

# The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice

---

MARIE-CLAIRE PONTTHOREAU\* AND FABRICE HOURQUEBIE\*\*

The recent constitutional reforms in France have made very important modifications to the Constitution of 1958. Although the *Conseil Constitutionnel* ('CC') has been a much contested institution for a long time these recent constitutional changes<sup>1</sup> have confirmed both its usefulness and its legitimacy. The aim of this article is to help understand the nature of French constitutional review in light of this constitutional amendment, and, in particular, why the specific nature of the court has been preserved even if the reform has also had the effect of reducing the difference between the French model of constitutional review and that of other European models.<sup>2</sup> The question is all the more topical today, as after 50 years of debates, and further to the recent constitutional amendment, the citizen has acquired the power to refer matters to the CC, but in an indirect way via the mechanisms of certified questions. This is not novel in terms of the procedures applying to other European constitutional courts but in terms of constitutional review '*à la française*' it can be regarded as revolutionary, confirming a trend towards legal centralism.

## THE ORIGINS OF THE *CONSEIL CONSTITUTIONNEL*

French constitutional review is quite unique. In order to explain the main characteristics, it is necessary to go back to its origins. Although very remote from French legal tradition, the CC is solidly rooted in the French political system. Two elements deserve to be underlined.<sup>3</sup> The first feature highlights an important difference between the French system and other European legal systems.

\* Professor of Constitutional Law and Comparative Law, University of Bordeaux (France)

\*\* Professor of Public Law, University of Toulouse (France)

<sup>1</sup> L. n° 2008-724, 23 July 2008 in *Journal Officiel* 24 July 2008, p.11890.

<sup>2</sup> 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.

<sup>3</sup> 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, 119-142.

## The lack of an explicit constitutional charter of fundamental rights

A constitutional charter of fundamental rights is a familiar feature of other post- World War Two constitutions. On the other hand, the French Constitution is without an explicit constitutional charter. This is due to a series of political circumstances which do not concern the issue of constitutional review.

The first draft Constitution of 1946, adopted by the National Assembly – where the three major parties were the Communists, Socialists and Christian-Democrats – contained a catalogue of rights similar to the Italian Constitution of 1947. But this draft Constitution was rejected by a negative referendum in May 1946. A new amended version was adopted during the summer on the basis of a consensus amongst the three major parties. The charter of rights included in the first version could have been adopted with small amendments, but for an unresolved battle about freedom of education. In the French context ‘free schools’ means catholic education, and the tradition of the political left has been very much opposed to religious education since the beginning of the 20th century, as the Church was seen as a major opponent of revolution and democracy. As no agreement was possible on this major and very sensitive issue, the Assembly decided to adopt only a Preamble, recognising a number of new rights on a declarative mode in addition to the old Declaration of 1789. The Preamble also referred to ‘the fundamental principles recognised by the Republic’s laws’ (*principes fondamentaux reconnus par les lois de la République*), an ambiguous sentence which obviously was referring mainly to the Freedom of the Press Act of 1884 and the Freedom of Association Act of 1901, but also, for the left, it referred to the Act of 1905 separating the Church and State, whilst some Christian democrats had in mind some sentences of other statutes which provided for financial support for free schools.

This has two consequences. First of all, it means that fundamental rights are still potentially a pretext for debates based on party-politically based interpretations, far more so than in a country like Germany. This gives a highly political content to all debates on the interpretation of the Constitution. Technically speaking the only means by which France can claim a list of constitutionally protected rights under the 1958 constitution is through the very short paragraph 1 of the Preamble according to which ‘the French People solemnly proclaims its faithfulness to the rights of man and to the principles of national sovereignty as defined in the Declaration of 1789, confirmed by and with additions from the Preamble of the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004’. According to the established interpretation, this refers to the Declaration of Human Rights of 1789, a list of 17 articles, very representative of the first generation of rights; the Preamble of the Constitution of 1946, a list of 16 paragraphs of a declaratory nature, and representative to a large extent of the second generation of rights; and the famous ‘fundamental principles’ recognised by the Republic’s laws for which there is not the slightest indication of content, and even less a list. Principles about the environment are a contested amendment of the Preamble, but the Council has recognised constitutional values for all these principles (decision n° 2008-564 DC of 19 June 2008). French scholarship refers to these texts as the ‘*bloc de constitutionnalité*’, for example the texts and principles that have constitutional value even if they are not directly embedded in the document called ‘*Constitution de la République française*’. There is a continuing debate about the precise limits of the *bloc de constitutionnalité* (see below).

## The legacy of parliamentary sovereignty

From the Revolution of 1789, French public law has been dominated by two fundamental concepts: the general will is the only source of law (*la loi, expression de la volonté générale*), and the principle of representative democracy. The first concept introduced the sacred character of statute law, without much attention being given to the difference between the Constitution and acts of parliament. A century later, with the institution of parliament firmly rooted, the second concept 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. According to the theory of *souveraineté populaire* the People were the only sovereign, and expressed themselves through their elected representatives and through direct consultation. Under the 3rd Republic (1875–1940), the golden age of classical French constitutionalism, those concepts helped to support the unlimited power of parliament. This was enhanced by the fact that the three ‘constitutional laws’ of 1875 had been conceived as a transitional constitution and thus contained only arrangements for the functioning of state institutions. This firmly established parliamentary sovereignty, and therefore French constitutional law was opposed to the concept of constitutional review. Parliamentary sovereignty was not a principle as such, only the result of the combination of the two dominant legal concepts. Only a small part of legal scholarship tried to undermine theoretically this unlimited power of members of Parliament: Raymond Carré de Malberg was most representative of this view. In his pamphlet, *La Loi, expression de la volonté générale* (1931),<sup>4</sup> 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.

