

**COMMUNICATION TO THE COMPLIANCE COMMITTEE
TO THE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-
MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS, DONE AT AARHUS ON 25
JUNE 1998**

I. Information on correspondent submitting the Communication

Mr Patrick JANIN, demeurant 62, rue Duquesne à Lyon (6^{ème}), France.

Mr Patrick JANIN, a French citizen, is applying to the Committee in his capacity as an amateur naturalist and an active member of environmental protection associations.

By virtue of his activities in the environmental sphere, he is submitting this Communication to the Committee as ‘a member of the public concerned’ within the meaning of article 9 of the Convention and as ‘a member of the public’ within the meaning of paragraph 18 of the Addendum to Decision I/7, Review of Compliance (First Meeting of the Parties, Lucca, 21-23 October 2002).

[REDACTED]

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By this Communication, Mr JANIN is requesting the Committee to review full compliance with the provisions of the Convention relating to access to justice in environmental matters, particularly with regard to the provisions of article 9, paragraph 2, of the Convention, which enshrine the condition for legal interest to institute proceedings, as far as concerns Decision No. 392550 of 23 October 2015 of the French Conseil d’Etat [Council of State] (Annex No. 1)

II. Party concerned

The French Republic

The Aarhus Convention came into force in France on 6 October 2002 (cf. Law No. 2002-285 of 28 February 2002 authorizing approval of the Convention and Decree No. 2002-1187 of 12 September 2002 on publication of the Convention, JORF [Official Journal of the French Republic], 21 September, p. 15 563).

III. Facts of the Communication

On 10 August 2015, Mr Patrick JANIN addressed a petition (Annex No. 3) to the French Conseil d’Etat requesting a declaration that an Order of 30 June 2015 by the Minister of Ecology, Sustainable Development and Energy establishing the list of species of animals classified as

pests, the periods stipulated for their destruction and the methods of destruction to be used was unlawful and that it be annulled for ultra vires

The petition submitted by Mr JANIN was based on the infringement of a right guaranteed by the French Constitution, namely that everyone has the right to participate in the public process of making decisions likely to affect the environment, as laid down in Article 7 of the Constitutional Charter for the Environment. Mr JANIN submitted that the public consultation procedure organized under the legislative provisions of the Environmental Code (Article L. 120-1) and in which he took part personally (Annex No. 4) did not, because of its omissions and weaknesses, allow genuine, effective exercise of the right for everyone to participate in preparation of the Order of 30 June 2015. Consequently, Mr JANIN asked the Conseil d'Etat, in accordance with Article 61-1 of the French Constitution, to refer the matter to the Constitutional Council for a priority preliminary ruling on the issue of constitutionality, with the intention of triggering a review by the constitutional court (the Constitutional Council) of whether the legislation concerned (Article L. 120-1 of the Environmental Code) is consistent with the requirements of Article 7 of the Charter for the Environment.

By a final, unappealable Decision of 23 October 2015 (Annex No. 1), the Conseil d'Etat declared Mr JANIN's petition inadmissible and dismissed it on the ground that he had not demonstrated a definite, direct personal interest in the annulment of the contested Order.

IV. Provisions of the Convention alleged to be in non-compliance

The purpose of this Communication is to request a review of compliance with the provisions of article 9 of the Convention, relating to access to justice, in particular the provisions of article 9, paragraph 2, relating to the condition for legal interest to institute proceedings.

In addition to the matter of access to justice, the content of the case which Mr JANIN is bringing before the Committee also concerns public participation in decision-making in environmental matters, which is also covered by the Convention in articles 6 to 8. However, in this Communication, Mr JANIN intends to call into question only the conditions for access to justice which have been invoked against him by the French administrative court.

V. Nature of alleged non-compliance

The substance of the dispute relates to a decision made in an environmental matter as provided for in the Convention – in this case, the destruction of species of wildlife. Therefore the purpose of this Communication is to seek examination of whether the dismissal of Mr JANIN's petition complies fully with the letter and the spirit of the provisions of article 9 of the Convention, as referred to primarily in article 9, paragraph 2, under which:

“2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest [...] have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and,

where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.”

Several factors and circumstances give rise to doubts about whether the dismissal of Mr JANIN’s petition is in full compliance with the Convention.

It is true that Mr JANIN was able to initiate a review procedure before a court of law within the meaning of article 9, paragraph 2, of the Convention – in this case, an action before the Conseil d’Etat on grounds of ultra vires. But, through a very restrictive assessment of his legal interest in bringing proceedings, the substance of his petition was not considered: the petition was found to be inadmissible and, in consequence, his request for a referral to the constitutional court (the Constitutional Council) of a question – called ‘a priority preliminary ruling on the issue of constitutionality’ in French law – concerning the environment was dismissed. Thus, he was deprived of court action on the basis of an assessment that was both restrictive and absolute on the part of the Conseil d’Etat.

In the first place, it should be noted that the Conseil d’Etat, as the French administrative court which is the proper court for reviewing decisions made by public authorities and likely to affect the environment, has unfettered discretion as far as concerns assessment of petitioners’ legal interest in bringing actions on grounds of ultra vires, including in environmental matters. It does not consider itself bound by legislation, by the Constitution, or even by international conventions to which France is party, including the Aarhus Convention.

In its Decision of 23 October 2015, the Conseil d’Etat holds that although Article 7 of the Constitutional Charter for the Environment provides that everyone has the right to participate in the public process of making decisions likely to affect the environment, (...) these provisions have neither the aim nor the effect of altering the conditions for an administrative court’s assessment of an interest giving standing to bring proceedings against decisions likely to affect the environment (second ground). The French Constitution has no effect on or control over the discretion of the Conseil d’Etat.

