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The precautionary principle in the light of the public participation principle

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The precautionary principle is widely recognised by international law and is found in many conventions. According to the 1992 Rio Declaration for example, principle 15 states:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[1].

Likewise, it was recognised under EU law pursuant to the Treaty of Maastricht, which was also concluded in 1992 (art. 130R which became art. 174 pursuant to the Treaty of Amsterdam), and which set, for the European Union, the objective to promote sustainable growth respecting the environment. This provision further

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1) S. Maljean-Dubois, *Quel droit pour l'environnement?*, Paris, Hachette Supérieur, 2008, pp 75-82 ; A. Van Lang, *Droit de l'environnement*, 3e éd, Paris, Presses Universitaires de France, 2011 para 120-126 [Van Lang, *Droit de l'environnement*]. Voir aussi G. J. Martin, « Apparition et définition du principe de précaution » (2000) 239 LPA 7 à la p 9 (L'extenso); M. Boutonnet et A. Guégan, « Historique du principe de précaution » dans Ph. Kourilsky et G. Viney, dir, *Le principe de précaution : rapport au premier ministre*, Paris, Éditions Odile Jacob, 2000, 253 ; Ch. Leben et J. Verhoeven, dir, *Le principe de précaution: aspects de droit international et communautaire*, Paris, Éditions Panthéon-Assas, 2002 ; M. Boutonnet, *Le principe de précaution en droit de la responsabilité civile*, Paris, Librairie générale de droit et de jurisprudence, 2005 ; Ph. Kourilsky et G. Viney, dir, *Le principe de précaution : rapport au premier ministre*, Paris, Éditions Odile Jacob, 2000; G. Viney, « Le point de vue du juriste sur le principe de précaution » (2000) 239 LPA 66 ; A. Guégan, « L'apport du principe de précaution en droit de la responsabilité civile » (2000) 2 RJE 147; P. Jourdain, « Principe de précaution et responsabilité civile » (2000) 239 LPA 51 ; C. Thibierge, « Avenir de la responsabilité, responsabilité de l'avenir » (2004) 9 D 577 (Dalloz); D. Mazeaud, « Responsabilité civile et précaution » (2001) 14 RCA 72.

provides that "Community policy […] shall aim at a high level of protection […]. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay".

The international and European legal systems have influenced French domestic law which recognised the precautionary principle soon after, in 1995, in the "Barnier Act" (art. L. 110-1 of the Environmental code).

According to the legislator :

I. - Natural areas, resources and habitats, sites and landscapes, air quality, animal and plant species, and the biological diversity and balance to which they contribute are part of the common heritage of the nation.

II. - Their protection, enhancement, restoration, rehabilitation and management are of general interest and contribute to the objective of sustainable development which aims to satisfy the development needs and protect the health of current generations without compromising the ability of future generations to meet their own needs. They draw their inspiration, within the framework of the laws that define their scope, from the following principles:

1º The precautionary principle, according to which the absence of certainty, based on current scientific and technical knowledge, must not delay the adoption of effective and proportionate measures aiming to prevent a risk of serious and irreversible damage to the environment at an economically acceptable cost".

More importantly, pursuant to the law of 1 March 1995, French law has adopted a Charter for the Environment which forms part of the Constitution. Together with the most important texts, i.e. the 1958 French Constitution and the 1789 Declaration of Human Rights, it recognises the environmental principles, rights and duties as being at the top of the hierarchy of norms.

The precautionary principle is included in article 5 of the Charter for the Environment which states :

"When the occurrence of any damage, albeit unpredictable in the current state

of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage".

French courts have recognised the constitutional status of the precautionary principle. In the context of a constitutional review arguing the violation of the precautionary principle by the legislator, the French Constitutional Council (*Conseil Constitutionnel*) declared[2] that the provisions under article 5, " together with all the rights and duties defined in the Charter for the Environment, have constitutional status; that they apply to the Government and to administrative authorities within the limits of the areas under their jurisdiction".

Thus in France, the legislator must comply with the precautionary principle and it must be enforced by public authorities. Where there is a risk of significant damage to the environment, measures must be taken to remedy the situation, despite the lack of scientific certainty.

During this conference, we will look at two topics that give rise, in France, to an inventive way of applying the precautionary principle and that provide food for thought as to the conditions for its implementation, both in terms of process and substance. Genetically modified organisms (GMOs) and mobile phone masts. Indeed, both seem interesting as, beyond the precautionary principle, they each highlight, in their own way, the connection between the precautionary principle and the principle of public participation in environmental public decisions. Let us explain such connection (1) before we look at each topic in turn (2 and 3).

