What are the Justifications for French Judicial Review?
A Cultural Approach for a Deep Understanding of National Justifications

Marie-Claire Ponthoreau
Professor of Constitutional Law and Comparative Law
University of Bordeaux (France)

In the French case, the difficulty is that judicial review of legislation does not belong to the national legal and political cultures. The historical setting was very unfavourable for the appearance of a *Conseil constitutionnel* (1958). For over ten years, there was hardly any link between the French system of constitutional review and fundamental rights, as these were not at stake in the numerous cases submitted to the Council. Furthermore, the Council did not develop as an institution that reviewed statutes on merit, but only verified whether the right procedures were followed. The whole system of mechanisms imagined in 1958 was designed to contain excesses of non-majoritarian parliamentarianism of the continental type that had developed in France.[1] Thus, the *Conseil constitutionnel* was conceived as an auxiliary to the Executive. Previously, its main competence had been to ensure that Parliament did not infringe upon the powers of the government. This was perceived as a necessary safeguard against the supremacy of Parliament over the Executive. A review system was necessary to guarantee that the limitations on the powers of the legislature were strictly observed.

For these reasons, France has shifted away from the traditional model of constitutionalist legislative supremacy; but it has not completely adopted the alternative European model of constitutional justice. French constitutional review is quite peculiar, as is confirmed by the most recent constitutional amendment.[2] The specificity of the Council has been preserved, even if the reform outlined above has also had the effect of reducing the differences between the French model of constitutional review and that of other European models:[3] the citizen acquires the power to refer matters to the Constitutional council, but in an indirect way via the mechanisms of certified questions. Thus the specificity of the Council is weakened, but nevertheless preserved.

---

[1] Ponthoreau, M.-C. and Ziller, J. (2002), "The Experience of the French *Conseil constitutionnel*: Political and Social Context and Current Legal-theoretical Debates," in Sadurski, W. (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-communist Europe in a Comparative Perspective*, Kluwer, Dordrecht, pp. 119-142.

[2] L. n° 2008-724, 23 July 2008, in *Journal Officiel*, 24 July 2008, p. 11890.

[3] However, the main characteristic of the European model is its diversity. See Rubio Llorente, F. (1996), "Tendances actuelles de la juridiction constitutionnelle en Europe," *Annuaire international de justice constitutionnelle* XII, 11.

The *Conseil constitutionnel* suffers from its singularity. Firstly, it is not a real court but an auxiliary of the Executive.[4] Secondly, in order to balance these criticisms, it became a guardian of fundamental rights in 1971. As such, the Council has less to do with the procedural issue of the method of appointment of its members than with the substantive issue of the determination of their functions, which became a source of tension between constitutional review and legislative supremacy. Unlike the Italian or German constitutional courts, the Council is not bound by a fully-fledged catalogue of fundamental rights. Even the most critical commentators note that the Council has to face a difficult alternative: ''if the constitutional judge were to apply only the letter of the Constitution, its review would be inefficient and useless because the text only exceptionally gives an answer to the question put to the court. If on the contrary it tries to give life to the Constitution through a 'constructive' interpretation, it will be accused of arbitrariness and of wanting to act as a government.''[5] It is obvious that the Council has followed the second path in order not to be a useless institution. Above all, this issue was the condition for the research into what legitimises the French constitutional justice system, that is to say, what values require that such an institution be maintained.

Thus, the problem of justification for French judicial review appeared in 1971 when the Council decided to become a guardian of fundamental rights. The origin of the Council still accounts for an important part of the current debates about constitutional review and explains the main theories that provide justification for French judicial review. The purpose of this paper is to identify and test the cultural assumptions underlying the justifications proposed by French constitutional doctrine. Indeed, it is possible to demonstrate that the justifications behind the national judicial review are culture-bound. The main characteristic of these French justifications is that judicial review has to be compatible with democracy. How is this achievable? What are the limits of these justifications? And what are the national specificities of these justifications?

1. Justifications for French Judicial Review

This section concentrates on three main theories in contemporary French legal doctrine, best illustrated by Louis Favoreu, Georges Vedel, and Dominique Rousseau. As opposed to these trends in defence of the Council, Michel Troper adopts the point of view of legal science as a descriptive rather than prescriptive theory: his aim is not to defend the Council, but to understand what it does or to understand which justifications are proposed in order to maintain constitutional justice in general (and not, in particular, the Council).[6] Thus, his work is not included in the primary analysis, but is crucial for a critical analysis of French scholarship.

