

## **Rights and Liberties, Liability of the French State and Judicial Review**

On 24 December 2019 the Conseil d'Etat ruled that indemnification can be granted under French law on the ground of a prejudice suffered due to the application of a law ruled contrary to the Constitution by the Counsel Constitutional.

The Conseil d'Etat now leaves the door open to a new possibility for indemnification, within the framework of a QPC examination (Question Prioritaire de Constitutionnalité) or by application of Article 61 of the Constitution (subject to conditions). Based on the hierarchy of norms, this new kind of liability of the State is stated in three decisions dated 24 December 2019 (req. N°425981, N° 425983 and N°428162).

This new regime lives now next to the already existing liability due to the application of the law (responsabilité du fait des lois) based on equal treatment before public burdens (principe d'égalité des usagers devant les charges publiques).

A QPC is a question raised by a tribunal or a court aiming at determining the conformity of a law to the Constitution. Article 61-1 of the French Constitution states in this respect that during an instance before a tribunal or a court (private or public), a plaintiff can support the view that a law contravenes rights and liberties guaranteed by the French Constitution. In such a situation, the Counsel Constitutional can be seized after remand of the case by the Conseil d'Etat or the Cour de Cassation.

The general principle under French administrative law is that the French State can be sued simply because of the application of a law, provided that (i) the plaintiff has suffered a prejudice qualifying as important and specific (grave et special) and (ii) the law in question does not exclude the possibility for a plaintiff to be indemnified. This type of liability is applicable even if the French State is not considered as being in default with the application of the law and is named liability without misconduct (responsabilité sans faute de l'administration).

This possibility started in France at the beginning of the 20th century (Conseil d'Etat, case Couitéas - 1923), with the admission of liability without misconduct of the French State due to an administrative decision of non-enforcement of judicial decisions. In such a case, in the general interest, the French State may decide not to enforce a judicial decision,

but in turn, has to indemnify the plaintiff. The ground for indemnification is the breach of equal treatment before public burdens principle (principe d'égalité des usagers devant les charges publiques). This principle is taken from the French 1789 declaration of the human rights and the citizen: each member of the community has to bear a certain amount of public burdens, but equal treatment shall prevail.

This principle has expanded thereafter with the admission of such a claim against a law (and not against an administrative decision only) by the Conseil d'Etat in 1938 (Conseil d'Etat, case Société la Fleurette - 1938). Such a case establishes that, in the silence of the said law, a plaintiff shall not bear a charge created by a law that he/she would not normally lie with, it being specified that, in the event of silence of the said law, such law shall not be considered as excluding the liability of the French State (Conseil d'Etat case Coopérative Agricole Ax'ion - 2005).

The liability of the French State can also be triggered due to its obligations to ensure the application of its international conventions, to indemnify all the prejudices resulting from the application of a law passed illegally because contrary to an international convention (e.g. ECHR) (Conseil d'Etat, case Gardelieu - 2007).

Now, according to the new decisions of the French Conseil d'Etat dated 24 December 2019, the other grounds for indemnification are (1) that the decision of the Counsel Constitutional does not decide that no indemnification shall be granted either (i) by excluding it expressly or (ii) by letting alive all or only a part of pecuniary effects caused by the law, that an indemnification would challenge, (2) the existence of a prejudice and (3) the link between the prejudice and the unconstitutional application of the law.

As a consequence, a plaintiff may be indemnified in the following conditions: (i) no express exclusion of indemnification by the Counsel Constitutional (ii) no all or part of pecuniary effects left alive by the Counsel Constitutional that an indemnification would challenge (iii) and (iv) a link between the prejudice and the unconstitutional application of the law.

According to the decision of the Conseil d'Etat, certain pecuniary effects of the law declared unconstitutional may prevail upon an indemnification. In this respect, it is reasonable to think that an administrative judge would apply an economic balance check between the necessity of indemnifying the plaintiff and the profit of letting alive all or only a part of pecuniary effects caused by the unconstitutional law.

An economic balance check is already applied in other circumstances (expropriation with the application of the *théorie du bilan coûts / avantages*), by the Conseil d'Etat (Conseil d'Etat case *Ville Nouvelle Est* - 1971).

In this perspective, it is reasonable to think that the application of an unconstitutional law may survive if it is more interesting from an economic point of view. This mentioned carve out is quite important as it gives the possibility to the Counsel Constitutional to let alive, even if the law is declared unconstitutional, and then cancelled, parts of its pecuniary effects.

In addition to the breach of equal treatment before public burdens principle (*principe d'égalité des usagers devant les charges publiques*), it can be suggested that other principles may underpin this kind of liability: preservation of legal safety (*sécurité juridique*) and /or granted rights (*préservation des droits acquis*), and / or economic balance check, to take into account all the adverse financial effects that an indemnification would cause.

The claim for indemnification can obviously be barred by effluxion of time, it being specified that the 4 (four) years period during which such a claim can be brought only starts if the prejudice resulting from the application of the law may be known in its reality and its scope by the plaintiff, without the possibility for him or her to be regarded as ignoring the existence of his / her right to claim until the declaration of unconstitutionality.

The indemnification request has to be brought before the administrative judge (*Tribunal Administratif*). It remains however to be seen whether legal practitioners will try to use these decisions of the Conseil d'Etat to sue the French State before the judicial order (*ordre judiciaire*). Under French law, the French Conseil d'Etat is the highest court entitled to address administrative cases and is part of the administrative order (*ordre administratif*) whereas the judicial order (*ordre judiciaire*) is composed of judiciary tribunal and courts (*jurisdictions judiciaires*) and is competent for private matters. How dealing with the fact that a tribunal or a court may apply deliberately after the declaration of unconstitutionality a law previously declared unconstitutional outside the scope of the carve out of the *ratio decidendi* of the Conseil d'Etat? Would Article 141-1 of the Code de l'organisation judiciaire, which gives competence to the judicial order in the event of indemnification of a prejudice due to malfunction of judicial public service, apply? It is reasonable to think that such indemnification would not be allowed even

if legal practitioners may wish to test it, and may be, open this possibility, for the residual adverse effects on the plaintiff of the law declared unconstitutional.

A lack of indemnification by the French State may also give rise to a lawsuit before the ECHR (European Convention on Human Rights), a plaintiff would still have in fine, the right to be indemnified on the basis of the application of a law declared unconstitutional. From a theoretical point of view, and on the basis of the hierarchy of norms, letting a country member of the European Council apply a law declared unconstitutional could raise issues.

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