1. The connection between the precautionary principle and the public participation principle

To begin with, the precautionary and public participation principles are certainly independent and the latter is not subject to the former. Arising from international law (the Aarhus Convention), it is recognised under French law and has also acquired constitutional status.

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2) Décision nº 2008-564 DC du 19 juin 2008, OGM Act, JO 26 juin 2008.

Article 7 of the Charter for the Environment states as follows:

"Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment."

A connection must however be established between the two principles, for two reasons :

On the one hand, the implementation of the precautionary principle requires that risk assessment procedures be put in place. The aim here is to determine the significance of risks and their degree of scientific uncertainty. It so happens that in France, even though this is not automatic and depends on certain conditions set by the legislator, French law provides for an assessment system with respect to "significant" or "material" environmental impacts which, subject to a number of conditions, involves the participation of the public. This assessment relates to projects and programmes impacting the environment and which are regulated by general or specific regimes. Such assessment may then find that certain risks exist which, even though uncertain, are caught by the precautionary principle.

This is the case for example pursuant to the European measures for the protection of habitats, taken by directive 92/43 dated 21 May 1992. This directive established a network which aims to "promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements". It is referred to as Natura 2000. It is provided that certain projects "likely to have a significant effect on a Natura 2000 site, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of their implications for the site in view of the site's conservation objectives". The opinion of the vast majority of the doctrine interpreting European Union case-law is that such assessment also relates to uncertain risks: it is the "possibility" rather than the certainty of a material impact which calls for the assessment of such impacts[3)]. Such assessment necessarily leads to public participation which is regulated by the Environmental code. In practice, the public may, after receiving information from the competent authority, make observations, including on uncertain risks. Through

3) E. Truilhé-Marengo, Droit de l'environnement de l'Union européenne, Larcier 2015.

these observations, the public takes part in the social assessment of uncertain risks.

On the other hand, with regard still to the assessment, while it mostly requires the involvement of scientific experts, the notion of risk is a deeply social one which, according to a number of authors[4], deserves to be debated within society, via public participation. More specifically, the precautionary principle brings out the issue of social acceptability of a risk that is potentially serious, scientifically uncertain and whose management has significant economic and social consequences. The precautionary principle thus raises the question of risk acceptability not solely from a scientific perspective, but also from a social one. In our view, given the scientific uncertainty and the various economic, ecological and social interests at stake, the degree of social acceptability should only be determined by a debate amongst civil society. In line with this view, the communication of the European Commission on the precautionary principle (2 Feb. 2000) insists on the importance of risk acceptability and, to achieve this, of a dialogue between stakeholders. Public participation therefore appears to be an essential tool for the "precautionary" management of health and environmental risks.

This is why in substance a number of measures for the management of serious and uncertain environmental and health risks turn out to be based directly both on the precautionary principle and on the public participation principle. One example is the regime regulating genetically modified organisms (GMOs).

2. The law of 25 June 2008 regulating genetically modified organisms (GMOs).

The risks surrounding the farming and marketing of GMOs give rise to substantial debates in France, as in the rest of the world, as to their consequences on health and the environment. There is great scientific controversy about these risks, which are uncertain and therefore justify the application of the precautionary principle, as clearly pointed out by the European Court of Justice[5]. In France, article L. 531-1 and the subsequent articles of the Environmental code implementing European directive 2001/18 of 12 March 2001 regulate the contained use, deliberate release and placing on the market of GMOs.

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4) Ch. Noiville, Du bon gouvernement des risques, Le droit et la question du risque acceptable, PUF 2003.

5) CJCE, 21 mars 2000, Greenpeace France, aff. C-6/99, point 44.

For the purpose of our presentation, we are particularly interested in the regime governing the release of GMOs. The term "deliberate release" is defined by the EU legislator as "any intentional introduction into the environment (…) for which no specific containment measures are used (…)". Indeed, in addition to demonstrating a strong cooperation between the member State and the European Commission, this regime relies on a system of risk assessment on a long term, case by case, basis which is required in order to obtain the authorisation for release which is granted by the competent state authority, i.e. the Minister for the environment.

According to article L. 531-2-1 of the Environmental code, « decisions to grant authorisations relating to genetically modified organisms shall only be taken after a prior independent and transparent assessment of the risks for the environment and human health. This assessment shall be carried out by a group of experts in accordance with the principles of competence, pluralism, transparency and impartiality".

