was introduced by the Loi Barnier[48], and today the rules pertaining to it are collected in the Environment Code which also sets up the National Commission for Public Debate.[49] This body organises public consultations on large urban development or public works projects sponsored by the State, local authorities, public institutions, and private entities.[50] The public is invited to voice its views on the advisability of the project, its goals, and its features. The purpose of the Commission is to ensure that the public can participate in the whole phase of project planning, from the commissioning of preliminary studies to the end of the public inquiry, and to ensure that the public is properly informed about the projects.

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45 Plans Municipaux d'Environnement, Plans Départementaux d'Environnement.

46 Planning programs for example water management (Schémas d'aménagement et de gestion des eaux), waste management (Schémas départementaux d'élimination des déchets), air pollution (Plans d'amélioration de la qualité de l'air).

47 National Commission for Public Debate. ADELS, Conseils de quartier, mode d'emploi (Neighbourhood councils, a users' guide), 2003; Anacej, Comment créer son conseil d'enfants et de jeunes (How to set up councils for children and young people); BOURG; BOY, 2005.

48 Loi Barnier n° 101, 2 February 1995.

49 Décret n°2002-1275 du 22 octobre 2002 relatif à l'organisation du débat public.

50 See articles L. 121-1 to L. 121-15 and R. 121-1 to R. 121-16 of the Code.

Concerning the *enquéte Public* (BLATRIX, 1996, p. 299313) (Public Inquiry) the Environment Code provides that "The public inquiry is mandatory for activities subject to an environmental impact assessment"[51]. The *Préfet* is competent both for organising the enquiry and later for taking the decision. The inquiry is led by an inspector or an inspection committee which is in charge of informing the public and gathering comments and additional information. When the inquiry is completed the inspector or the committee send the *Préfet* a report summarising the steps of the inquiry, the public comments, and the detailed reasons why the project should be approved or not. Unfavourable opinions do not bind the *Préfet* not to grant the authorisation.[52]

The last tool is the *concertation* (Consultation)**,** which can cover all sorts of situations where there is some degree of dialogue among the different actors in the course of the decision-making process (MERMET, 2008). Many local government entities have elaborated internally binding rules about having concertations when elaborating plans and programmes with effects on the environment.[53]

3.2 The implementation of participation rights granted by the Aarhus Convention

An important instrument in the implementation of Article 7 has been the organisation of the Grenelle Environment Roundtable.[54] The Roundtable brought together representatives of five sectors (the State, local authorities, environmental NGOs, companies, and trade unions) to define a 'road map' for ecology and sustainable development and town planning. On the basis of the efforts of the working groups and after a consultation phase with the different stakeholders, the negotiation phase ended with roundtable discussions with representative from the same five sectors, which allowed the main thrust of action to be decided in all areas. The initial conclusions of the process were made public at the end of October 2007. This work was translated into Act n° 2009-967 of 3 August 2009 on the programme for the implementation of the Grenelle Environment Roundtable and Act n° 2010-788.

[51] Articles L123-1 et seq and L122-1 of the Environment Code.
[52] Article L123-12 Environment Code. See WIKLUND, 2011, p. 30-31
[53] For more information and some adopted charters on concertations, see www.comedie.org/chartes.php .
[54] See www.legrenelle-environnement.fr/grenelle-environnement/.

The right to environmental participation has been recognised as a principle by Article 7 of the Environmental Charter which states that, "everyone has the right, [...] to participate in public decisions that affect the environment." The principal legislative measures are in Title II of Book I of the Environment Code, "Public information and participation": in particular Articles L. 121-1 to L. 121-16 (public debate and other means of consultation prior to a public inquiry) and L. 123-1 to L. 123-19 (public inquiry). These articles have been supported by Act n° 2010-788 of 12 July 2010 on a National Commitment to the Environment.

3.2.1 Different participation rules applicable to specific activities, plans, programs and policies, and normative instruments

A public inquiry is always planned with reference to the implementation of project listed in Annex I of the Convention. The largest urban development or public works projects may also be subject to a public debate (Article R. 121-2 of the Environment Code) or consultation prior to a public inquiry.[55] Projects subject to an impact study must be assessed by a public inquiry[56] or, in the case of exceptions to this rule, made available for public examination.[57] Other procedures may be organised in exceptional cases, such as public conferences, or on the initiative of local authorities, in particular *referenda*.

