Amicus Curiae in Case ACCC/C/2022/197 France

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The case submitted to the Aarhus Committee concerns the application of the Convention from two points of view: that of the restrictive nature of the remedy in the case of operations concerning the application of obligations arising from the Convention, and that of the independent and impartial nature of the body which judged this restriction to be in conformity with the Constitution of the French State.

On this second point, it is the participation of two members in the judgment of the decision that is called into question, as well as, for one of them, the factual and procedural impossibility of requesting his recusal.

Our contribution focuses on the fact that the obligation of independence and impartiality that must characterize a tribunal called upon to rule on a matter that falls within the scope of application of the Convention's obligations, must be understood, in the case under consideration, in the light of the fact that, as this concerns environmental obligations that challenge the action of State authorities, it is vital that the composition of the panel of judges is not characterized by proven and structural links with those same authorities.

However, the Conseil constitutionnel, before which the constitutionality of the law restricting the right of appeal was brought, is characterized by its systemic situation of partiality towards the acts and authorities thus controlled (the executive and legislative powers). From this point of view, the case before you is not exceptional.

We would like to show,

I. the structural incompatibility between the method of appointing members of the Conseil constitutionnel and the principle of impartiality;

II. that the organization of constitutional proceedings in France leads to recurrent breaches of the principle of the impartiality and independence of the courts;

III. The characterization, in the light of the CA and the ECHR, of the partiality of the court which handed down the decision at issue in the case which concerns your Committee.

I. Structural incompatibility between the method of appointing members of the Conseil constitutionnel and the principle of impartiality.

The rules, and more specifically the absence of certain rules, applicable to the process of appointing members of the Constitutional Council render its composition non-compliant with the requirements of independence and impartiality laid down in Article 9 of the Aarhus Convention (a). This non-compliance is compounded by a practice which casts legitimate doubt on the decisions rendered by the Conseil constitutionnel (b).

a. The composition of the Conseil constitutionnel does not meet the requirements of independence and impartiality

Unlike all political systems with a Supreme Court or Constitutional Court, with the exception of the USA and Switzerland, in France there is no requirement for members of the Conseil constitutionnel to have any training or experience. Few countries lay down rules of incompatibility with regard to the exercise of previous functions, but in the French case, this absence taints the composition of the Constitutional Council, whose function is to review laws in relation to the Constitution: a sitting member of parliament, a sitting minister or a sitting cabinet director may be appointed to sit directly on the Council, whose remit is to judge the laws in whose competition all these personalities have been involved.

The majority of the members of the Conseil constitutionnel have held previous positions which have involved them, at one time or another, in the making of laws whose conformity with the constitution they have to examine, either because they initiated the challenged law, or because they tabled one or more adopted amendments, or because they opposed this law during parliamentary debates, or because they gave their opinion on the bill. The almost systematic use of personalities who have held several political mandates in the past, or regular collaborators of these same personalities, blurs the necessary distinction between the act of judging and the act being judged. This sociological element was confirmed by Liora Israël and Nicolas Bau in a comprehensive study of the origins of Council members. Their conclusion is that politics is the primary source of recruitment for French constitutional judges, and that this trend has only become more pronounced in recent years (N. Bau, L. Israël, *Quelques éclairages sociologiques sur la composition du Conseil constitutionne*l, in E. Lemaire, T. Perroud, *Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence*, IFJD, 2022, pp. 61-81).

b. The shortcomings of the practice on "déport"[1]

The incompatibility of the Council's composition with the requirements of independence and impartiality is compounded by a practice of "*déport*" by its members that is both rare and not very

[1] "*Déport*" is the obligation of judges to step down when his.her impartiality is questioned. "*Récusation*" is the faculty of parties to force a judge to step down when s.he has a link with a party.

transparent, thus undermining the serenity that should accompany the delivery of justice. If the principle of impartiality is justified by the need to ensure that there is no doubt as to the conditions under which a judicial decision is rendered, then it implies that a judging body and its members must "*déport*" themselves if their participation would, in view of the circumstances, be such as to cast legitimate doubt on the decision to be rendered.

The practice of deporting members of the Conseil constitutionnel was very sparing until 2010, but has become much more common since then. Although the reasons for a removal are never made public (it is regrettable that there is no list of objective grounds for recusal, as is the case in many other courts), around 70% of removals concern members of the Conseil constitutionnel who have served in government or parliament. However, this practice is insufficient in view of the structural link between the composition of the Council and the cases and parties it hears.

The present case concerns the participation in the deliberations of two former ministers who had been members of a government belonging to the presidential majority behind the contested law, even though, as ministers, they had come out in favor of the contested mechanism, and even, in the case of one of them, defended the contested principle of restricting recourse by adopting the circular implementing the law. The unprecedented nature of this configuration reinforces the doubt that unfortunately hangs over political society as to the impartiality of the decisions handed down by the Conseil constitutionnel.