Such collective expertise is the responsibility of the High Council for Biotechnology whose « missions are to assist the Government on all matters relating to genetically modified organisms or any other biotechnology and to deliver opinions with respect to the assessment of environmental and human health risks » (L.531-3).

On this particular point, the Constitutional council, in its aforementioned ruling of 19 June 2008, clearly stated that « by the combination of these provisions, the legislator has taken adequate measures to guarantee the respect by public authorities of the precautionary principle with regard to genetically modified organisms ». In other words, this prior authorisation procedure which includes assessments prior to authorisation together with a continuous monitoring of risks following such authorisation is considered to be a concrete demonstration that the legislator is applying the precautionary principle.

This is of particular interest in the context of our subject as participation of the public is included in this prior authorisation procedure. It is integrated within the administrative process of authorisation subject to risk assessment.

The law states that « the freedom to consume and produce products with or

without GMOs, without this being harmful for the environment and the specific nature of conventional and quality crops, is guaranteed with due respect to the principles of precaution, avoidance, information, participation and liability which are inscribed in the 2004 Charter for the Environment and in compliance with community provisions" (art. L. 531-2-1). More importantly, it further provides, with regard to public participation, that "The State ensures effective information and participation of the public at an early stage prior to taking any decisions authorising (or not) the deliberate release into the environment and the placing on the market of genetically modified organisms (art. L. 533-9 Environmental Code).

Hence the connection between precaution and participation to enable the public to take part in the public decision to authorise the farming or trade of GMOs.

What does this idea of public participation entail, as a reflection of the precautionary management of risks at stake?

In practical terms, participation can take place in two ways.

On the one hand, indirect participation through the High Council for Biotechnology. The Council is responsible for advising on matters including authorisations in the light of the risks incurred. Indeed, such advice is the result of a cooperation between various members of the committees, a scientific committee and a non-scientific committee. The latter is the economic, ethical and social Committee which includes representatives of a number of associations, representatives of professional organisations, a member of the National consultative ethics committee for health and life sciences, a deputy (*député*) and a senator (*sénateur*) which are both members of the Parliamentary office for the evaluation of scientific and technological choices, and representatives of associations of local authorities. These are meant to be the representatives of civil society…

On the other hand, a more direct participation. The law provides that the public must be, first of all, informed and then consulted. Informed because the farmer who has an interest in the authorisation request must enclose with the authorisation request a file including information that is not considered confidential, bearing in mind that this requirement does not apply to low risks. More specifically, the authorisation request for GMOs which are not intended to

be put on the market must be accompanied by "an information sheet intended for the public stating the following" (article L.533-9):

1º The aim and planned uses of the release ;
2º The name and address of the applicant ;
3º The summary description and location of the release ;
4º The general description of the genetically modified organism(s) ;
5º The methods and plans to monitor operations and for emergency intervention ;
6º The summary of the assessment relating to impacts and risks on the environment.

At this stage the competent administrative authority will consult the public by electronic means on the authorisation request, except with respect to any confidential information, in order to collect observations.

To achieve this, a notice published in the Official journal of the French Republic (*Journal Officiel de la République française*) no less than fifteen days prior to the launch of the consultation process must announce the conditions and duration of such consultation process which may not last less than fifteen days.

This law thus shows that the assessment involving participation is partly connected to the precautionary principle. Indeed, the public gives its opinion on the uncertain risks and therefore on the degree of acceptability of the risk involved. This system appears to be quite weak however. The consultation process takes place only after the public has been informed, carries no real weight and no real social debate is organised to assess the social acceptability of a serious and uncertain risk.

Yet the idea of a social debate on this topic is not unknown to French law. One must recall that a Consensus conference took place in France with regard to GMOs in 1998. The aim was to debate with the public of the risks relating to GMOs, of their pros and cons. The legislator could have taken up this idea to schedule similar conferences on a regular basis so that the public may get involved in the public decision process together with policy makers. The legislator made no such choice.

Given these shortcomings, the public is eager to participate and thus be involved in state decisions regarding GMO-related risks. This can be seen in a number of ways.

First of all, it must be pointed out that social controversy gave rise, in December 2010, to the first European citizenship initiative aiming to freeze GMO authorisations. According to article 11-4 of the Treaty of Lisbon, European citizens have the right to ask the European Commission, within the realm of its jurisdiction, to submit an adequate proposal to the European parliament and Council of the European Union. It is necessary to collect the approval of one million citizens of the Union who must be nationals of a significant number of Member States. It is also required that the requested legal act be "necessary for the purpose of implementing the treaties". This initiative may have failed for reasons of validity (such initiatives could not be launched before 2012), nevertheless it does show the extent to which the public wishes to take part in risk management when it comes to serious but uncertain risks.