Parliamentary instability during the last decades of the 3rd Republic and even more during the 4th Republic (1946–1958), as well as the lack of courage of most members of parliament in 1940, were the grounds for a dramatic change. This was also prompted by the unsolved crisis of the Algerian war which helped General de Gaulle to come back into power in 1958. At that time there was an important consensus amongst scholars and 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 CC. The aim of the system was clearly to avoid parliament going beyond the competencies which were distinctively attributed 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.

Furthermore, the CC developed as an institution which should not review statutes on merit, but only check if the right procedures had been followed. Until 1971 decisions focused on this issue. It was mechanical review and without interest. The most interesting decision deals with the review of the rules of procedure of the Houses of Parliament. The decision 59-2 DC (17, 18, 24 June 1959) is really important here because it is the

<sup>4</sup> *Economica*, 1984 reprint.

consequence of the break with parliamentary sovereignty: because of constitutional review, it is impossible to amend the Constitution by a convention between the legislative and the executive via the rules of procedure of the Houses of Parliament. In particular, the aim was to avoid the Government risking its political life by way a motion of no confidence at any moment in the legislative process, as in the 4th Republic which was known for its enormous governmental instability.

This has two consequences. For more than 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 CC. The main problem with this change has been that the whole system of mechanisms imagined in 1958 was designed to prevent excessive occurrence of the continental type of parliament with coalition governments, which had developed in France as also in Germany under the Weimar Republic. The personality of General de Gaulle and the constitutional reform of 1962, providing for the direct election of the President of the Republic, created the conditions for a majoritarian parliament on the Westminster model, and thus those mechanisms tended to become important weapons used by the government against the opposition. Until 1971 the CC was mainly seen as one of these mechanisms, thus not at all as a guardian of fundamental rights. This origin of the CC still accounts for an important part of the current debates about constitutional review in France.

#### THE SINGULARITY OF FRENCH CONSTITUTIONAL REVIEW

Fifty years after its birth, the CC is still the subject of heated debates about the issue of its possible reform. In the 1970s and 1980s the main doctrinal debate about the CC referred to its nature: judicial or political? The discussion was unavoidable, be it only for the choice of the word 'Council' instead of 'Court' when it was established. Nowadays the judicial nature of the CC seems to be admitted by a large body of scholarship. However insisting on the fact that the CC is in line with the European model of constitutional courts might reinforce the idea that the CC is just as much a 'constitutional court' as the German Constitutional Court. This argument is more and more contested.<sup>5</sup> The comparison between the CC and the European constitutional courts shows the singularity of the French case.

#### **The composition of the *Conseil constitutionnel***

The first singularity is that former Presidents of the Republic are *de jure* life members of the CC. This rule is actually applied: Valéry Giscard d'Estaing and Jacques Chirac take part in the CC's activity.

The second singularity is that there are no professional qualifications for membership. So, the Constitution does not particularly require judicial experience or experience as a professor of law.

The third singularity is that members are appointed by the President of the Republic, President of the National Assembly and President of the Senate. So, the members of parliament do not take part in the process of nomination of CC members.

<sup>5</sup> Fromont, M (2001) "La justice constitutionnelle en France ou l'exception française" in *Mélanges Conac*, Economica, 167.

However the recent constitutional amendment has provided for parliamentary control of the nominations. The explanation is simple. The nominations are unrestricted. Thus, a number of commentators stress the fact that the French system enables the appointment of experienced politicians to the CC, which might account for a fine-tuned political sensitivity.<sup>6</sup> As a matter of fact, more than two thirds of the 60 members of the CC to date have been active in politics before joining it, as members of government (about one third), members of parliament, or direct advisers of major politicians. For instance, the President of the CC is Jean-Louis Debré, a former minister and former President of the *Assemblée nationale*. This has accounted for the acceptance of the CC's decisions by the political class. In any case, the most important thing is the behaviour of the member after his nomination: she or he has a '*devoir d'ingratitude*'<sup>7</sup> in regard to the appointing body.

Some other commentators underline how few academics have been members of the CC,<sup>8</sup> something which contrasts highly with the Italian experience, and also that of Germany. Only five members of the CC have been professors of public law: Marcel Waline, François Luchaire, Georges Vedel, Jacques Robert and Jean-Claude Colliard. Two of these were CC members together 1965-1971, and none during 1959-1962 and 1974-1980. Following the last appointment in March 2007, there is no professor of public law. The number of career judges (*magistrats*) is even smaller, and they have obviously been appointed for political reasons much more than for professional ones. A much higher number have been advocates, but most of the latter had also very quickly started a political career. Clearly the authorities in charge of appointing the CC members have tried to send signals to society that legal technique should not be the most important element in the CC's reasoning. The lawyers on the CC are not to be found amongst the ranks of professors of public law, a characteristic that corresponds best to French public law tradition. Strikingly, the number of former members of the *Conseil d'Etat* in the CC is twice as high as that of professors of law.