When a project is subject to an impact study, the public may be involved already from the stage of deciding the study's scope: Article L. 122-1-2 of the Environment Code allows the developer to ask the authority competent for taking the decision to organise a consultation meeting with local stakeholders interested by the project to allow everyone to share their views on the potential impact of the planned project. Act n° 2010-788 lays out arrangements for consultations taking place between the public debate phase and the public inquiry. It also allows for consultations prior to the public inquiry without, however, making them a requirement.

If the Commission recommends that developers should pursue or continue public consultation, they are obliged to do so and to comply with the consultation arrangements suggested by the Commission. For all projects that do not fulfil the criteria for referral to

[55] See article L. 121-16 of the Environment Code.
[56] See article L. 123-1 of the Environment Code.
[57] See article L. 122-1-1 of the Environment Code.

the Commission, Article L. 121-16 of the Environment Code allows the entity responsible for the project, plan or programme to conduct a consultation prior to the public inquiry, at the behest of the public authority competent for authorising or approving the project. The authority may also require a consultation exercise to be organised involving all the stakeholders (the State, local authorities, environmental NGOs or foundations, and organisations representing employees and companies).

Concerning Article 7 of the Aarhus Convention, France has transposed both Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment[58] and Directive 2003/35/EC of 26 May 2003[59] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, which apply the principles of the Aarhus Convention at the European Union level.

Finally, concerning the implementation of Article 8 of the Aarhus Convention, Article 244 of the *loi Grenelle* II of July 2010 lays out the arrangements for the public to participate in the regulatory decisions of the State and public institutions that have a direct and significant impact on the environment.[60] Drafts of such decisions must be published electronically for a minimum of 15 days in conditions that allow the public to make comments[61] or published prior to their referral to a consultative body comprising representatives of categories of persons concerned by the decision.[62] Notwithstanding this recent improvement, according to the CRIDEAU[63] the absence of direct effect in France and of a clear European Directive regarding Article 8 make it impossible to invoke this provision before a French court (LAERNOES, 2011, p. 54).

3.2.2 Participation beyond defence and consultation, as negotiation or co-decision, and compensation mechanisms to avoid nimby and facilitate compromise

Most of the largest construction projects such as highways, high-speed railways or airports are challenged before the *Conseil d'Etat*; NGOs are sometimes seen by the

[58] Ordinance n° 2004-489 of June 2004, Decrees n° 2005-613 and n° 2005-608 of 27 May 2005.
[59] Decree n° 2006-578 of 22 May 2006.
[60] This right is codified by Articles L.120-1 and L.120-2 of the Environment Code.
[61] The website for publications is www.developpement-durable.gouv.fr/-Consultations-publiques-.html.
[62] For instance a public consultation exercise was arranged at the end of 2006 on preliminary drafts of the law and decree transposing Directive 2004/35/EC on 21 April 2004 on environmental liability.
[63] Interdisciplinary Research Center of Environmental Law of Territorial and Urban Planning.

State as an obstruction to each and every project because they systematically invoke the Aarhus Convention, and in particular Articles 6, 7 and 8. The issue is that participation in planning decisions is a frustrating exercise because it is still extremely difficult for the public to express its point of view in decision-making because it has always to "fight to have its views heard" (BLATRIX; MERMET; RAOUL-DUVAL, 2011).

Also according to the European Environmental Bureau (EEB)[64] France grants the public a very limited time to participate (LAERNOES, 2011, p. 51-53). This means that the issue in France is not to find mechanisms to avoid obstructions or NIMBY but to improve participation.

3.2.3 NGOS participation rights (also considering art. 7 – "public which may participate")

French law does neither define 'public' nor 'public which may participate', which allows anyone interested to participate, including the NGOs. Nevertheless participation seems to be increasingly limited to the participation of NGOs active in the environmental field. It is as if these organisations represented the public.

The Environment Code has introduced a system of accredited associations for environmental protection[65] 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, 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 harmful 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 applies to any part of the national territory, and a regional association an act concerning a part of the regional territory, including municipal decisions.[66]

[64] EEB, feb 2011 powerpoint on http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1.
[65] In French :associations agrées de protection de l'environnement.
[66] Article 142-1 Environment Code.