In addition to that, participation of the public can be seen in litigation proceedings which, in this area, are significant[6]. Authorisations or refusals with regard to the placing on the market or release of GMOs thus give rise to disputes before the courts, on the basis of a control of their legality. There are many cases opposing the State to associations protecting the environment or GMO producers. Furthermore, the courts are also called upon to remind mayors that they have no power to issue municipal decrees prohibiting the farming of GMOs on their Municipality, as such authorisations fall within the competence of the State.

Finally, there is a portion of the public which is very hostile towards the farming and placing on the market of GMOs and which resorts to violent and illegal means of protest, prohibited under criminal law. This is a militant form of participation in the public decision-making aimed at enforcing the precautionary principle. Indeed, on several occasions, a number of citizens reaped GMO corn fields that were intended for scientific research. They are now known as "GMO reapers" and are regularly prosecuted by criminal courts on the grounds of "destruction of property".

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6) A. Van Lang, Droit de l'environnement, PUF, 2012, nº 133 et s.

In order to understand, one must recall that, under French law, the doctrine very quickly envisaged that the precautionary principle could lead to an increase in "criminal prosecutions of public or private decision-makers"[7]. As the precautionary principle is not a separate offence, the doctrine was wondering then about the possibility that a failure to comply with the precautionary principle may be sanctioned through certain accusations into which it could be inserted. However, looking at the case-law, litigants have tended to rely more on justifying facts. Under French criminal law, justifying facts are circumstances which justify or legitimate offences. Such is the case of the state of necessity. Pursuant to article L. 122-7 of the French Criminal Code, the state of necessity refers to the situation in which a person finds herself, which leaves no other choice to such person, in order to safeguard a higher interest, than to accomplish an act which is prohibited under criminal law.

In order to justify the reaping of GMOs (destruction of another person's property), the defendants have in fact argued the state of necessity. According to them, in the face of the current and serious danger incurred as a result of GMO farming, and given the State's failure to implement the precautionary principle, it is necessary to carry out the destruction of property. While a number of trial judges have been seduced by this analysis[8], the Court of Cassation (*Cour de Cassation*) clearly rejected it[9]. It provides that the state of necessity is not characterised as there is no evidence of any danger. More importantly, it adds that, if there was indeed a failure by the State to comply with the precautionary principle, the defendants should use legitimate legal proceedings to challenge such shortcomings, rather than actions that may damage other people's property.

One can therefore conclude that while the management of serious and uncertain risk calls for the precautionary principle to be applied in conjunction with the principle of public participation, the effectiveness and efficiency of such a connection remains fragile given that they depend on conditions set by law.

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7) G. Viney et Ph. Kourilsky, Le principe de précaution, Rapport au Premier ministre, éd. O. Jacob, 2000.

8) T. Corr. Foix, 3 oct. 2000, D. 2001, JP, p. 1357 ; T. Corr. Orléans 9 décembre 2005)

9) v. Cass. crim., 28 avril 2004, nº 03-83.783 ; crim. 18 fév. 2004, nº 03-82.951 ; crim. 27 mars 2008, nº 07-83.009 ; crim 7 février 2007, nº 06-80.108 ; crim. 4 avril 2007, nº 06-80.512 ; crim. 31 mai 2007, nº 06-86.628 ; réc. crim. 3 mai 2011, nº 10-81.529.

The same observation can be made when we look at the case of mobile phone masts.

3. Mobile phone masts

A great paradox surrounds mobile phone masts at the moment. On the one hand, the French State is required to cover the entire territory with mobile phone masts in order to efficiently and equally satisfy the citizens' demands in terms of communications. On the other hand, citizens are suspicious of the electromagnetic waves thus generated because of the potential health risks demonstrated by a number of scientific papers and they challenge these in court. The increase in litigation may however undermine the process of covering the entire territory.

Mobile phone masts are therefore a perfect example of the difficulties surrounding the precautionary principle[10]. The risk associated to these masts needs to be managed in a delicate and reasoned manner in the context of scientific uncertainty. This is why the implantation of a mobile phone mast is regulated by the State which is the competent authority to implement the precautionary principle. Such implantation requires two authorisations. The first one is granted by the French Electronic communications and postal regulatory authority (*Autorité de régulation des communications électroniques et des postes*) (ARCEP), pursuant to article L. 42-1 of the Postal and electronic communications code (CPCE). Such authorisation specifies the conditions pertaining to the use of the frequency, in particular to prevent interference and reduce exposure of the public to electromagnetic fields. The second authorisation is granted at a local level by the National agency of frequencies (*Agence nationale des fréquences*)(ANFR) which is in charge of coordinating the implantation throughout the country of radio stations in order to ensure the best possible use of available locations and compliance with the limit values with regard to public exposure to electromagnetic fields (decree of 3 May 2002)[11].