Naturally, the appointments to the CC are political. But it remains difficult to estimate the political consequences of these appointments<sup>9</sup> and there is no direct correlation between political nominations and votes for or against statutes passed on the initiative of a particular political party.<sup>10</sup> It would be too simple to deduce from this procedure the political nature of the CC. According to Alec Stone, 'although being qualified as jurisdiction, the Constitutional Council remains a power'.<sup>11</sup> Indeed the politicization of constitutional review which he describes is also the case for other constitutional courts or supreme courts,<sup>12</sup> and extends as far as all the constitutional courts which have powers on the border of law and politics. On the contrary, as Louis Favoreu put it, the CC will allow politics 'to be seized' by the law.<sup>13</sup> So, in the decisions relating to nationalizations in 1982, or relating to privatizations in 1986, the CC pronounced on eminently political questions,

<sup>6</sup> Rousseau, D (2006) *Droit du contentieux constitutionnel*, Montchrestien, 38.

<sup>7</sup> Translates as 'duty of ingratitude', in other words the recipient is under a duty to demonstrate no favour towards the appointing body.

<sup>8</sup> Melleray, F (2007), 'Sur une exception française', *Actualité juridique. Droit administratif*, 553.

<sup>9</sup> Hourquebie, F (2001) 'Les nominations au Conseil constitutionnel' (108) *Les Petites Affiches*, 9-15.

<sup>10</sup> Shapiro, M (1990) 'Judicial Review in France' (6) *Journal of Law and Politics*, 531

<sup>11</sup> Stone, A (1989), *The birth of judicial power in France*, Oxford University Press, 1992.

<sup>12</sup> See Stone, A (1999), 'La politique constitutionnelle' in Drago G, Bastien F, Molfessis N (eds.), *La légitimité de la jurisprudence du Conseil constitutionnel*, *Economica*, 117-140.

<sup>13</sup> Favoreu, L (1988), *La politique saisie par le droit*, *Economica*.

characteristic of governments with left or right wing programmes. Nevertheless, although composed mainly of judges appointed by right-wing political parties, the CC did not negate these statutes: it decided they were congruent with the Constitution, but this was 'congruency conditioned by interpretation'. In short, the CC did not really prevent these big political reforms; it even facilitated political change.

Furthermore the day to day running of the CC is controlled by the *Conseil d'Etat*: the CC has been installed in the *Rue Montpensier* in the same block of buildings as the *Palais Royal* where the *Conseil d'Etat* sits. This may seem purely incidental but the Secretary-General of the CC is traditionally also a member of the *Conseil d'Etat*. He (the gendered pronoun is used deliberately as all Secretaries-General so far have been male) is not only in charge of the organization of the CC, but it seems that he has a more and more important role in the drafting of the CC's decisions.

### The lack of procedural rules

The first specificity here is that the procedure is exclusively written and inquisitorial. No parties are represented. This feature is not really original. However, it is particularly marked in France in contrast to other European constitutional courts.

The second specificity is that Acts of Parliament may be referred to the CC, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, 60 deputies or 60 senators. Unlike the other European constitutional courts, the political authorities are the only authorities allowed to refer bills to the CC. There is no organic relationship between the CC and the others judges, in particular the two supreme courts (*Conseil d'Etat* and *Cour de cassation*). This point is very important, being a big difference from other constitutional courts. For them, in comparison, certified questions are the main method of constitutional review: constitutional court proceedings begin with a certification order, whereby a judge suspends all proceedings and submits the question to the constitutional court. In some cases (the German and Spanish Courts), citizens who feel that their civil rights have been violated can initiate a constitutional complaint. This is impossible in the French system. Several proposals for reform have been put forward from time to time, particularly concerning the introduction of concrete constitutional review of laws. The first reform, in 1990, which was rejected by Parliament, foresaw the possibility for an administrative and judicial tribunal to send the certified question about an act to the two supreme courts. These reforms are not any more on the agenda.<sup>14</sup> The recent constitutional amendment brings about a real change: the introduction of certified questions.

However the uniqueness of the CC is still present, weakened but still preserved. The new article 61-1 of the Constitution provides that in case of the violation of constitutional rights by an article of statute law, the judge can suspend all proceedings but he cannot submit a question directly to the CC. He has to submit the question to one of the two supreme courts of the judiciary order (*Cour de cassation*) or administrative order (*Conseil d'Etat*). Thus the certified question is referred to the CC by one of the two supreme courts who will exercise a filter on the questions submitted by ordinary judges. The aim of this

<sup>14</sup> On the origins of the reform, see the work by the *Balladur Committee* for the reform of institutions; more information can be found at : <http://www.comite-constitutionnel.fr/actualites/?mode=details&id=48>.

original screening, apart from fundamentally reforming the organisation, is clearly to avoid too many pending questions before the CC. While we can understand the reason for this initial screening, this function is exercised by constitutional judges in several other European constitutional courts. There is a risk in the French system of tension between the CC and the two supreme courts arising from the latter submitting inappropriately certified questions.<sup>15</sup>

### The powers of the *Conseil constitutionnel*

The powers of the CC can be divided into two categories.