3.2.4 A reasonable timeframe for the different phases

Regarding the implementation of Art. 6(3) AC, the order establishing an inquiry specifies its duration, which must neither be less than 30 day nor exceed two months. According to L. 123-9 of the Environment Code the public inquiry commissioner may make a justified decision to extend the inquiry for a maximum of 30 days. It has been noted that "the difficulties in accessing the relevant files in time before the start of the decision making process render the full implementation of Article 6, paragraph 3 impossible" (LAERNOES, 2011, p. 50).

3.2.5 A comparison between the Aarhus Convention requirements for participation and those of EU EIA and SEA

As already recalled, France has transposed both Directive 2001/42/EC of 27 June 2001 and Directive 2003/35/EC of 26 May 2003. These provisions enhance the dissemination of information to the general public and public participation at each stage of the development of a project, plan or programme which has an impact on the environment. The new Article L. 122-8 of the Environment Code, inserted by Article 233 of the Act on National Commitment to the Environment, specifies that where a draft plan, scheme, programme or other planning document subject to environmental assessment does not have to submitted either to a public inquiry or another form of public consultation, the entity responsible for drafting must make available to the general public, before its adoption, the environmental assessment, the draft document, an indication of the authorities responsible for taking the decision and an indication of bodies from which information on the draft document can be obtained as well as opinions delivered by administrative authorities on the draft document where these are binding. The comments and suggestions collected during the time when documentation is available to the general public must be taken into consideration by the authority competent to adopt the plan, scheme or document.

Despite the transposition of the mentioned provisions, France has not completely implemented Article 7. As it has been remarked by both legal scholars and public

servants, the public inquiry takes place too late in the procedure.[67] According to Michel Prieur, "it would have been much better to foresee an earlier participation of the public, when it is still possible to amend the project" (PRIEUR, 2004, p. 112. PRIEUR; GUIGNIER, 2006) Another problem is that the inquiry does not provide neither early information nor public participation to the design of the project. The solution "for this kind of project is, for it to be submitted, in addition to the public inquiry, to the public debate or to an early consultation of the public" (JEGOUZO, 2008, p. 280). Therefore, only when a public debate or a consultation is organised at the beginning of the process, French law complies with both the Aarhus Convention and Directive 2003/35/EC.

3.2.6 Taking into account the results of public participation

From a formal point of view Article 6, paragraph 8, has been duly implemented in French law even though in fact the outcomes from public participation are not very stringent on decision makers.

The Environment Code states that at the end of a public debate, the developer must take a decision, which is published. The developer indicates in the decision the principle of and conditions for the continuation of the project placed before the public, and where appropriate the main changes to be made. The developer also lists measures that he deems necessary to put in place to respond to the lessons drawn from the public debate.[68] Moreover at the end of a public inquiry, the public inquiry commissioner must draw up a report describing the process of the inquiry and considering the comments made. This report must include counterproposals made during the inquiry as well as any responses from the developer.[69] In a separate document, the public inquiry commissioner or the inquiry commission records the conclusions reached and the grounds thereof,

[67] During the 'Grenelle de l'environnement' process one expert group wrote a report about environmental governance. The French ministry of the environment was part of this expert group. On page 69 of the report, the following is proposed: "To develop the consultation of the public [such as public debate] early in the elaboration procedure of plans, and not only at the end of the procedure [public inquiry]" (Group 5 report, Construire une démocratie écologique: Institutions et gouvernance, September 2007, p. 69, available at http://www.grenelleenvironnement.gouv.fr). This proposal has been notably made by the IGE, 'Inspection Générale de l'Environnement', which is the internal inspection department of the French ministry of the environment. It clearly shows that at present public inquiries come instead at the end of the procedure.
[68] Art. L. 121-13 of the Environment Code.
[69] Art. L.123-15 of the Environment Code.

specifying whether or not they are favourable to the operation.[70] The Act of 27 February 2002 introduced the project declaration, adopted by a local authority after the public inquiry, in which it expresses its view as to the public interest of the project, including in particular the main changes that have been made following the public inquiry.[71] Articles 236 and 238 of Act n° 2010-788 specify that the decision and the project declaration must take into consideration "the result of public participation".