Furthermore, it must be noted that the construction of mobile phone masts falls

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10) G. Viney, L'influence du principe de précaution sur le droit de la responsabilité civile à la lumière de la jurisprudence : beaucoup de bruit pour presque rien ?, Dalloz 2013, p. 562 ; D. Mazeaud, La responsabilité du fait des ondes, Mélanges J. L. Baudouin, éd. Y Blais 2012, p. 871.

11) M. Bacache, RTD civ. 2014, p. 176.

within the scope of planning regulations requirements. Depending on the height and surface area of the facility, a prior declaration at the town hall or a request for a construction permit must be made. Within 15 days following the filing of the request, and, during the related inquiry of such request (1 or 2 months depending on the circumstances), the mayor must display in the town hall a notice regarding the filing of a request for a permit or a prior declaration. During this period of time, the informed public may consult the file. However, this information process does not give rise to comments and remains limited as it does not include any assessment of environmental impacts. The potential risk arising from mobile phone masts is therefore borne by the locals. More importantly, this leads to a lack of social debate as to the acceptability of the health risk surrounding mobile phone masts.

As a result of this, it is not surprising that the last few years have seen a growing amount of litigation in this respect. This is the second form of significant public participation : access to the courts to challenge public decisions made in a scientific context. Being of the opinion that the implantation of mobile phone masts does not comply with the precautionary principle, associations constituted of members of a same local area near the mast institute proceedings before administrative or civil courts. Keep in mind that under French law, there is an important distinction : the administrative courts have jurisdiction over disputes involving the administration and the civil courts have jurisdiction over disputes between private persons.

To start with, with regard to the Council of State (*Conseil d'Etat*) (the highest jurisdiction for administrative matters), this council has agreed to examine the legality of decisions relating to implantation authorisations for mobile phone masts in the light of the precautionary principle[12)]. However, the result of such proceedings is not in favour of the claimants. Looking at the administrative case-law, two observations can be made. First, as in the case of GMOs, the State, and no one else, is responsible for determining the conditions for implantation of mobile phone masts across the country and the measures to be taken to protect the public from the effects of waves. Thus the mayor is not competent to specify any particular conditions[13)]. In other words, risk management is the sole responsibility

12) CE 19 juillet 2010, nº 328687, Assoc. Quartier les Hauts de Choiseul.
13) V. 3 arrêts du CE, 26 oct. 2011, nº 326492/329904/341767.

of the State. In exceptional circumstances, when the mayor opposes a request for implantation of a mobile phone mast, he or she must prove that such refusal is justified by the risks incurred in the current state of scientific knowledge, even if uncertain[14]. On the other hand, while the council has agreed to examine the legality of authorisations in the light of the precautionary principle, the Council of State considers that the risks remain insufficiently proven to challenge such authorisation. Furthermore, it prioritises the need for the State to cover the territory on behalf of the general interest. We note therefore that under the pretext of enforcing the precautionary principle, by requiring the proof of risks that are sufficiently proven, the court makes a wrong application of the avoidance principle.

Secondly, public participation through access to the courts can be seen before the civil court, whose jurisdiction relates to disputes between private persons[15]. This civil case-law with regard to mobile phone masts is very significant as it shows the extent to which the concerned public uses legal proceedings to challenge risks that have been previously approved by the State. Going before the civil court is a means to stand against the State's action which, in this area, imposes health risk onto citizens. When such risks exist but are not chosen, they can be challenged using legal means.

It was not a given that such proceedings would take place. One must indeed keep in mind that, in theory, according to article 5 of the Charter for the Environment, the precautionary principle is to be enforced by the Government. It is not meant for private persons, in this case mobile phone operators. However, from a very early stage, the doctrine did wonder about its influence on private law and the vast majority argued in favour of its extension to private persons, such as businesses. Civil courts have agreed with this doctrine. Thus, thanks to the court's power of interpretation, in France, both public and private decision-makers are considered competent when it comes to the precautionary principle.

Mobile phone masts happen to be a typical symbol of the extension of the precautionary principle. One must look here at a number of rulings made by trial

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14) CE 30 janvier 2012, nº 344992.