First, there is judicial authority covering two types of disputes, normative and abstract proceedings which are optional in the case of ordinary laws or international agreements and mandatory for institutional acts and rules of procedure of the parliamentary assemblies and electoral and referendum disputes. The CC decides on the lawfulness of presidential elections and the conduct of referenda, the results of which are announced by it. It also decides on the lawfulness of parliamentary elections and the rules on eligibility and incompatibility of interests of members of parliament.

Second, there are consultative powers. The CC gives its opinion when officially consulted by the Head of State whenever article 16 of the Constitution is applied and thereafter on decisions taken within that context. Moreover, the Government consults the CC on texts concerning the organisation of voting in presidential elections and referenda.

The CC does not have a general power as 'guardian of the constitution', so that certain conflicts are not reviewed, i.e. conflicts between state powers, and general problems of constitutional interpretation. Control by the CC is limited: this difficulty can be clearly seen during the period of '*cohabitation*' (when the President of the Republic and the Prime Minister did not come from the same political party). During this period, the most important problem of interpretation concerned article 13 of the Constitution which provides: 'The President of the Republic signs *ordonnances* and decrees deliberated upon in the Council of Ministers'. In 1986 Jacques Chirac, as Prime Minister, wanted to use *ordonnances*<sup>16</sup> in order to resolve some national problems speedily. However, François Mitterrand, President of the Republic, decided not to sign the *ordonnances*.<sup>17</sup> In making such a constitutional interpretation, the President is not subject to any reviewing court. The only solution for the Prime Minister is that the draft *ordonnance* has to be passed by Parliament as a *loi*.

### TWO IMPORTANT DATES: 1971 AND 1974

After decades of governmental instability, France became a prominent example of a strong executive, with a dominant party (the Gaullist party UNR, then the UDR replaced in 1976 by Chirac's RPR) which had no parliamentary tradition and thus little respect for the

<sup>15</sup> Roux, A (2008) 'Le nouveau Conseil constitutionnel. Vers la fin de l'exception française?' *JCP La semaine juridique*, 54.

<sup>16</sup> The Government has the possibility of securing a delegation of power under article 38 to pass legislation by *ordonnance*, thus avoiding further parliamentary battles and saving time.

<sup>17</sup> During the first *cohabitation*, F. Mitterrand refused to sign two very important *ordonnances*: one about privatization and the other one about electoral reform: see Bell, J (1992), *French Constitutional Law*, OUP, Clarendon Press, 107.

rights and status of opposition. Once De Gaulle had withdrawn from politics after having lost the 1969 referendum, the opposition parties, mainly those from the centre, started using the Constitution in order to develop better conditions for parliamentary democracy. Concerning the CC, the first clear case where this happened was in 1971 and the second in 1974. The two dates are closely linked and the cases determined the development of constitutional review.

### **1971, the birth of the *Conseil Constitutionnel* as the protector of fundamental rights**

The President of the Senate for the first time took the initiative in asking the CC to review a bill on merit in a highly sensitive political context where the government was struggling for months with extreme left groups. In order to stop post-1968 unrest, the bill was intended to reform the famous Act of 1901 on Freedom of Association. The Senate had been strongly opposing General de Gaulle from 1962 to 1969 and the President of the Senate, Alain Poher, had been a candidate of the centre at the 1968 presidential election. In the same way as his predecessor, Gaston Monerville, he wanted to promote the image of the Senate as a defender of civil liberties. Monerville was very sceptical towards the CC, which had refused to acknowledge his request to review the 1962 Act instituting direct election of the President on the basis that it had been adopted by referendum.

It was quite a surprise for public opinion to discover that there was an institution called the *Conseil Constitutionnel* that was able to counteract government, even when the latter had an overwhelming majority in the National Assembly. For legal scholarship, the surprise was just as great, as there seemed to be nothing in the Constitution to prevent amendment of the 1901 Act. The 1789 Declaration did not recognise any freedom of association: on the contrary the Revolution abolished all 'intermediary institutions' (*corps intermédiaires*) as well as the system of corporatism which had been dominating professional life and obstructing the proper functioning of market mechanisms. One or more of the subtle legal minds amongst the members of the CC remembered the sentence about the fundamental principles recognised by the Republic's laws, of which the 1901 Act was the most prominent example. Interestingly the CC not only took a big risk in using such an unprecedented and extensive technique of interpretation, but also decided to quash the bill:<sup>18</sup> obviously there were not only subtle legal minds but also some very sensitive political minds amongst the members of the CC, who knew that they would be supported by an important part of the political class, which stretched beyond the divisions between government and opposition.