[4] For details, see Ponthoreau, M.-C. and Hourquebie, F. (2009), "The French *Conseil constitutionnel*: An Evolving Form of Constitutional Justice," *The Journal of Comparative Law*, forthcoming.

[5] Lochak, D. (1991), "Le Conseil constitutionnel, protecteur des libertés?," *Pouvoirs* 13, 42.

[6] Troper, M. (1990), "Justice constitutionnelle et démocratie," *Revue Française de Droit Constitutionnel* 1, 31.

1.1 Three main theories

Doctrinal positions can be organised around the theory of "the pointsman" (*théorie de l'aiguilleur*), developed by Louis Favoreu as early as 1982.[7] According to this theory which rests upon Charles Eisenmann's work and which is supported and completed by Georges Vedel, any unconstitutionality – even on content – can be analysed as a lack of competence on the part of the ordinary legislator, as only the constitution-making power could make the decisions that were quashed by the judge. Therefore the constitutional judge can only indicate which way ought to be taken at an unclear juncture between legislative and constitutional procedure. The metaphor points out that the Council does not express an opinion on the content of the law. The court rules only on the process by which it was passed. Thus, the *Conseil constitutionnel* is a pointsman who merely directs trains down one or another track, according to their nature or their destination. The powers that are instituted by the constitution (*pouvoirs constitués*) have to follow the will of the constitution-making power (*pouvoir constituant*). Thus the Council never goes against the general will and the will of the nation's representatives. This last point is made by Georges Vedel, who compares the constitutional amendment to the institution of the *lit de justice*. In that institution in the *Ancien Régime*, the sovereign himself acted in order to overturn the will of *parlements* that opposed him.

Georges Vedel underlines that constitutional choices by unelected judges are difficult to admit as prevailing over choices by representative bodies unless those choices can be corrected for the future by the constitution-making power (i.e., the supreme power of the land). In his words: "It is the completeness of the power of constitutional revision that gives legitimacy to the review of constitutionality of statutory enactments. To any person who complains that the law enacted by the vote of the representatives of the Nation is not sovereign like the Nation itself, the answer is that 'the law gives expression to the general will only in respecting the constitution.' This formulation justifies the review of constitutionality, but it has this virtue only because it implies that barrier the law meets in the constitution may be raised by the people as sovereign or their representatives, if they have recourse to the supreme mode of expression: constitutional revision. If judges do not govern, it is because at any given moment the sovereign, on condition that he appears in majesty as the Constituent, may … quash their judgments."[8] Thus, the *Conseil constitutionnel* cannot be considered as an undemocratic institution because it does not have the last say.

On the contrary, Dominique Rousseau recognises that the Council is an undemocratic institution according to the common definition of democracy.[9] In a democracy, decisions are made by a majority of the people or the people's representatives, while judicial review composed of unelected judges has the power to oppose decisions adopted by elected officials. Thus, Dominique Rousseau proposes to redefine democracy and constitution. The constitution is firstly designed as a charter of fundamental rights. The constitution, as an organisation of

[7] This theory is fully developed in Favoreu, L. (1987), "Le Conseil constitutionnel et la cohabitation," *Regards sur l'actualité* 135, 3.

[8] Vedel, G. (1992), "Schengen et Maastricht," *Revue Française de Droit Administratif* 2, 179-180.

[9] Rousseau, D. (1999), "La jurisprudence constitutionnelle: quelle 'nécessité démocratique'?" in Drago, G., Nolfessis, N., and François, B. (eds.), *La légitimité de la jurisprudence du Conseil constitutionnel*, Economica, Paris, p. 363.