15) M. Boutonnet, « Les risques éventuels générés par les antennes relais de téléphonie-mobile devant le juge civil », *Gaz. Pal.* 2009, nº 326/328, p. 11.

judges in civil law matters. The facts are always similar : a number of people living near a mobile phone mast and arguing that this mast is causing health risks which are uncertain but may potentially be serious, institute legal proceedings against the relevant mobile phone operator. They request that the court put an end to such risks by ordering the dismantling or prohibition of the mast.

When ruling in favour of such requests, the courts have relied on two types of reasoning.

On the one hand, the vast majority of rulings is based on the law relating to nuisance (*théorie des troubles anormaux du voisinage*), combined, expressly or implicitly, with the precautionary principle. Under French law, this concept enables anyone suffering as a result of a disturbance that goes beyond what you would normally expect in the context of neighbourly interactions to request compensation for and cessation of such nuisance. This concept was created by a judge in 1844 with regard, at the time, to industrial nuisance.

To justify the cessation of risks and put an end to the set-up of mobile phone masts, rulings provide that the fact that it is impossible to guarantee the absence of any health risk constitutes a nuisance (*trouble anormal*). In other words, even though the risk is uncertain, there is a nuisance because the lack of evidence that there is no risk leads to the characterisation of a nuisance. Another way of saying this is that the lack of safety with respect to a mobile phone mast may lead to the legal qualification of a nuisance.

Such rulings include the decision of the Grasse High Court of 30 June 2003, the judgment of the Versailles Court of appeal of 4 February 2009[16] upholding the decision of the Nanterre High court dated 18 September 2008[17]. In this case, the judgment is interesting as, after acknowledging that the standards defined by the 3

16) P. Jourdain, « Risque et préjudice (suite): réparation au titre des troubles du voisinage du préjudice généré par la présence d'antennes relais de téléphone mobile » [2009] RTD civ 327 ; M. Boutonnet, « Point de vue » [2009] D Juris 499 ; G. Courtieu, « Proximité d'une antenne relais de téléphonie mobile » [2009] RCA Comm 75. Voir aussi B. Mallet-Bricout et N. Reboul-Maupin, « Droit des biens » [2009] D Pan 2300.

17) Trib gr inst Nanterre, 18 septembre 2008, (2008) D Jur 96 (comments : M Boutonnet) [Nanterre, 2008]. Voir Trib gr inst Toulon, 26 mars 2006, (2006) Droit de l'environnement 164 (comments : D. Deharbe et E. Hicter).

May 2002 decree relating to the generation of electromagnetic waves had been complied with, the court considered that doubts remained as to their impact on health and concluded that there was a "legitimate concern which constitutes a nuisance".

On the other hand, some courts have turned out to be even bolder. One example is the decision of the Nevers High Court dated 22 April 2010[18]. In this particular case, the court refused to apply such law relating to nuisance (*théorie du trouble de voisinage*) which, according to this court, is only relevant if there is a risk that is certain. The court rejected the fiction and interpretation made of this concept. The ruling was based solely on the precautionary principle as a general principle of the law. After acknowledging the great scientific uncertainty and the significance of the risk, the court did not order that the operator dismantle the mast, but that it carry out additional research on the risks at stake and, depending on its findings, find a more adequate location.

This ruling is interesting for several reasons[19]: to start with, it recognises the victims' request without taking into account the fact that the operator complied with the standards on the generation of telephone waves. It considers that uncertain risks remain despite compliance with such standards and that those risks must be managed with the precautionary principle in mind. This means that the public may challenge decisions that comply with the standards set by the State despite the fact that such decisions may potentially be compliant with the precautionary principle. Secondly, this ruling aims to provide a solution which is respectful of the interests of both parties. It tries to achieve a conciliation of interests: to carry out one's business without harming others. In this sense, it complies with the legal conditions of the precautionary principle which is in itself mindful of the need for conciliation. In other words, through legal proceedings, the public calls for the judge to start a dialogue in favour of a better acceptability of the risk by society and the persons who are subject to such risk.

This entire case-law has been questioned by the doctrine as, ultimately, it allows certain victims to put an end to operations that benefit a large number of

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18) Trib gr inst Nevers, 22 avril 2010, (2010) n° 10/00180. V. le commentaire de C. Sintez, Revue assurances-responsabilite civile-assurances, nov. 2010/11, comm. 275.