### **The constitutional amendment of 1974**

It is quite clear that this case law would have remained quite exceptional without the political changes of 1974, where Valéry Giscard d'Estaing from the centre right won the presidential election, putting an end to Gaullist domination of the institutions of state. He very quickly prompted a series of reforms in order to modernise French political life by enhancing the status of the opposition. One of those reforms was the change in the list of authorities allowed to refer bills to the CC. In the 1958 Constitution only the President of

<sup>18</sup> Decision n° 71-44 DC of 16 July 1971: the decision can be found at: [www.conseil.constitutionnel.fr/decision/1971/7144dc.htm](http://www.conseil.constitutionnel.fr/decision/1971/7144dc.htm) (no English translation).



the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate could do so – only the latter could be close to the opposition. From 1974 on, 60 members of the National Assembly or 60 members of the Senate could refer a bill to the CC, a change of procedure that opened the door to a quite extensive jurisprudence. The origins of the 1974 reform seem to be quite often forgotten in contemporary debates. The lack of consensus on a possible charter of fundamental rights has always prevented a more comprehensive reform which would officially establish the CC as a major institution of the French system of rule of law. The constitutional sources of the institution may be found in the mechanism of parliamentary checks and balances, any further role being based on the actual content of the CC's case law, which would probably not have developed as it did if France had not been familiar for a long time with a system of legislative review which provided techniques to be taken up by the CC in reviewing acts of parliament. This reform and the decision of 1971 are also the origin of a recurrent problem concerning the extension of norms of reference for constitutional review.

#### RELATIONSHIP BETWEEN THE *CONSEIL CONSTITUTIONNEL* AND THE LEGISLATURE

The main problem here is the way constitutional justice is being exercised. In particular, there are three reasons which explain the tension between the CC and Parliament. First of all, discussion on the extension of norms of reference has always been very lively since the fundamental decision of 1971. The second discussion is about the extension of reviewing techniques, and the third is about reinforcing the protection of fundamental rights.

#### **The extension of norms of reference**

This problem is clearly summed up by the following quotation from Prime Minister Balladur to the Congress in Versailles – the *Congrès* in France is a plenary meeting of both houses of parliament – which convened for the first time in November 1993 in order to reverse a decision of the CC through constitutional amendment: 'Since the Council has decided to extend the scope of its review to the Constitution's Preamble, this institution has been inclined to check the congruency of Acts of Parliament with general principles which are sometimes more of a philosophical or political than a legal nature, sometimes contradictory, and furthermore conceived in times different to ours'. Unlike the Italian or Spanish constitutional courts, the CC is not bound by a fully-fledged catalogue of fundamental rights. Even the most critical commentators note that the CC has to face a difficult dilemma:

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.<sup>19</sup>

<sup>19</sup> Lochak, D (1991) 'Le Conseil constitutionnel, protecteur des libertés?' (13) *Pouvoirs*, 42.

It is obvious that the CC has followed the second path in order not to be a useless institution.

In this framework legal scholars are debating the room for manoeuvre which the CC may enjoy while tracing the limits of the '*bloc de constitutionnalité*'. The main discussion is about the definition of '*principes fondamentaux reconnus par les lois de la République*'. It is still the CC that decides whether the conditions needed for the recognition of such 'fundamental principles' are met. By laying down more precise conditions (decision of 20 July 1988) the CC, however, puts limits on the development of its own interpretation, and its authority would suffer if it did not respect such interpretation. Certain legal scholars try to minimise the CC's power to create the norms of reference for the constitutional review. However, the judge's function is an interpretative activity. So, it would be better to improve the reasoning of the CC's decision even though this denies the CC's law-making power.<sup>20</sup> The difficulty in admitting this explains the other discussion about the extension of reviewing techniques.

### The extension of reviewing techniques

As soon as 1987, in the framework of a conference on 'the Constitutional Council and political parties',<sup>21</sup> members of parliament started to question the technique of 'congruency conditioned by interpretation' ('*conformité sous réserve d'interprétation*'). This method was described as 'the Constitutional Council treading on the legislator's ground' (P. Clément, centrist party) or leading to the 'slippery path of injunction' (J.-C. Martinez, extreme-right). This technique of congruency conditioned by interpretation, also used by the German and Italian constitutional courts, enables the Council to indicate to the executive and the judiciary what conditions are necessary to a constitutionally correct application of a statute. It may thereby subtract or add to the statutory text in order to make it congruent with the constitution. As a matter of fact, courts have tried to resist congruency conditioned by interpretation because it limited their own power to interpret (see below).

The CC competes with government and parliament in law-making. However constitutional scholarship is far less opposed to it, as it is conscious that the CC has to face a growing number of cases and thus needs to have a more flexible attitude towards congruency of a statute with the Constitution. Refusing to declare an act as void is not only motivated by the will to safeguard a text with high political content which includes questionable provisions, but is not contrary to the Constitution as a whole. It is also a way of avoiding the discontinuity in norms which would result from quashing the text, a sanction which would be disproportionate because of the gap that would remain in the text of the statute if only some words or sentences of the statute had to be deleted.

<sup>20</sup> Ponthoreau, M-C (1994) *La reconnaissance des droits non écrits par les cours constitutionnelles italienne et française. Essai sur le pouvoir créateur du juge constitutionnel*, Economica-PUAM.

<sup>21</sup> Favoreu, L (ed.) (1988), *Le Conseil constitutionnel et les partis politiques*, Economica.