Despite the above referred provisions, the problem is that the opinion of the inquiry commissioner does not bind the final decision. Indeed permits can be granted against the opinion of the commissioner. Article L.126-1 of the Environment Code stipulates that the nature and the motives of the modification to a project may not alter the general economy of such a project. This means "that a project may never be altered completely which seems to be in contradiction with Article 6, paragraph 4 and paragraph 8 of the Aarhus Convention"(LAERNOES, 2011, p. 50). Moreover, as pointed out by two NGOs[72] for a French administrative court 'taking into account' means that the competent authority may not deviate from 'fundamental orientations' of the documents to be taken into account.[73]

Concerning Article 6, paragraph 9 of the Aarhus Convention, the Act of 27 February 2002 stipulates that project declarations[74] and public interest declarations[75] must be accompanied by a statement of grounds. The same applies to decisions to grant or refuse permission to projects subject to impact assessments, which must be accompanied by a statement of grounds and made public.[76] The problem is that French law does not require the decision-maker to disclose the detailed reasons for her/his decision not to take into account the results of the public participation or the opinion of the inquiry commissioner, but it provides just a general principle: the official documents of the administration shall be published.

[70] Art. R. 123-22 of the Environment Code.
[71] Arts. L. 126-1 and R. 126-1 to R. 126-4 of the Environment Code.
[72] Comments of the "Associations amis de la terre france" and "France Nature Environnement" on the project of the French Report (Convention D'Aarhus-COP4-2011) p.10 par. 4.
[73] CE, july 28 2004, Association de défense de l'environnement et autres, Féderation nationale SOS environnement et autres, BJCL, n° 9, 2004, p. 613.
[74] Art. L. 126-1 of the Environment Code.
[75] Art. L. 11-1-1 of the Expropriation Code.
[76] Art. L. 122-1 of the Environment Code.

DIREITO DAS POLÍTICAS PÚBLICAS
REVISTA DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO DA UNIRIO

4 ACCESS TO COURTS

4.1 Pre-implementation

Generally speaking, the French system provides for mechanisms satisfying the requirements on access to justice of the Aarhus Convention. The French judiciary is divided into branches: On one hand, there are courts of ordinary jurisdiction which hear both civil and criminal cases, and on the other hand administrative courts which only hear administrative cases.[77] The *Cour de Cassation* is the highest court having ordinary jurisdiction, while the *Conseil d'Etat* sits at the top of the administrative jurisdiction. Moreover the *Conseil constitutionnel* is the constitutional court.

When challenging an administrative decision in France administrative appeal as well as judicial review are available. There are two types of administrative appeals: the *Recours gracieux* ("non-contentious appeal") to the same authority having taken the decision challenged or having failed to act, and the *Recours hierarchique* to a hierarchically superior authority (WIKLUND, 2011, p. 25).

In general, the French system for appeal and review in environmental matters follows the general procedures or instances, no specific rules having been enacted for challenging violations of environmental legislation by public authorities, individuals or private bodies (WIKLUND, 2011, p. 22) Environmental claims may be pursued in the three courts (civil, criminal and administrative) and the competence depends on the nature of the claim (WIKLUND, 2011, p. 25).

A new procedure which is also applicable to environmental cases is Article 61-1 of the Constitution, added by Constitutional Act n° 2008-724 of 23 July 2008. It allows parties to a judicial proceeding to challenge statutory provisions infringing the rights and freedoms guaranteed by the Constitution. The principles and rules that may be invoked in a 'priority question of constitutionality' are enshrined in the 1958 Constitution and the texts listed in its preamble (the 1789 Declaration, the preamble to the 1946 Constitution and the Environmental Charter). Particularly important for the present contribution are the right of access to environmental information held by public bodies and the right to

[77] Laws of 16-24 August 1790 and 16 Fructidor Year III (1795).

participate in public decisions that affect the environment (Article 7 of the Environment Charter, whose constitutional value has already discussed).[78]

4.2 Implementation of the third pillar

4.2.1 Alternatives to court procedures

Concerning denied access to information, French law distinguishes between administrative appeal and judicial review procedures. In some cases administrative appeals are a condition precedent to judicial review. This is the case of complaints related to the access to information, where the CADA has to be consulted before the administrative courts can examine a complaint (WIKLUND, 2011, p. 34-37).