19) Sur cette analyse, G. Viney, art. préc., p. 564.

people. Whereas the proceedings are instituted by one or a few individuals, the consequences thereof are collective. Indeed, putting an end to the operations has consequences for the whole neighbourhood and not just for the person instituting the proceedings. Most of all, it calls into question the competence of the State which, as reminded by the administrative courts, must cover the territory with an efficient network while minimising health risks. According to Professor Stoffel-Munck, "the civil court substitutes its own assessment of the requirements of the precautionary principle to that carried out by the Government" and "it thus takes away the effect of the compromise made by the Government between public interest needs and the degree of scientific uncertainty"[20].

Hence, this line of case-law has been challenged before the Jurisdiction Court (*Tribunal des conflits*). In France, this Court is important as it is in charge of maintaining the allocation between civil and administrative matters. In six rulings dated 14 May 2012[21], the Jurisdiction Court (in charge of resolving jurisdiction disputes due to the principle of separation of powers) declared that public authorities designated by law have exclusive competence to "determine and monitor the conditions of use relating to frequencies or frequency bands and the terms for implantation of radio stations across the territory, as well as the measures protecting the public against the effects of waves"[22]. This court concluded that a civil court cannot order the dismantling or prohibition of mobile phone masts as this would mean that the court would infringe on the State's powers. Civil courts are only competent when it comes to compensation or cessation of a nuisance (*troubles anormaux de voisinage*) which result from an unlawful implantation or an implantation which is in violation of administrative requirements or nuisance unrelated to the protection of public health[23]. In other words, while civil courts are competent once the damage is done and must be compensated for, such court has lost most of its power when it comes to avoiding

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20) Ph. Stoffel-Munck, La théorie des troubles de voisinage à l'épreuve du principe de précaution, D. 2009, p. 2817.

21) Trib confl, 14 mai 2012, (2012) D Juris 1930 (comments G.J. Martin et J-Ch. Msellati) ; Trib confl 14 mai 2012, (2012) Rec nº 3846 ; Trib confl 14 mai 2012, (2012) Rec nº 3848 ; Trib confl 14 mai 2012, (2012) Rec nº 3850 ; Trib confl 14 mai 2012, (2012) Rec nº 3852 ; Trib confl 14 mai 2012, (2012) Rec nº 3854.

22) G. J. Martin et Msellati, ; A. Van Lang, « La clause générale de répartition des compétences au secours des antennes relais » [2012] AJDA Chron 1525 à la p 1528.

23) *Ibid*.

such damage.

The Court of Cassation upheld the decision of the Jurisdiction Court in two rulings dated 17 October 2012[24] and a ruling dated 19 December 2012[25].

The doctrine's view is that these rulings have put an end to the possibility of anyone invoking the precautionary principle in front of a judge. Indeed, by putting an end to the preventive powers of the civil courts, they also put an end to any proceedings based on the precautionary principle to avoid damages. More specifically, through the prism of the participation principle as well, they have extinguished the possibility for stakeholders to challenge a risk which is serious, albeit uncertain.

Therefore the result of this case-law seems to be that ultimately it is no longer possible to obtain the cessation of a risk even if it is uncertain as the State has declared itself competent to manage such risk using a special police power[26]. Thus it is the State that determines the acceptability of the risk incurred by the locals.

Our view is that this case-law is highly debatable. It is true that the ruling of the Jurisdiction Court can be justified when you consider, as does part of the doctrine[27], that the standards set by the State in terms of wave generation caused by mobile phone masts take into account the precautionary principle. This is all the more justified given that the precautionary principle does not mean that any operations that may cause some risk must come to an end. However, by depriving the court of the possibility to enforce the precautionary principle itself, it also undermines the public participation principle. Access to the courts on environmental and sanitary matters has simply been shut down.

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24) Cass civ 1re, 17 octobre 2012, (2012) D Jur 2523, nº 11-19.259 [Cass civ 1re, nº 11-19.259] ; Cass civ 1re, 17 octobre 2012, (2012) D Jur 2523, nº 10-26.854 [Cass civ 1re, nº 10-26.854] ; A. Van Lang, « La question de la compétence judiciaire dans le contentieux des antennes-relais : fin ou suite? » [2012] RDI Chron 612 [Van Lang, « Compétence »].

25) Cass civ 3e, 19 décembre 2012, (2013) D Jur 91, nº 11-23.566 [Cass civ 3e, nº 11-23.566] ; Ph. Malinvaud, « Troubles de voisinage dus aux antennes-relais : où en est-on? » [2013] RDI Chron 162.

26) V. sous Trib confl, 14 mai 2012, (2012) D Juris 1930 (annotation Gilles Martin et Jean-Charles Msellati)

27) Ph. Stoffel-Munck, préc.