## Reinforcing the protection of fundamental rights

One of the most debated issues of the last decade is that of supra-constitutionality. This formulation is specific to French scholarship and linked to a debate that originated under the 3rd Republic. It was triggered by the formulation introduced into French constitutional law by the revision of 1884 (which is still applicable), according to which the republican form of government may not be amended. It points to natural law as being above the Constitution. The debate was very vivid in 1993 when the Government introduced a bill amending the constitution, which had the same content as a text which had been rejected by the CC's decision of 13 August 1993 concerning a bill on immigration. For the first time constitutional amendment was used in order to by-pass a decision of the CC. Far beyond the crisis, the issue was whether the power of constitutional amendment was unlimited and could thus give constitutional status to provisions that would violate fundamental rights.

It would be anti-democratic for a judge to overrule a decision that has been taken by the people according to established procedures. The CC's decisions of 6 November 1962 and of 23 September 1992, whereby the CC refused competence to review a bill approved by referendum, point in this same direction. This raises a familiar dilemma relating to the court's role: if one deploys the 'ultra-democratic' argument (what might otherwise be termed the parliamentary sovereignty position) the question arises whether even minimal review is justified once the democratic will has been expressed. On the other hand, how are minority rights going to be protected if one adopts a liberal argument which regards constitutional review as a fundamental safeguard against the abuse of power.

An important part of scholarly opinion saw the power of constitutional amendment as the expression of constitution-making power and thus needed the concept of supra constitutionality in order to limit this power. There has been some speculation since the constitutional decision of 2 September 1992 (mentioned below) whether the CC viewed itself as competent to review these limitations. A clear answer by the CC was given only in a 2003 case: it decided 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 of 26 March 2003).<sup>22</sup> This means that the constitutional legislator enjoys complete freedom of action: in others words, it has full discretion as to whether to modify the Constitution. A 2006 case confirms that the fundamental principles of constitutional identity are not untouchable (see below).<sup>23</sup> This is a strange understanding of the supremacy of the Constitution: on the one hand, the constitutional legislator is 'sovereign' and stands higher than the Constitution whilst on the other hand the Constitution (or more precisely some of its fundamental principles) stands higher than EC law.<sup>24</sup>

<sup>22</sup> Decision n° 2003-469 DC of 26 March 2003 can be found at: [www.conseil-constitutionnel.fr/decision/2003/2003469/index.htm](http://www.conseil-constitutionnel.fr/decision/2003/2003469/index.htm) (no English translation).

<sup>23</sup> Decision n° 2006 240 DC of 27 July 2006, paragraph 19: 'The transposition of a Directive cannot run counter to a rule or a principle inherent to the constitutional identity of France, except when the constituting power consents thereto'.

<sup>24</sup> Ponthoreau, M-C (2008), 'Interpretations of the National Identity Clause: The Weight of Constitutional Identities on European Integration', in Baroncelli, S Spagnolo, C and Talani, L S (eds), *Back to Maastricht: Obstacles to Constitutional Reform the EU Treaty (1991-2007)*, CSP, 49.

## RELATIONSHIP BETWEEN THE *CONSEIL CONSTITUTIONNEL* AND OTHER COURTS

The CC is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a supreme court in the meaning of the Supreme Court of United States. Indeed there was never any direct relationship between it and the two supreme courts, which are the highest court of appeal (*Cour de cassation*) and the Council of State (*Conseil d'Etat*). This situation will be changed because the recent constitutional amendments provide that in the case of the violation of constitutional rights by an article of statute law, the ordinary judges could suspend all proceedings and submit the question to one of these two supreme courts. It is at this point that one of these two supreme courts, having operated as a filter, returns the certified question to the CC. In a different sense, the CC comes into contact with the other jurisdictions through its jurisprudence and the authority given by the Constitution to its decisions.

### **Implicit relationships between the *Conseil constitutionnel* and other courts**

First of all, the Constitution allows the CC to exert a real influence on the other courts' jurisprudence through article 62, which emphasizes the legal effect of the decisions meant as an absolute authority. The decisions of the CC are binding on the public authorities and all administrative and judicial authorities. No appeal lies against them. The legal force of the decision attaches not only to the judgment itself but also to the necessary reasoning supporting it. Consequently, an act of parliament which has been judged contrary to the Constitution cannot be promulgated and brought into effect.

However, to protect parliamentary sovereignty as much as possible against a decision of unconstitutionality and to indicate to the judiciary what conditions are necessary to a constitutionally correct application of a statute, the CC developed the technique of 'congruency conditioned by interpretation' (*'conformité sous réserve d'interprétation'*), also used by the German and Italian constitutional courts. Because the consequences of a decision that a law is unconstitutional could be very controversial and could be immediately understood as a political position, the CC prefers to adopt an intermediate solution which consists of declaring conformity subject to interpretation.

These *'réserves d'interprétation'* (reservations) are circulated, and are obvious to, all authorities made responsible for applying law, that is to say the Government and administration, but also to ordinary judges. When they are formulated, they define the power of the judges, and are therefore a significant element of their case law, as shown in a large number of decisions of the *Conseil d'Etat* and the *Cour de Cassation*. Thus reservations alert the judge applying the law, through the process of concrete review, to the risk of his decision turning out unconstitutional. However, such interpretation may lead to a very strong reaction by the authorities, fuelling the debate over government by judges. Reservations can also be understood as a means of strengthening the authority of a law by determining its constitutionality at the time it is brought into effect, thereby increasing the effectiveness of *a priori* review.