In decision no. 2010-25 QPC, for example, 5 of the 9 judges had a connection with the law: former senators Michel Charasse and Hubert Haenel had voted against and for the contested law respectively; former deputy Jacques Barrot had voted for the law, and the President of the Constitutional Council, Jean-Louis Debré, was President of the National Assembly when the law was passed; finally, Jean-Pierre Steinmetz had taken part in the drafting of the law as Director of the cabinet of the Prime Minister who had initiated it. At the time, none of them backed down.

Recently, decision no. 2023-1060 QPC of September 14 was handed down by the Constitutional Council in the presence of Jacqueline Gourault, signatory of the law that amended the disputed Article L600-8 of the Urban Planning Code (by law no. 2018-1021 of November 23, 2018) and, moreover, signatory of the circular of December 21, 2018 presenting its content to the

administrations responsible for applying it. This shows that the problem is structural and not limited to one isolated decision.

The question prioritaire de constitutionnalité also very often brings together former "colleagues", some of whom are judges and others parties. A case in point is the deplorable Ducray affair, in which two former direct colleagues of the plaintiff took part in the judging panel (one was a member of the same government, the other was the advisor to the President of the Republic at the same time) which repealed, with immediate effect, the law that allowed the former Secretary of State's criminal conviction to be upheld (decision n°2012-240 QPC of May 4, 2012).

II. The organization of constitutional proceedings in France leads to recurrent breaches of the principle of the impartiality and independence of the courts

The Constitutional Council's incompatibility with the principle of impartiality is further reinforced by the rules of procedure that apply to it.

a/ The factual non-compliance of the quorum rule with article 9 of the CA.

Article 14 of the Ordinance of November 7, 1958 on the Constitutional Council states that "The decisions and opinions of the Constitutional Council are rendered by at least seven Councillors, except in cases of force majeure duly recorded in the minutes". Although it is defined differently in different legal systems, *force majeur*e always presupposes an abnormal, irresistible or invincible situation, having prevented the application of the rules of ordinary law (the concept is recognized by the European Court of Human Rights, for example in its Saakachvili v. Georgia ruling of March 1, 2022, and by the Court of Justice of the European Union, for example in its ruling of July 11, 1968, 4-68). In the French system, force majeure is defined by the Cour de cassation as an unforeseeable and insurmountable event preventing the debtor from fulfilling his obligation. Nevertheless, the Conseil constitutionnel frequently resorts to force majeure to enable it to rule below the required quorum. In 2017, for example, nine decisions were taken below quorum, each time on the grounds of "force majeure". Even more recently, the Conseil issued a ruling on a question prioritaire de constitutionnalité submitted by a former French Prime Minister and former right-wing candidate

in the 2017 presidential election, which once again forced it to rule below the quorum (decision no. 2023-1062 QPC of September 28, 2023, M. François F.). Three members withdrew: Alain Juppé because he had been a minister when François Fillon was Prime Minister; François Seners because he had been a member of François Fillon's cabinet; François Pillet because he had supported François Fillon's candidacy. The decision was therefore made by six members, whereas the quorum required is at least seven members of the Board. The very participation of three of the six members may be questioned, insofar as they have had to express conflicting opinions with the applicant in the past, in the context of the political "game".

The said force majeure situation is therefore neither unforeseeable nor abnormal, and could be resolved by a change in the composition and operating rules of the Conseil constitutionnel.

Today, the systemic infringement of the principle of judicial impartiality caused by the composition of the Conseil is thus reinforced by its procedural rules, which lead it either to deviate from the principle of force majeure, or to maintain itself in an objective and/or subjective situation of partiality when judging a case. In this respect, an increase in the number of councillors and the institution of a deputy for each councillor would be necessary to guarantee the impartiality of the Constitutional Council when it rules.

By way of comparison, Germany's Constitutional Court has ruled out the possibility of invoking force majeure to rule below the quorum: in this situation, the Court simply cannot sit. However, the composition of this court does not entail the same risks as the Constitutional Council, and the application of this rule never actually arises.

b/ The unsuitability of the challenge rules in relation to article 9 CA.

While it is legitimate to set a time limit beyond which the parties are no longer entitled to request the recusal of one of the members of the panel called upon to rule on a case, the rules governing recusal must not have the effect of depriving the parties of the possibility of using them for reasons not related to the proper conduct of the trial. This is the case when the composition of the panel of judges changes between the time a case is referred to the court and the time it rules on the case, after the recusal period has elapsed.