powers and a tool of government, is not to be taken into consideration. What is important is the guarantee of fundamental rights. Democracy is redefined as a state limited by law, and, more precisely, as a system that guarantees rights by judicial review. In this system, the people do not truly exercise their sovereignty except through the constituent power. Thus, the judicial review of legislation is founded on the possibilities of divergences between the will of the people as a constituent power and the will of the representatives as the power of the majority.[10] This last distinction is important because it is the foundation of the following rationale: the *Conseil constitutionnel* no longer appears to deny the will of the people but guarantees the people's sovereign will as expressed in the text of the constitution contrary to the will of the political majority (i.e., the majoritarian government). However, it is not sufficient in order to justify French judicial review because in France statutes are supposed to be the expression of the general will. Is it possible for this will to be subordinated to the will inscribed in the constitution? Can the people have two different conceptions of will? The people who exercise legislative power through their representatives are different from those who exercise constituent power. In order to resolve this difficulty, there is only one solution: there is a "real" will of the people which is the will of an "eternal" people and this will prevails over the will of the "present" people. What is the role of the *Conseil constitutionnel*? The Council does not represent the sovereign people; it gives reality to this sovereignty: it allows the people to see themselves as sovereign and not only as a represented body.[11] Thus the Council is the institution that says what the voice of the sovereign people is.

1.2 Three main criticisms

Firstly, the theories developed by Louis Favoreu and supported by Georges Vedel are based on the idea that judicial interpretation is exercised without discretionary power or when this discretionary power is denied. The trend led by Favoreu and Vedel tries to downplay the *Conseil*'s power in order to avoid presenting it as "the master of sources of constitutional law.'' The purpose of such a position is to avoid the criticism of a government of judges. The debate on the limits of the ''constitutional bloc'' has been focusing on the ''fundamental principles recognised by the Laws of the Republic'' (PFRLR). Vedel claims that the Council has set strict conditions on recognising such principles. Favoreu claims that even the principle of continuity of public services – a very important and specific traditional principle of French administrative law that guarantees the continuity of public administration and other policy-implementing bodies – and that of the separation of powers which the Council calls ''principles with constitutional value'' can somehow be linked to provisions of the constitution, and that at any rate the Council does not use the expression ''general legal principles." This reasoning, which leads to minimising the Council's power to establish principles, is subject to two kinds of comments. First, an unlimited belief in the constitutional text is being transferred based on what the Council says, as if it were possible to lay down definitively the meaning of a provision of the constitution without having to repeat the interpretative reasoning at the moment it is being applied. Second, it is still the Council that decides whether the conditions needed for the recognition of PFRLR are met. In laying down more precise conditions, however, the Council limits the development of its own interpretation. Furthermore, its authority would suffer if it did not respect its own interpretation.

[10] *Op. cit*., p. 367.

[11] *Op. cit*., p. 374.

Secondly, if denying the discretionary power of judicial interpretation is not enough (and it is not), there is another justification. There are different degrees in the defence of the Council. Yet, to legitimate the Council, it seems that it is enough to say that it does not have the last word. Two kinds of criticisms can be developed in opposition to this rationale. On the one hand, the debate on the legitimacy of judicial review should take into account how difficult it is in practice to obtain constitutional amendments necessary to correct judicial choices. To give the last word to the derived constitution-making power (*pouvoir constituant dérivé*) reinforces the protection of fundamental rights, because the Parliament has to put a positive step into action: the procedure of amending the constitution could be a politically cumbersome procedure. However, if this path is literally never open, judicial review becomes more difficult to defend. In the French case, the Constitution of 1958 cannot be amended without the consent of the Senate; thus it is impossible to reform and to limit powers of the Senate. Since 1958, the Senate has been composed of a right-wing majority. Thus, it is impossible for the left-wing majority to amend the constitution as the government wishes. That is a contingent argument.

On the other hand, this rationale does not solve the issue of majoritarian theory: abuse of power is not to be feared from the legislative, but from the constitution-making power. Indeed, it would be anti-democratic for a judge to overrule a decision that has been taken by the people according to established procedures. However, how are minority rights going to be protected if one adopts a liberal argument that regards constitutional review as a fundamental safeguard against the abuse of power? On the other hand, if one deploys the "ultra-democratic" argument (what might otherwise be termed the parliamentary sovereignty position) the question arises as to whether even minimal review is justified once the democratic will has been expressed.