With regard to the Convention, it holds in the same Decision that “the requirements of article 9 of the Aarhus Convention do not on any view have either the aim or the effect of giving everyone a right to review of any decision likely to affect the environment”. This is to be understood as meaning that the Convention neither creates nor guarantees a right for individuals to seek review of decisions made by public authorities and likely to affect the environment.

This fundamental position – that the Conseil d’Etat has unfettered discretion – does not take into account the subject-matter (petitions relating to environmental issues), the ‘sufficient interest’ condition or the objective of the Convention, as these are enshrined in article 9, paragraph 2:

- because it is unfettered, this discretion is not compatible with the protection of a sufficient interest under article 9, paragraph 2, of the Convention. Consequently, it is open to criticism as improper;

- what is more, it runs counter to the objective of “giving the public concerned wide access to justice within the scope of this Convention”, enshrined in article 9, paragraph 2, as the Conseil d’Etat’s Decision in this case shows. This Decision is based on an extremely restrictive assessment by the court of Mr JANIN’s legal interest in bringing proceedings. Yet legal interest in bringing proceedings constitutes part of access to justice, since it partially determines how effective such access is. To guarantee access to justice, it is not enough simply to have legislation providing for review: it is also necessary that a legal interest in bringing proceedings should be recognized and accepted according to conditions which are not arbitrary and are sufficiently liberal as to “giv[e] the public concerned wide access to justice”. That is manifestly not the case in this instance.

It should therefore be considered whether decisions of the French administrative courts, such as the Conseil d’Etat Decision described above, comply fully with the provisions of article 9, paragraph 2, of the Aarhus Convention.

In the second place, in this case, the assessment by the Conseil d’Etat of Mr JANIN’s legal interest in bringing proceedings does not comply with the provisions of the Convention, under which “what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention”.

(a) In connection with his action before the Conseil d’Etat, Mr JANIN produced a statement of the case, detailing the reasons for his personal legal interest in bringing proceedings against the Ministerial Order of 30 June 2015. That statement is annexed to this Communication (Annex No. 2).

In particular, through his long-standing and continuing activities in the environmental sphere, he submits that he has established as a matter of fact that he had “sufficient” legal interest in bringing proceedings, within the meaning of the provisions of article 9, paragraph 2, of the Convention.

In its dismissal of his petition on 23 October 2015, the Conseil d’Etat simply stated that Mr JANIN had not demonstrated a definite, direct personal interest, but did not clarify what his case lacked that would enable it to accept his legal interest in bringing proceedings. Mr JANIN, on the other hand,

- could reasonably maintain that the fact he had participated in the public process of making a decision likely to affect the environment, in accordance with Article 7 of the Constitutional Charter for the Environment, logically gives him a legal interest in bringing court proceedings against the same decision;
- was able to describe his numerous activities and responsibilities in various nature protection associations.

(b) The legal effects and the consequences before the court of the very restrictive assessment of Mr JANIN’s legal interest in bringing proceedings run counter, legally and factually, to:

- 1) the provisions of the Convention under which members of the public concerned must have access to a review procedure before a court of law to “challenge the substantive and procedural

legality” of any decision concerning the environment, the preparation of which is subject to a public participation procedure;

- 2) the objective of giving the public concerned “wide access to justice”.

In the present case, Mr JANIN’s access to justice has been limited to the point where he has been prevented from exercising his right to such access.

The substance of his petition was not considered.

His access to justice has been denied on two counts. Firstly, his access to the administrative court has been rendered worthless, since his petition was held to be inadmissible; his access to justice has been rendered completely ineffective. Secondly, his possible access to the constitutional court was not even considered (“... without there being any need to take a view on his request for the Conseil d’Etat to refer to the Constitutional Council the question of whether Article L. 120-1 of the Environmental Code is consistent with the rights and freedoms guaranteed by the Constitution” - third ground).

Mr JANIN was unable to have the substance of his petition considered because his access to justice was very strictly limited (without any substantive explanation on the part of the court concerned), even though he considers that he had – and had demonstrated – a legal interest in bringing proceedings that was sufficient when viewed in the light of the provisions of the Convention.

Mr JANIN also points out that, “under the combined provisions of Articles R. 432-1, R. 613-5 and R. 733-1 of the Code of Administrative Justice, only lawyers authorized to appear before the Conseil d’Etat and the Cour de Cassation may make oral submissions on the day of the sitting at which the case will be judged”. (Letter from the Conseil d’Etat to the petitioner, dated 2 October 2015). This placed an additional restriction on consideration of his case.

For all these reasons, Mr JANIN considers that he has been subject to wrongful impairment of his environmental civic rights, of which the Aarhus Convention is one basis.

It should therefore be considered whether the conditions for dismissal of the petition submitted by Mr JANIN comply fully with the provisions of article 9, paragraph 2, of the Aarhus Convention.

By this Communication, Mr JANIN is not expecting or asking the Aarhus Convention Compliance Committee to recognize that he has a legal interest in bringing proceedings, but rather to decide whether, in the case he is presenting to the Committee, the treatment of his petition before the court – in particular, the conditions applied by the court in assessing his legal interest in bringing proceedings – fully complied with the provisions of article 9, paragraph 2, of the Convention.

Mr Patrick JANIN is at the Committee’s disposal: he is ready to provide any additional information and to attend any hearing.

VI. Supporting documentation (copies, not originals)

- Decision of the Conseil d'Etat of 23 October 2015, Petition No. 392550.
- Statement of the case on Mr JANIN's legal interest in bringing proceedings.
- Petition submitted to the Conseil d'Etat by Mr JANIN.
- Mr JANIN's participation in the public consultation organized in view of the preparation of the Order of 30 June 2015.

XI. Signature

Lyon, 4 November 2015