In the case of the Constitutional Council, this situation may arise each time one of its members leaves office and is replaced by another. In the case submitted to the Aarhus Committee, three of the nine members of the panel (Jacqueline Gourault, François Seners and Véronique Malbec) took up their duties to judge the case, after the deadline for the applicant to request the recusal of one of them had elapsed. He was thus deprived of his right to be judged under conditions guaranteeing the impartiality of the panel. In this respect, the argument that the appointment of new members was the subject of previous press articles cannot be accepted, since the court can only assess a request for recusal with regard to the members who actually made up the Board on the day of the request. Nor can the litigant be asked to read the press in order to justify the impossibility of applying the rules guaranteeing the impartiality of a court.

It should also be noted that the French Conseil d'Etat has ruled that "a plea based on the irregularity of the composition of the judgment panel, whatever its grounds, may be raised at any time during the proceedings, even after the start of the judgment session, including before a higher court" (CE, Oct. 12, 2009, Petit). The Conseil constitutionnel could thus have drawn inspiration from French case law.

III. Characterization, in the light of the CA and the ECHR, of the partiality of the court which handed down the decision at issue in the case which concerns your Committee.

The question raised here is this: is the active participation of two members of the court in the drafting of the text submitted to the judge for assessment compatible with the European Court of Human Rights' concept of impartiality? While the rules of procedure of the Constitutional Council, like those of the German Constitutional Court, stipulate that "the mere fact that a member of the Constitutional Council has participated in the drafting of the legislative provision which is the subject of the constitutionality question does not in itself constitute grounds for recusal" (article 4), the very specific composition of the French body means that the almost systematic partiality of the members of the judging panel is accepted.

In the case submitted to the Committee, it is first necessary to characterize the situation of the two members in question with regard to the notion of impartiality (a) in order to conclude that it does not comply with the principles laid down by the European Court of Human Rights (b).

a) The position of two members of the judging panel in relation to the text in question

When they were appointed to the Conseil constitutionnel, Jacques Mézard and Jacqueline Gourault held government posts subject to the principle of government solidarity, for which there is no rule requiring them to be independent or impartial. As it happens, they both have a link with the text of the law challenged in the present case.

As part of his previous duties, Jacques Mézard was in *charge of the statement on the contested law (a law initiated by the government) before the National Assembly on October 3, 2018*, a statement at the end of which he indicated that "the ELAN law will be able to become a reality and I believe it will improve the daily lives of the French, of all French people throughout the territory of the Republic".

As part of her government duties, the second was specifically responsible for drafting the circular implementing the contested law (circular dated December 21, 2018), the content of which leaves no doubt as to its author's agreement with the contested measure: article 80 of the law, the circular states, "aims to make building permits more secure, speed up judgement times and better sanction abusive appeals".

Jacques Mézard and Jacqueline Gourault have both expressed an opinion in agreement with the contested law, but, above all, they have defended its principle in the *exercise of their functions prior to that of judge*, and when neither of them were subject to requirements of independence and impartiality: one defended the law before the National Assembly, which had to pass the law, and the other defended it before the administrations which had to apply it.

b/ The principles laid down by the European Court of Human Rights therefore characterize a situation of partiality.

The European Court of Human Rights (ECtHR) has been called upon to rule on the combination of judicial and legislative functions, and its position could not be clearer. In the *McGonnel v. United Kingdom* case of February 8, 2000, the Court stated that "any direct participation in the adoption of legislative or regulatory texts may suffice to cast doubt on the judicial impartiality of a person subsequently called upon to decide a dispute as to whether there are grounds for departing from the

wording of the legislative or regulatory texts in question" (ECHR, Feb. 8, 2000, no. 28488/95, McGonnell v. United Kingdom).

The European Court has made the assessment of impartiality dependent on the circumstances of the case, and it seems to us that, given the facts described above, the principle of impartiality has been breached. However, it could also be agreed that the general situation of the Constitutional Council is such as to make it possible to characterize a "global" situation of partiality on the part of the court, as it did in the case of *Boyan Gospodinov v. Bulgaria* (ECHR, Sept. 10, 2018, no. 28417/07).

This is why procedural rules play such an important role in the Court's reasoning, which requires the existence of deportation procedures precisely in order to guarantee the impartiality of the judge (ECHR, Grand Ch., Oct. 15, 2009, no. 17056/06, Micallef v Malta, §§ 99 and 100), a procedure which, as we have seen, remains either inapplicable or impossible to apply before the Conseil constitutionnel without violating another procedural rule (point II).

For all these reasons, it seems to us that the decision by which the Constitutional Council rejected the request of the Association La Sphinx was rendered contrary to the principles of independence and impartiality necessary for the proper application of the rules imposed on States in the context of their obligations under the Aarhus Convention.