In France, the discussion has been redirected in this way by Olivier Beaud's writings:[12] what is at stake is not the protection of the constitutional judge but the preservation of the constitution. Certain constitutional matters are placed beyond the risk of change, save through the extraordinary democratic majorities that constitutional amendment requires. A constitutional limitation to amending power is only possible through a distinction between derived constitution-making power (*pouvoir constituant dérivé*) and original constitution-making power (*pouvoir constituant originaire*). Before Beaud recalled this old distinction which had already been made before World War II by Bonnard, an important part of the doctrine saw the constitution-amending power as the expression of constitution-making power and thus needed the concept of supra-constitutionality in order to limit this power. For a large part of the legal doctrine, it is impossible to accept the limitation of the derived constitution-making power by the constitution and constitutional judges because deputies represent not only electors but the people (or the nation); the legislative power expresses the general will and also the constituent power. There is no difference between ordinary law and constitutional law; thus it is necessity to find a concept outside the constitution in order to limit the constitution-amending power.

Furthermore, according to Favoreu, admitting this review of constitutional bills ''destroys the argument according to which the legitimacy of the constitutional judge derives from the fact that he does not have the last word.''[13] This is also the reason why Vedel strongly opposes

[12] Beaud, O. (1994), *La puissance de l'Etat*, PUF, Paris.

[13] Favoreu, L. (1994), "La légitimité du juge constitutionnel," *Revue Internationale de droit comparé* 2, 581.

such a review of constitutional amendments.[14] There is however confusion: nobody proposes to submit the original constitution-making power to review and thus the constitutional judge cannot have the last word. The judge is not sovereign.[15] The constitution-amending power derived from the constitution is empowered by the constitution to modify the text only if the limits on time and content are acknowledged. The review of constitutional bills is a condition to avoid distorting the constitution by constitutional amendments. At the same time, the debate shifts towards what in the constitution cannot be amended.

Thirdly, we have to examine D. Rousseau's position. He does not argue that judicial review reinforces democracy, but that it changes the definition of democracy. However, saying that the Council is the institution that gives voice to the sovereign people is not so obvious. It might mean that the constitution is what the *Conseil constitutionnel* says it is, that is, the traditional problem of discretionary power of judges in interpreting the constitution. His answer is the following: the Council takes part in a continuing creation of rights: through its exchanges with other institutions, social actors, e.g., political parties, the doctrine, and, more globally, public opinion, the Council acknowledges new demands and concerns emanating from our ever-evolving society. This does not eliminate the Council's subjectivity but ''forces it to let the text evolve [together with] its jurisprudential arbitration,'' even if the author regrets that ''the Council is sometimes too slow in accompanying this walk towards progress.''[16]

This logic of constantly establishing rights and the attempt to see the Council as a vehicle of "trendy ideas" are questionable; the danger is not that of a constitution with variable geometry but that of a judge who would be beholden to public opinion as expressed by the mass media. The kind of public and reasoned use of opinion of the *Siècle des Lumières* to which D. Rousseau refers does not exist anymore, and it is thus surprising that he tries to theorise a ''continuous democracy'' as being a ''deliberative democracy, [as] a sign of something beyond representative democracy,'' and thus as a new era of democracy in which constitutional justice would serve as a pillar.[17] His idea is to connect the theory of democracy to the theory of the constitution. However, the consequence for the constitution is its complete dissolution as a normative text. The constitutional text is still the starting point of interpretation, but it is no longer the finishing point. In the French case, the constitution is not an object of consensus and so constitutional values are still in question. The consequence for constitutional judges is that they are at the heart of the political conflict. Furthermore, the Council is presented as the only institution which might balance the representatives' wrongdoings, i.e., the improper solicitation of the sovereign power. The representatives are not sovereign, only delegates. On the contrary, the Council is not, according to D. Rousseau, the representative of the people, but this institution gives the people the representation of their sovereignty. However, this sovereignty could not exist without the *Conseil constitutionnel*: it

---

[14] Vedel, G. (1993), "Souveraineté et supraconstitutionnalité," *Pouvoirs* 67, 96.

[15] Beaud, O. (1993), "Le Souverain," *Pouvoirs* 67, 43.

[16] Rousseau, D. (2008), *Droit du contentieux constitutionnel*, Montchrestien, Paris.

[17] Rousseau, D. (1995), "Introduction," in Rousseau, D. (ed.), *La démocratie continue*, L.G.D.J.-Bruylant, Paris-Brussels.

needs it. This makes for a strange conception of the people's will because the obvious risk is that the people's will will become the will expressed by the Council.