Independently of reservations, the case law of the CC exercises a profound influence on the case law of all other jurisdictions. Since the development of constitutional review - through the constitutional amendment of 1974 - there have been few aspects of individual

rights untouched by this process. It is indeed certain that the ordinary jurisdictions are inspired more and more by the CC's case law. Besides, the more decisions of the CC serve the purposes of ordinary jurisdictions, the more this reception can take place. The CC must therefore be sensitive, when exercising its supervisory role, to the effect of its decisions on these jurisdictions. Reciprocally, the case law of the *Conseil d'Etat* and the *Cour de Cassation* influences that of the CC. Although the CC in *a priori* review does not exercise a similar jurisdiction to these courts, it must nonetheless envisage, in light of their case law, how cases might be disposed of by them. Moreover the CC is very much influenced by the advice given by the *Conseil d'Etat* as part of the process of drafting the legislation in question.

Finally, the dialogue among judges bears upon the '*contrôle de conventionalité*', that is, control of the law in respect to international standards. The CC exercises its control only with regard to the Constitution and to the '*bloc de constitutionalité*' and not with regard to treaties, as was established in a 1975 pivotal decision.<sup>25</sup> The reason for this is the difference in character between this control and the control of constitutionality. As a consequence, the '*contrôle de conventionalité*' is exercised by all the common jurisdictions, the *Cour de Cassation* declaring itself competent to exercise this jurisdiction in a decision of 1975<sup>26</sup> and similarly with the *Conseil d'Etat* in a decision of 1989.<sup>27</sup> In the field of fundamental rights particularly, because of the risk of being overruled, the ordinary judges are strongly aware of European law as interpreted by the Courts of Strasbourg and Luxemburg and are in danger of abandoning the Constitution as it has been interpreted by constitutional judges. There is thus a risk that these two kinds of review might result in conflicting positions. For this reason voices are heard today calling for better articulation of these two forms of review, which for the most part have the same object, namely the fundamental rights contained in the Constitution and the treaties. The issue is whether to confirm the current understanding of constitutional review or to widen it by reference to treaties containing fundamental rights, such as the EU Agreements, both pacts of the UN, and the proposed charter of the fundamental rights of the EU (Proposal of the President of Constitutional Council, Jean-Louis Debré).

## THE MOST IMPORTANT DECISIONS

A '*grande décision*' (fundamental decision) was delivered by the CC on 16 July 1971 relating to freedom of association, which is fundamental in two ways. First, because it gave interpretative force to the preamble of the Constitution; and second, because it established the first stage in the emergence of the CC as a real defender of fundamental rights. This case<sup>28</sup> marked an acceleration of the process of recognition of fundamental rights by constitutional judges.

<sup>25</sup> '*Interruption volontaire de grossesse (IVG)*', Decision n° 74-54 DC, of 15 January 1975: English translation at <http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf>.

<sup>26</sup> '*Jacques Vabre*', Cour de cassation, 24 May 1975, *Société Café Jacques Vabre*; the decision can be found at: <http://www.conseil-constitutionnel.fr/dossier/quarante/notes/vabre.htm>.

<sup>27</sup> '*Nicolo*', Conseil d'Etat, of 20 October 1989, *Nicolo*; the decision can be found at: <http://www.conseil-constitutionnel.fr/dossier/quarante/notes/nicolo.htm>.

<sup>28</sup> Favoreu L, and Philip L, (2007) *Les grandes décisions du Conseil constitutionnel*, 14<sup>e</sup> Paris, Dalloz.

### Decisions establishing essential liberties

In its decision 51 DC of 21 December 1973, the CC established for the first time the constitutional value of the principle of equality before the law. Since this decision, the principle of equality has been the object of more than 100 applications to the CC, and it has henceforth been the most invoked reason for unconstitutionality. In its decision 87 DC of 23 November 1977, the CC gave constitutional value to freedom of conscience as well as to freedom of education. The constitutional character of the respect for the rights of the defendant and the principle of the presumption of innocence were recognized in the decision 70 DC of 19-20 January 1981. Freedom of the press was established as a fundamental right in the decision 181 DC of 10-11 October 1984. The real constitutional status of foreigners was established in the decision 325 DC of 12-13 August 1993, which recognized the right to lead a normal family life and the immigration rights of dependents. At the same time as the constitutionalisation of individual freedom, the CC established certain number of economic and social rights such as: the right to strike (decision 77-105 DC of 25 July 1979); the freedom to join a trade union (decision 144 DC), the right to work (decision 156 DC) and the property rights of shareholders (decision 132 DC of 16 January 1982).