As already mentioned, Article 20 of Act n° 78-753 of 17 July 1978 set up the CADA to ensure freedom of access to administrative documents and to hear appeals on decisions refusing access to documents.[79]

If the CADA finds the refusal illegal but the competent authority confirms it, the applicant may challenge the decision in front of the administrative courts. While it is mandatory to consult the CADA, its opinions and decisions are neither binding on nor enforceable against the administration (HALLO, 2007). In practice, however, the administration complies with favourable opinions from the Commission in 65 per cent of the cases.[80]

[78] This is a new remedy introduced on 1 March 2010 before all courts. In an interim order of 16 June 2010 (Conseil d'Etat, ordonnance de référé, 16 June 2010, Appeal n° 340250), the Council of State held that a priority question of constitutionality may be raised before an administrative judge for interim applications ruling in first instance or appeal pursuant to article L.521-2 of the Code of Administrative Justice. In a plenary ruling of 3 October 2008 (Conseil d'Etat, arrêt d'assemblée, 3 October 2008, n° 297931, Commune of Annecy) the Council of State recognised the constitutional status of the Environmental Charter, infringement of which can be invoked to contest the legality of administrative decisions. See National Implementation Reports 2011 France, see footnote 32.

[79] There are two distinct ways in which applicants can bring interim proceedings against the refusal: They can file an interim application for the decision refusing communication of a document to be suspended pursuant to article L. 521-1 of the Code of Administrative Justice. In this case, the interim application for suspension must be accompanied by an application for the annulment of a decision to refuse communication. For this latter application to be admissible, the matter must have been referred to the Commission on Access to Administrative Documents. The applicant has two months to apply to the Commission. The Commission sends an opinion to the competent authority on whether the information requested should be communicated. Within a month of receipt of this opinion, the administration informs the Commission how it intends to follow up the application for communication. The applicant can file an interim application for access under the so-called "useful measures" proceeding specified under article L. 521-3 of the Code of Administrative Justice. As this interim application is urgent, there is no need for the Commission to issue an opinion. See National Implementation Reports 2011 France, see footnote 32.

[80] National Implementation Reports 2011 France, see footnote 32.

Article 6 of Act n° 73-6 of 3 January 1973 provides that persons who consider that the administration has not acted in accordance with its mission of public service may ask for the case to be brought to the attention of the French Ombudsman, the *Médiateur de la République*, who is an independent authority.[81] However, the claim must be lodged with a Parliamentary representative, who in turn will decide whether or not to submit the claim to the Ombudsman.[82] When the complaint is deemed to be justified, the Ombudsman issues any recommendations he or she believes will resolve the matter, in particular recommending to the body in question any solution allowing the claimant's dispute to be settled equitably. Prior to the complaint, the necessary procedures must be carried out with the relevant administrations and the complaint has no effect on deadlines for appeals. All administrative remedies must have been exhausted before submitting a claim to the Ombudsman. An inquiry to the Ombudsman does not suspend the statute of limitation for judicial review.[83] The Ombudsman too gives opinions (*avis*) recommending solutions to an administrative dispute, but these are purely advisory in nature, and as for the CADA, they lack any binding effect.

4.2.2 Standing, including of NGO´s

Any natural or legal person (with legal personality) including non-French citizens,[84] environmental groups and territorial authorities[85] has standing to bring proceedings before the French administrative courts.

In administrative courts standing of individuals follows the criteria set out in the *Code de Justice Administrative*. Basically the admissibility of a claim depends upon the nature of the contested measure and the interest of the claimant. The contested decision must be an administrative act and must affect the claimant's material or moral interests. The claimant must thus show that his or her interest is direct, certain and current.[86]

[81] See article 1 of loi 73-6 du 3 janvier 1973.
[82] See article 6 of the mentioned law.
[83] See article 7 of the mentioned law.
[84] In CE, sect. 18 avril 1986 Mines Potasses Alsace, the foreign province of Northern Holland, the City of Amsterdam and a Dutch environmental protection association initiated proceedings against a decree authorising a mine to dump waste into Rhine waters.
[85] Article L142-1 of the Environment Code.
[86] CE, 21 décembre 1906 - Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey - Tivoli - Rec. Lebon p. 962.