To conclude: the theories are weak. However, do strong justifications exist? How is it possible to conciliate democratic requirements and French judicial review? Before answering this crucial question, it is important to understand the national specificities of these justifications. In this way, we can find reasons for the difficulty of resolving the tension between legislative supremacy and effective protection of fundamental rights.

2. National Specificities of These Justifications

The national specificities of these justifications are deeply entrenched in constitutional history. Although there is commonality with other constitutional experiences, in particular with the American experience, there is a specificity linked to the French conception of the democratic ideal and to the weakness of our constitutions. Unlike the Americans who very early on gave judicial power to their courts, the French refused to do so from the start.[18] This does not mean that the question of the supremacy of the constitution was completely absent from revolutionary debates,[19] but that the democratic trend was the strongest. These particular aspects have consequences on the way the theories of justification for judicial review are built.

2.1 Cultural assumptions

From the Revolution of 1789 onwards and for about 160 years, French public law has been dominated by two fundamental concepts: that the general will is the only source of law, and that of representative democracy. The tradition of "supremacy of law" is derived from the works of Jean Jacques Rousseau. The statute law being presented as the expression of the general will was reputedly both irreproachable and infallible. No doubt Rousseau attributed these characteristics to legislative acts as long as they were directly voted by the people. But in the melting pot of ideas of the French Constitutional Assembly of 1789, those providential qualities were attributed to a statutory law passed by representatives. A century later, with parliamentarianism firmly rooted, the principle of representative democracy led to a monopoly on decision-making by members of parliament, through a combination of two, supposedly opposed, theories of sovereignty.

According to the theory of "*souveraineté nationale*" the only sovereign was the Nation, embodied by its representatives – allowing for a role for the King and for restricted suffrage. According to the theory of "*souveraineté populaire*" the People were the only sovereign, which expressed itself through its elected representatives and through direct consultation. Under the Third Republic (1875–1940), the golden age of classical French constitutionalism,

[18] The French revolutionaries instituted a mechanism in 1790 to enlist legislative help in cases where gaps, conflicts, or ambiguities in the law left judges in a compromising position. According to this mechanism, known as the "*référé législatif*," the courts could call upon the legislature itself to settle any vexing legal interpretative issue by issuing "a decree declaring the law." The Constitution of 1791 provided sanctions for judges who interfered in the legislative power.

[19] A good example is Sieyes' contribution; see below.

those concepts helped to support the unlimited power of the two Houses of Parliament. This was enhanced by the fact that the three ‘‘constitutional laws’’ of 1875 had been conceived as a transitional constitution and thus only contained arrangements for the functioning of state institutions. This firmly established parliamentary sovereignty and therefore French constitutional law was as opposed to the concept of constitutional review as British constitutional law. Parliamentary sovereignty was not a principle as such, but only the result of the combination of the two dominant legal concepts. This theoretical limitation as well as the political circumstances restrained the two supreme courts – the *Cour de Cassation* for civil and criminal courts and the *Conseil d'Etat* for administrative courts – from any attempt to develop a French version of Marbury v. Madison.

Only a small part of legal scholarship tried to theoretically undermine this unlimited power of members of parliament: the most representative was Raymond Carré de Malberg, professor in Strasbourg after World War I. His influence was limited by the fact that he met quite a bit of hostility from a number of colleagues who accused him of being overly influenced by German legal theory. He was rediscovered only in the sixties and is now considered to be the main forerunner of modern French constitutionalism. In his pamphlet, *La Loi, expression de la volonté générale* (1931), he demonstrated how the initial revolutionary theories had been unduly diverted by politicians and recommended introducing elements of direct democracy and constitutional review in order to balance parliamentarianism.

For these reasons, there was an important consensus in doctrine and amongst politicians about the need to reduce the power of members of parliament. This resulted in the Constitution of 4 October 1958 which contained a number of technical constraints limiting the power of parliament, including a system of review of statute law by the newly created Constitutional Council. The aim of the system was clearly to avoid parliament going beyond the competencies that were distinctively attributed to them by the constitution. The purpose was not to check how parliament exercised legislative power, but to see that it restricted itself to adopting statute law in the most important fields and did not interfere with the executive power of the cabinet.