### Decision 290 DC of 9 May 1991 relative to the status of Corsica<sup>29</sup>

The decision relating to the law-making status of Corsica was another '*grande décision*' which addressed the structure of the Republic. Indeed, the CC interpreted the provision of the indivisibility of the Republic as giving constitutional effect to the indivisibility of the 'French People'. By so doing, it negated the first article of the law which proclaimed the existence of 'Corsican people, the constituent of the French people', because the Constitution recognizes only the French people, consisting of all the citizens without distinction of origin, of race or religion. Echoing this ruling, the CC in its decision 99-412 DC of 15 June 1999 referred to the principle of uniqueness of the French people, to which it would give constitutional value.

### Decisions 308 DC, 312 DC and 313 DC of 19 April, 2 and 23 September 1992: Maastricht I, II and III<sup>30</sup>

The year 1992 was marked by the debate on the Treaty of Maastricht which entailed a controversial constitutional amendment prior to the ratification of the treaty. Three related decisions allowed the court to exercise a real control over the constitutionality of international treaties based on the principle, 'the constitution, nothing but the constitution'. As a result they required for the first time a prior amendment of the Constitution before ratification of the treaty and provided a specific constitutional foundation to the European framework (three articles of Title XIV called 'European communities and the European Union' are now Title XV and include five articles). More particularly the Treaty of Maastricht recognized the concept of European citizenship by proposing the right to

<sup>29</sup> See notably Luchaire (F) (1991), 'A propos du statut de la Corse', *Revue française de droit constitutionnel*, 484.

<sup>30</sup> See *Les Grandes décisions du Conseil constitutionnel* n° 45.

vote and eligibility of community nationals in municipal and European elections. The CC supported this concept and the rights which are tied to it, but nevertheless recognized a constitutional exception relating to local councillors participating in the election of senators. Finally, the effect of the judgment in the Maastricht III decision is to allow the CC to decline jurisdiction to control a constitutional amendment act approved by referendum, in the name of the sovereignty of the constituent power and therefore avoid the path to 'supra-constitutionality'.<sup>31</sup>

### **Decision 98-408 DC of 22 January 1999, International Criminal Court<sup>32</sup>**

This decision illustrates perfectly the involvement of the CC in questions of a political nature. Indeed, the CC settled the interpretation of the former article 68 of the Constitution, which limits the liability of the President of the Republic for actions performed in the exercise of his office except in cases of high treason. The question was whether this article prevented penal liability. The difficulty of interpretation appeared in a case concerning the former President Jacques Chirac, who was questioned regarding matters occurring before he took office. If the facts were to be considered as not associated with his office, he benefited from immunity; otherwise, he could be prosecuted before the ordinary criminal courts. As a consequence, the Council, then the *Court de Cassation*, on 10 October 2001, intervened to clarify the criminal liability of the Head of State. It decided that acts made prior to the beginning of the mandate should be considered as disassociated with it. Further, that prosecution for criminal malpractice would be suspended during the mandate in order to protect the presidential office and the privilege of immunity from the jurisdiction of the High Court of Justice. At the end of his mandate, the President could be brought before an ordinary court.

### **Decision 2004-496 DC of 10 June 2004, Law for the trust in the digital economy<sup>33</sup>**

The CC considers that the transposition of European directives into French law is a constitutional requirement which must be respected. But the constitutional judge maintains the right to control standards stemming from community law if they become 'express dispositions contrary to the Constitution' (*'dispositions expresses contraires à la Constitution'*). In other words, the CC refuses to control the constitutionality of a law of transposition which is necessarily consequential on a European directive. However the supremacy of the Constitution would not be affected because the judge reserves the right to modify a law of transposition which becomes an express disposition contrary to the Constitution. An application of this case law was made in two recent decisions (2006-540 DC of 27 July 2006, Law relative to copyright; and 2006-543 DC of 30 November 2006, Law relative to the sector of the energy). The CC replaced the judicial mention of 'express disposition contrary to the Constitution' with the 'constitutional identity of France' (*'identité constitutionnelle de*

<sup>31</sup> See however the discussion of this decision above.

<sup>32</sup> See the except serie of the *Revue du droit public* (2003) and Favoreu L (2002), 'De la responsabilité pénale à la responsabilité politique du Président de la République', *Revue française de droit constitutionnel*, 7.

<sup>33</sup> See Levade A (2004), 'Le Conseil constitutionnel aux prises avec le droit communautaire dérivé', *Revue du droit public*, 889.

*la France*'). They achieved this by considering that the transposition of a European directive could not go against a rule or principle inherent to the constitutional identity of France.

This type of control is new. It is not always easy to put into practice, but it fits in well with the logic of 'the French-style' of constitutional review, which is a priori control. This control allows the constitutionality of the law of transposition to be determined before it comes into effect.

In the same way as all French institutions, the CC has been the object of recurring attempts at reform in the name of a search for permanent legitimization; but few of these have been successful. The most important reform, approved on 23 July 2008, notably allowed change to the appointment procedure and to the conditions to refer bills to the CC. But the organic law which establishes the detailed provisions will not probably 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, 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. The greatly enhanced regulatory role which the CC will play in the future of constitutional democracy also begs a more fundamental and more general question: one that relates to the emergence of a countervailing power in the French constitutional system.<sup>34</sup>

<sup>34</sup> About this question see Hourquebie, F (2004), *Sur l'émergence du contre-pouvoir juridictionnel sous la V<sup>ème</sup> République*, Bruxelles, Bruylant.