Concerning NGOs already in 1906 associations were granted standing to bring actions on behalf of collective interests.[87] Since the 1970s, a stronger emphasis has been put on the role of interest groups active in the field of environmental protection.[88] French courts, both administrative or judicial, are usually generous on NGOs standing.[89] NGOs may introduce any claim as long as it is formed in accordance with the legal requirements.[90]

The rights and obligations of environmental NGOs are clearly laid out in Articles L.141-1 and supplemented in the Environment Code. As it has been already remarked, the Environment Code has introduced a system of accredited associations for environmental protection. Articles L142-1 of the CE and L600-1-1 of the Urban Code have stipulated that in order to challenge an administrative decision, a NGO must have been created before the decision was adopted. Furthermore the NGO must have deposited its statutes before the decision was made public.

Under Article L. 142-1, paragraph 1, any environmental NGO may bring proceedings in administrative courts for any complaint relating to its purposes. Article L. 142-1, paragraph 2, gives NGOs standing in proceedings against any administrative decision having harmful impacts on the environment. Finally under Article L. 142-2, NGOs have the right, under certain conditions, to exercise the same rights as those granted to private applicants to ask for damages in criminal cases.

4.2.3 The review of "substantive and procedural legality" as required by art. 9(2) of the Aarhus Convention

The classification of legal actions before the administrative courts includes four types of proceedings, categorised by the nature and extent of the powers of the court:

87 CE, 28 décembre 1906, Syndicat des Patrons Coiffeurs de Limoges.
88 See for example Decree n° 71-45 of 2 April 1971, article 61. (WIKLUND, 2011, p. 34-37).
89 The Court has ruled that an environmental NGO may bring a civil action not only before a criminal court, but also before a civil court (Court of Cassation, 7 December 2006). It has also ruled that an association may bring legal action on behalf of collective interests, as long as such interests fall within the scope of its mandate, without reference to any requirement for authorisation (Court of Cassation, 5 October 2006) See National Implementation Reports 2011 France, see footnote 32.
90 CE 31 octobre 1969, Syndicat de défense des Eaux de la Durance, Rp 462. (WIKLUND, 2011, p. 42) p. 34-37);

interpretation proceedings, repression proceedings, full jurisdiction proceedings, and annulment proceedings.[91]

In interpretation proceedings courts give an interpretation when an administrative decision is unclear; courts can also declare the measure illegal if so transpires after having interpreted it. In repression proceedings (*Contentieux de la repression*) the court has the power to levy penalties for contraventions with an administrative nature.[92]

In full jurisdiction proceedings (*Contentieux de pleine jurisdiction*) the court can annul the decision on the basis that it is illegal or substitute it by one of its own; it can also reform decisions laying down new technical standards for the subsequent administrative activity, and can order damages to be paid to the plaintiff. This procedure is used when a question is raised regarding the existence of a situation affecting an individual right. In the environmental area, this procedure is applicable for every legal action related to the liability of public authorities and for litigation on classified installations.[93]

The last type of legal actions – also available in environmental cases – is made up of annulment proceedings. The most common is *recours pour excès de pouvoir* which is used to ask the annulment of a decision due its illegality. Once declared the illegality, the court can either annul the decision or send it back to the original authority for a new decision.

4.2.4 The remedies available

Injunctive relief to prevent imminent harm or even to stop certain illicit activities can be sought before civil courts. Such injunctions may be ordered, subject to a constraint in an amount set by the court in the event of a delay in execution. Then, an injunction for redress may also be obtained, subject to a fine for non-performance, by filing an application to the competent court.[94]

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[91] In accordance with one of two major typologies. This one is Laferrière's, as presented in CHAPUS, 2001, p. 749

[92] An example of type of repressive administrative procedure is called *Contraventions de grande voirie*, and concerns damage to the public domain, see (WIKLUND, 2011, p. 34)

[93] The rules on classified installations (installations classées pour la protection de l'environnement) include the activities listed in the IPPC directive (2008/01/EC). (WIKLUND, 2011, p. 35-36)

[94] See National Implementation Reports 2011 France, see footnote 32.

With regards to administrative courts, Article L. 521-1 of the Code of Administrative Justice provides that in urgent cases and where there is a serious doubt as to the lawfulness of a disputed decision, the court can suspend the enforcement of a decision or of some of its effects. A negative decision may also be suspended. Furthermore, Articles L. 554-11 and L. 554-12 of the Code provide for two special suspension procedures to protect nature or the environment that obviate the need to demonstrate the urgency of the interim measure. The first may be used against permits wrongly issued without a prior environmental impact assessment. The second allows the suspension of a planning decision that is subject to a prior public inquiry but either no inquiry has been held or the inquiry commissioner has issued an unfavourable opinion. Similarly, Article L.123-16 of the Environment Code provides that an administrative court must grant the suspension of a decision taken after unfavourable findings by the inquiry commissioner if there is serious doubt as to the legality of this decision.