The domination of the democratic trend during the revolutionary debates also led to the weakness of the constitution. This weakness is linked to certain applications of constitutional review which had the effect of depreciating the reviewing institution. Under the Constitution of Year VIII (1800), the *Sénat* served the function of guardian of the constitution but it was totally subservient to the Emperor and was thus much more prone to applying the "*senatus consulte*" to modifications to the constitution desired by the Emperor, than to protecting it. We later find an analogous institution, though of less extreme servility, in the *Sénat* of 1852 Constitution (*Second Empire*). The *Sénat* of 1852 quite simply forgot its role as judge of constitutional conformity and became a political chamber that measured, not the constitutionality of the statute submitted, but its legislative grounds. Finally, a third attempt, made under the Fourth Republic (Constitution of 1946), gave rise to a Constitutional Committee that bore a certain resemblance to a court judging the constitutionality of laws, but access to it was very difficult and the constitution itself formally forbade the invalidation of any text that would violate the rights and liberties laid out in its Preamble. Stated otherwise, the 1946 system was a peaceful means of solving conflicts arising from a certain number of problems inherent in the mechanics of the institutions, but the normal matter of constitutional review, which is to guarantee rights and liberties, was proscribed.

In the final analysis, French revolutionaries did not conceive the constitution as the supreme rule. The constitution is a "special rule" about the organisation of the power. They had an idea of the constitution as a tool for their ambition. Thus, a culture of the constitution does not exist in France because the constitution is a tool of power and not a tool for the limitation of power.[20] The rise of constitutionalism was late in coming, not before the liberal trend in the nineteenth century. For instance, Tocqueville denounced the tyranny of the majority as a possible democratic danger.[21] The other consequence of the revolutionary period is the flexibility of the constitution even if France has a rigid constitution. We often change the constitution and the current constitution (the fifteenth constitution since the first in 1791) has been amended twenty-four times. The constitution enjoys such flexibility that the Parliament's will acts as a supreme rule and we are thus closer to the British system than the American system.

2.2 Consequences of cultural assumptions on the justifications of French judicial review

Judicial review is not in harmony with French political culture. On the one hand, there is a deep attachment to parliamentary sovereignty and, on the other hand, judicial review is seen by a large part of the legal doctrine as the condition for an effective constitutional law. The main consequence for the justifications of judicial review is the defence of the *Conseil constitutionnel*. The price of this defence is the lack of reflection on what democracy and the constitution are, from a substantive point of view. Both shortfalls are linked because, in the final analysis, the legal doctrine does not reach a compromise between constitutionalism and democracy.

Democracy is understood in a simple way: a government in which the people are sovereign. On this simple basis, the procedural definition is the main definition of democracy. For this reason Favoreu's and Vedel's positions are well accepted by a large part of the legal doctrine and by politicians.[22] The legislature is excessively concerned with the issue of constitutionality. Thus, there remains the risk that the constitution (in particular, the core of the constitution, i.e., fundamental rights and fundamental principles of constitutional order) will be violated. The idea of the supremacy of the constitution is not as rooted in French legal doctrine as in other legal doctrines (such as American or German doctrine).

However, the idea of the supremacy of the constitution was defended by Sièyes in 1795: "either the constitution is binding or it is a nullity." This idea was later proposed through the distinction between constituent and constituted powers on the one hand and the possibility of judicial review on the other hand. The problem remains: what does "the supremacy of the

---

[20] Ponthoreau, M.-C. (2008), "La constitution comme structure identitaire," in *Les 50 ans de la Constitution*, LexisNexis Litec, Paris, p. 37.

[21] Tocqueville: *"Je regarde comme impie et détestable cette maxime qu'en matière de gouvernement la majorité d'un peuple a le droit de tout faire ... Le pouvoir de tout faire, que je refuse à un seul de mes semblables, je ne l'accorderai jamais à plusieurs ... La toute puissance me semble en soi une chose mauvaise et anormale*" (*De la démocratie en Amérique*, 2ème partie, chap.7).

[22] This controversy led the *Conseil* to decide that the constitution did not authorise it to examine provisions passed by the constitutional legislator in order to assess their compatibility with entrenched constitutional principles (decision n° 2003-469 DC of 26 March 2003, *Loi constitutionnelle relative à l'organisation décentralisée de la République)*.

constitution" mean? A large part of French legal scholarship rejects a substantive definition of the constitution. Thus, the idea that the constitution is a paramount and superior law is not accepted or only on the basis of a naturalistic conception of the constitution.