However, this topic calls for a necessary debate on the social acceptability of uncertain risk and for this purpose access to the courts is essential[28]. Indeed, according to some quite diverse theories of sociology of law, the judge is the "living representative of society" (*organe vivant de la société*)[29]. It stands as an intermediary between the State and society as would a "judge Hermes", to use the words of François Ost. Applied to environmental and health matters which are subject to scientific uncertainty, this means that the court should play a role in assessing risk acceptability by weighing the various interests at stake.

This is all the more true as the role of lawsuits has evolved. They have become a place where a dialogical and discursive democracy takes place[30]. Given the shortcomings of social debate within usual frameworks put in place by the Government, lawsuits have become a means to challenge the political legitimacy of certain decisions.

In terms of adequacy, one must also recall the danger of this new case-law. A health tragedy occurred in France in the nineties, when blood was contaminated with the AIDS virus, even though the State has fully validated the placing on the market of the contaminated blood. One can therefore see that legal and political validity should not be confused. Allowing the State to "determine the risk" also means allowing it to get it wrong if there can be no judicial challenge.

What are the solutions envisaged with respect to mobile phone masts ?

First of all, one must be aware that victims do have access to a number of solutions. They can challenge the legality of an authorisation before the administrative court. However, it is unlikely that such an action would succeed, such court being against a strict application of this principle. In addition to that, they may obtain the avoidance of the risk of damage caused by a mast in certain limited conditions. But it would be difficult to demonstrate once again the unlawfulness of the set-up of a mast or the fact that the dispute has nothing to do

28) Sur ce rappel, M. Mekki, La ou les légitimité(s) du ou des juge(s) et le principe de précaution, to be published in Le principe de précaution en droit de la responsabilité civile et pénale comparé, M. Hautereau-Boutonnet et JC Saint-Pau.

29) D. Salas, Droit et institution, Léon Duguit et Maurice Hauriou, in La force du droit, p. 193.

30) A. Garapon, Bien juger…, p. 229.

with public health. As a result of this, victims are left only with the compensation solution. Indeed, once the damage has been caused, the civil courts can reclaim their power on matters of civil liability. On this particular point, French law is unique in that it takes into account the precautionary principle where there is a liability claim which involves judging the wrongdoings of the person causing the damage. Since a decision rendered by the Hight Court (Cour de cassation) on the 3 march 2010[31)], the violation of the precautionary principle could lead to the civil liability if there is soma damage. The facts of the case were the following: the owner of a piece of land where there was a water spring has built a well. The company who works with this water has considered that it could lead to risks of water pollution. That's why this company has sued the owner to obtain damages with regards to the violation of the precautionary principle. Then, the Court has rejected the claim because the conditions of the precautionary principle were not met. It clearly means, that if the risk existed, even if it was uncertain, the judge would have recognized the breach of the precautionary principle and granted compensation for environmental damage.

However, these forms of compensation remain last resort solutions. It is obvious that the locals who live near a mobile phone mast do not seek compensation but rather to avoid the risk in the first place ! This is why there should be a focus on the reinforcement of avoidance. As the courts can no longer address the concerns of the victims through lawsuits, it therefore seems urgent to reinforce the participation of the public as soon as a proposed mobile phone mast set-up is considered. It is the only way that the risk can be debated and potentially acceptable.

In line with this view, a number of mayors are organising public meetings within their municipality in order to allow inhabitants to be better informed and to debate with the main players.

Furthermore, a new framework for the monitoring and measure of electromagnetic waves was put in place by a decree dated 14 December 2013. This is to ensure that the wave measures respect public health according to state data. The new decree also created a fund to finance risk management. The decree

31) Émilie Bouchet-Le Mappian, « Le principe de précaution dans un litige entre voisins » [2010] D 2419; Cass civ 3e, 3 mars 2010, (2010) Bull civ III, nº 08-19.108.

enables certain people to request such monitoring and to be informed of the wave measures, including the National Agency of Frequencies, the State, local authorities, the French Agency for Food, Environmental and Occupational Health & Safety (*Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail*) and a number of associations that work for the protection of the environment, public health and users of the public health system, as well as some family associations. According to the doctrine, this decree complies with the precautionary principle as it enables private persons to participate in the monitoring of risks[32)].

However this does not solve the problem entirely. Indeed, while the public now has access to monitoring of generated electromagnetic wave measures, it would only be able to challenge such measures if they were in breach of what is required by the State pursuant to the legal framework.

Hence the feeling remains that in order to be effective, the management of serious and uncertain risks requires adequate enforcement both of the participation as well as the precautionary principle by the civil courts.

32) M. Bacache, préc.