Book IX of the Code of Administrative Justice also provides remedies to beneficiaries of court decisions having become final, enabling them to secure their enforcement when administration fails to give them effect within a reasonable time.

The constitutional principle of the separation of powers is generally read as forbidding courts to take decisions in the place of the administration. However, in two cases the law allows administrative courts to call upon the administration to give effect to a *res judicata* at the request of the complainant: (a) when the *res judicata* 'necessarily entails' the adoption of a given implementation measure,[95] and (b) when it 'necessarily entails' the taking of a decision after completion of a fresh investigation of the case.[96] The court may give a deadline to the administration to give effects to the ruling, providing for a fine if the deadline is not met.[97]

Administrative courts may also award damages to compensate for non-economic harm suffered by the claimant. Claims for damages are possible in full-jurisdiction procedures (*Contentieux de pleine jurisdiction*). Individuals may claim damages when their interests have been violated by a public authority's decision while NGOs must show

[95] Art. L. 911-1 of the Code of Administrative Justice.
[96] Art. L. 911-2 of the Code of Administrative Justice.
[97] Art. L. 911-3 of the Code of Administrative Justice.

that the illegal measures taken impair the attainment of the objectives mentioned in their articles of incorporation.[98]

Compared to the civil liability, environmental damages present peculiar features: they include damages suffered by persons and/or properties but also those suffered by the environment *per se*. French civil law deals with environmental damages using the general principles of civil liability found in the Civil Code. The difficulty for the NGOs has traditionally been to prove damages linked sufficiently to the interests they defend. Recently, however, a civil court has recognised the widest possibilities for the NGOs to bring cases in order to obtain compensation for damages caused to the public interest they represent.[99]

4.2.5 Time and costs of judicial remedies and legal aid

There are no fees for initiating administrative judicial procedures. Certain costs are however connected to a judicial procedure even if they are generally not excessively high in France. The civil, administrative and criminal procedure codes contain provisions on lawyers and other fees, costs and the burden of costs.[100]

As a general rule, legal representation before judicial bodies is mandatory since June 24, 2003 (decree n°2003-543). In appeal procedures before the administrative appeal court and before the *Conseil d'Etat*, the plaintiff must hire the services of a senior lawyer qualified to plead before the higher courts (*avocat* au *Conseil d'Etat et à la Cour de Cassation*). Costs for inspections and other activities by the judges, experts, witnesses will be borne by the losing party if the court so decides. The court may also require the losing party to pay for the winning party's lawyer.[101] The lawyer's fees are around 160-200 EUR per hour. Experts, who are often needed in environmental procedures, are

[98] 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.
[99] 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. See (WIKLUND, 2011, p. 37)
[100] Nouveau code de procédure civile: art. 700 ; Code de procédure pénale : art 457-1 ; Code de justice administrative : art L. 761-1.
[101] On average 1000 € for the administrative court, 1,500 € for the Administrative Appeal Court and 2000 € for the Conseil d'Etat.

extremely expensive, for instance, an expert on noise may cost between 3000 and 15000 EUR.[102]

Under Act n° 91-647 of 10 July 1991, as amended, a system of financial aid may help applicants, including NGOs, whose financial resources fall below certain thresholds. This guarantees them effective low-cost access to the courts.[103] The Decree n° 91-1266 of 19 December 1991, implementing the law, provided for two kinds of legal aid, one specifically to help with access to the courts and the other to facilitate the provision of legal advice and assistance in non-judicial procedures (WIKLUND, 2011, p. 40-41).

5 CONCLUSIONS

Generally speaking, France has been somewhat proactive in ensuring its compliance with the Aarhus Convention and with the EU legislations by enacting legislation implementing the three pillars. However, some issues still persist. The Convention can only have a real impact if the exact content of the obligations is known beforehand and not if the *Conseil d'Etat* determines the direct effect of its provisions one by one.