Furthermore, Michel Troper has developed a critique on a logical base: "if a constitution cannot be revised by an ordinary law, an ordinary law contrary to the constitution is, by definition, null. But, in that case, the argument that, given the supremacy of the constitution, the courts must be able to nullify contrary laws arrives at a conclusion that merely repeats the major premise, and we are faced with a simple tautology. …
1. A constitution is supreme (or binding) if unconstitutional laws can be invalidated.
2. Therefore unconstitutional laws are subject to invalidation."[23]

Troper adds: "In order to escape this tautology, one must show that the existence of a special procedure of revision necessarily entails that unconstitutional laws are subject to invalidation";[24] i.e., the constitution is supreme because a judge can set aside unconstitutional laws. However, he thinks that is impossible and thus he also criticises judicial review as the sole way of realizing the supremacy of the constitution: "it is false to say that judicial review is a means of realising the supremacy of the constitution. It is indeed a "means" but what it achieves is the supremacy of constitutional norms produced by the authority of review."[25]

At this point in his reasoning, Troper does not try to justify the democratic character of exercising constitutional justice – unlike the other doctrinal positions already examined here. He tries to indicate what concept of democracy is compatible with such a power. As a premise of the French political system, he states that the Council has the quality of a representative institution and that, as such, it participates in the expression of the general will as a co-legislator. In Troper's view, the general will corresponds not to the moment of adoption of a statute but to that of its implementation. As ''the true legislator is not the author of the text but its interpreter,''[26] there is no hierarchy between the constitution and the decisions of the Council. The latter is only subject to its own will because only those norms that it originates exist. Therefore it is not only a co-legislator, but also the only true author of the constitution. Troper's theory tends to entirely dissolve the traditional distinction between law-making (*législation*) and judicial decision-making (*juridiction*).

Troper's position is original in French legal doctrine. He adopts the point of view of legal science as a descriptive rather than normative theory. In developing what he calls a realistic theory of interpretation[27] he tries to explain what ''interpreting'' means and – within a doctrine that is not well versed in hermeneutics – helps to get rid of the idea that a legal provision needs only interpretation in a case where it is not clear. He has done a lot in order to cancel the picture of the judge as the "*bouche de la loi*." However, if it is possible to think that the distinction between law production and law implementation is too rigid, it is not a reason for totally identifying them: the legislator is free from bonds to the legal system and can act at

[23] Troper, M. (2003), "The Logic of Justification of Judicial Review," *I-CON* 1, 104.

[24] *Op. cit,* p. 105.

[25] *Op. cit,* p. 108.

[26] Troper, M. (1990), "Justice constitutionnelle et démocratie," *Revue Française de Droit Constitutionnel* 1, 36.

[27] Troper, M. (2001), *Le droit, la théorie du droit, l'Etat*, Paris, PUF, p. 69.

the moment he or she decides to, whereas the judge can only act when asked to and cannot give random meaning to a legal text. Furthermore, whereas the judge has to justify his or her decisions, the legislator is not bound by any such duty. Troper's conclusions go directly against the democratic theory according to which only the people are sovereign. But for him this is only a myth. At any rate representation and sovereignty are meta-legal concepts.

3. Concluding Remarks: Weak Judicial Review, Weak Justifications

The Council's general attitude of not justifying its position on constitutional interpretation lacks accountability. It prefers to hide its law-making power and a large part of the legal scholarship has tried to downplay the Council's powers in order to avoid presenting it as the "master of sources of constitutional law." As a result, French judicial review is weak.