Concerning the access to information, according to the European Environmental Bureau[104] France has taken effective steps to promote the first pillar to officials and to the general public. However at a closer look non compliance seems to be mainly due to the lack of awareness of such rights by members of the public and to the lack of resources of the public authorities.[105] The NGOs also emphasise the need to improve access, and they have pointed out that there is a 'culture' of resistance to transparency in the French administration. The other difficulties are attributed to a lack of resources in some poorly staffed authorities and to requests that are badly drafted or that do not specify the

[102] Milieu report "Inventory of EU Member States' measures on access to justice in environmental matters." Available at: http://ec.europa.eu/environment/aarhus/study_access.htm.
[103] See National Implementation Reports 2011 France, see footnote 32.
[104] EEB, feb 2011 powerpoint on http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1 , last accessed on 2012.
[105] National Implementation Reports 2008 France, see footnote 32.

competent department. The administration still needs to put into place systems enabling requests to be passed on to the competent department.

In addition, there are still obstacles in the implementation of Article 5 concerning the collection and publication of data. The main difficulties here are due to lack of data on some aspects. Concerning public participation, the situation is more challenging: the French system for public participation at large offers many opportunities to participate in the procedures required by the Convention. However, certain tools appear to be weak. In France there is a deep-rooted feeling that public participation procedures have too often no impact on decision-making and just provide a cover for the authorities (HALLO, 2007).

The main obstacle is the way comments from the public are taken into account and implementation seems again to find a "certain reticence to transparency of the French administrative authorities" (LAERNOES, 2011, p. 51.53).

As it has been highlighted by many French authors[106] such as Jacques Chevalier, "public debate does not entail transfer nor real sharing of decision-making powers" (CHEVALIER, 2007, p. 505). There is also a consensus among French scholars that the public inquiry is not a procedure adequate to meet the requirements laid down in Article 6 of the Aarhus Convention (CAILLOSSE, 2007, p. 106). According to Michel Prieur, the public inquiry "often has the only role to artificially legitimate a choice that is already made" (PRIEUR, 2004, p. 112).

Moreover, specialists of Planning Law stated that "the public inquiry often starts late in the planning process, when it is hard to come back on the initial choices already made" (JACQUOT; PRIET, 2008, p. 107). As a consequence, when there is no substitution mechanism such as the public debate, the public inquiry, alone, is not sufficient to comply with the Aarhus Convention." (JECOUZO, 2008, p. 275)

Another problem is the limited direct effect recognised to the Aarhus Convention in domestic law because just few paragraphs of Article 6 and Article 7 are considered to be directly applicable.[107] The other paragraphs and Article 8 are held to create obligations between the signatories to the Convention only, and as a consequence, they can not be

[106] Pierre Lascoumes affirmes about the public inquiry "Cette enquête ne sert bien souvent qu'à légitimer artificiellement un choix déjà réalisé", see JOLY_SIBUET; LASCOUMES; GUCHAN; LEOST, 1988, p. 148.
[107] National Implementation Reports 2011 France, see footnote 32.

invoked as a ground to void the decision challenged.[108] This makes the effectiveness and applicability of those provisions very limited (LAERNOES, 2011, p. 50).

The French system of access to justice, according to the European Environmental Bureau[109], puts France in the list of the Parties that have already reached a satisfactory situation in transposing and implementing the III Pillar with relatively generous standing criteria for both individuals and NGOs. In fact France recognises and interprets in a non-restrictive way standing NGOs and members of the public, a sufficient interest being required in the administratives courts.[110] However, costs seem to be a potential issue. Many 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" (WIKLUND, 2011, p. 42).

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[108] CE, 28 December 2005, Association citoyenne intercommunale des populations concernées par le projet d'aérodrome de Notre-Dame-des-Landes, n° 267287, *Rec. Lebon,* p. 690.
[109] EEB 2010 powerpoint http://www.eeb.org/index.cfm/library/index.cfm?month=0&year=0&Aarhus=1
[110] Furthermore, in 2006 the Court of Cassation has been favourable to civil action brought by environmental protection associations. The Court has ruled that an environmental protection association may bring a civil action not only before a criminal court, but also before a civil court (Court of Cassation, 7 December 2006). It has also ruled that an association may bring legal action on behalf of collective interests, as long as such interests fall within the scope of its mandate, without reference to any requirement for authorization (Court of Cassation, 5 October 2006).

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