Until now, the political authorities have been the only authorities allowed to refer bills to the Council. Indeed, a lack of political will leads to a lack of constitutional decision. We do not believe that the last reform approved on 23 July 2008 will really change this situation. Precisely, the new article 61-1 of the Constitution provides that in the case of a violation of constitutional rights by an article of a statue law, the judge can suspend all proceedings but he cannot submit the question directly to the *Conseil constitutionnel*. He has to submit the question to either the supreme court of the judiciary order (*Cour de Cassation*) or that of the administrative order (*Conseil d'Etat*). Thus the certified question is submitted to the Council by one of the two supreme courts which will exercise a filter on the questions submitted by ordinary judges. The aim of this original screening is to avoid too many pending questions before the Council, except for the in-depth reform of its organisation. However, the organic law that establishes the detailed provisions will probably not be published for several months. At this point it is not altogether clear how the constitutional review function is going to be exercised in practice, and in particular, by which judges. In reality, much will really depend on the degree to which the *Cour de Cassation* and *Conseil d'Etat* act as a filter. This reform fits in well with the logic of "the French style" of constitutional review: "a review, but not too much." At the same time, after fifty years of debates, the reform can be viewed as revolutionary because the citizen has acquired the power to refer bills to the Council in an indirect way via the mechanisms of certified questions. In the future, will the French legal community upon further reflection be able to justify judicial review as an institution? It is not sure. On the contrary, the debate is likely to focus on the advantages of ex-ante or ex-post review. Such a debate assumes that judicial review is itself justified.

In a critical-normative perspective, a redefinition of democracy, such as that proposed by Dominique Rousseau, is necessary. However, I do not agree with his conception because the Council is conceived as the pillar of democracy and that leads to a judicial monopoly of constitutional interpretation (see above). On the contrary, in order to avoid the judicial supremacy and thus an exclusivist approach to constitutional interpretation that assumes a plurality of constitutional interpreters, the Council has to take into account the reactions of other constitutional organs.

Firstly, constitutional theory must regain its connection with questions of political principle. The idea that law and politics are two totally separate worlds and that the Council only acts within the first of these has serious consequences: in particular, the absence of reflection on democracy and the explanation of the constitution from a substantive point of view. The constitution is conceived only as a set of rules. However, it is not a legal text like another

because it sits at the top of the normative pyramid. Furthermore, the constitution shapes the national identity and establishes a nation's basic political points of view. It is the foundation of the political community. In this sense, the constitution is both a political and a legal text that contains principles and values for the past, present, and future.[28] The specificity of this text has to be recognised. Judges as guardians of the constitution must bear these considerations in mind when interpreting its provisions.

Secondly, we have to find a compromise between democracy and constitutionalism. This compromise is a practical one. The central question today is not concerned with the principle of judicial review (in France, the last constitutional amendment has confirmed its usefulness and its legitimacy), but with the manner in which it is applied. In this sense, I agree with Larry Alexander: "Legislatures are subject to the weaknesses. …. Of course, judges are not immune from these problems. … And judges are surely subject to cognitive biases. Moreover, judges who have the final say about constitutional rights are not beyond the corrupting influence of such power. Nevertheless, the question who is better in the long run in protecting the rights we possess that limit democratic decision-making is an empirical one, to be settled by the way the world is."[29]

If, according to the hypothesis, the problem of justification of judicial review is a problem of justification of judicial review at the national level, the answer cannot be absolute and definitive. It is a necessary contingent and linked to the exercise of judicial review. In this sense, judges have to feel bound by an obligation to motivate their decisions in order to facilitate their acceptance by the community of interpreters. Beyond being a legal duty, the justification of constitutional decision is the means of realising the principle of democracy. Because democracy is not only the right to vote and majority rule but is also a set of principles in which accountability and pluralism are inherent. Judges have to be made accountable for their decisions.[30] That means that their decisions have to be motivated in order to be reviewed by the people. That also means that judges have to earn their legitimacy for each decision. I have to recognise that my proposition of justification is also a weak justification. However, I do not believe that it is possible to propose a strong justification because the principle of democracy does not imply judicial review. One can imagine a democracy without judicial review even in the event of a global spread of constitutional supremacy and judicial review. In any case – and especially the French case – judicial review can be compatible with democracy subject to the crucial condition of substantial motivation (not only formal motivation) for constitutional decisions. At this stage, the debate shifts towards the determination of the motivation compatible with the principle of democracy.[31]

[28] For details, see Ponthoreau, M.-C. (2008), "La constitution comme structure identitaire," in *Les 50 ans de la Constitution*, LexisNexis Litec, Paris, p. 31.

[29] Alexander, L. (2003), "Is Judicial Review Democratic? Comment on Harel," *Law and Philosophy* 22, 253.

[30] Ponthoreau, M.-C. (1994), *La reconnaissance des droits non écrits par les cours constitutionnelles italienne et française. Essai sur le pouvoir créateur du juge*, Economica, Paris, p. 166.

[31] For details, see Ponthoreau, M.-C., *ibid*.