France

Conseil Constitutionnel on the European Constitutional Treaty. Decision of 19 November 2004, 2004–505 DC.[1]

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Introduction

The only real surprise of the recent decision of the French *Conseil constitutionnel* [constitutional Council] concerning the compatibility between the European and the French Constitutions was the timing of it. According to Article 54 of the French Constitution, a treaty may be submitted[2] for constitutional review at any time before ratification. In this instance, Jacques Chirac acted with unusual promptness, submitting his request on the very day the Treaty was signed, 29 October 2004. The *Conseil* itself reacted with equal speed, issuing its decision exactly three weeks later on 19 November 2004. Behind both courses of action lay the shadow of political concern related to the Socialist Party referendum on the European Constitution.

By moving so swiftly, the President effectively pre-empted and discouraged other challenges. This was very useful. In his letter, he only requested the *Conseil* to scrutinise the compatibility of the two texts, leaving the *Conseil* free to determine its own approach to the question. If opponents of the European Constitution, for instance, among socialists or communists, had taken the initiative, they most certainly would have called into question many specific articles of the European Constitution, compelling the *Conseil* to traverse some delicate and disputed territory in coming to its decision. But thanks to the President's astute move, the judges were able to select only those issues they thought necessary to underline, which probably spared many pointless discussions.

By coming to an unexpectedly quick decision, the *Conseil* deliberately sought to avoid interference with the ongoing campaign inside the Socialist Party. Given

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[1] Available, as well as all the other decisions of the *Conseil*, on <www.conseil-constitution nel.fr>.

[2] By the President of the Republic, the Prime Minister, the Presidents of either Chamber or sixty deputies or sixty senators.

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that Party members were invited to vote on 1 December, a decision published on the very eve of that vote, or after it, might have been either wrongly interpreted or troubling in its impact. Conversely, since the decision was known, analysed and commented upon one week before this internal referendum, it did not influence its outcome, which was the best that could be hoped for.

This is a useful reminder that it may be appropriate, sometimes, for a constitutional court to consist of people who have enough real-work political experience to be aware of issues that might otherwise, being ignored, lead to disastrous consequences. Yet, the principal interest of this short but significant decision naturally lies in its content. It considers four main issues, which will serve, in the same order, as the structure of this brief presentation and comment. As a preliminary matter, the judges had to qualify the text in question as either a treaty or a constitution. The *Conseil* interpreted it as a treaty, without any doubt or hesitation, and this for a very simple but significant reason: its competence according to Article 54 of the French Constitution is limited to review of an 'international agreement'. Therefore, the judges either had to decline their competence or to identify the European Constitution as a treaty, which they naturally opted for.

Primacy of European Union law

The problem is certainly not a new one. Yet, the *Conseil* could not but feel ill at ease on account of a decision it had taken only a few months before, on 10 June 2004.[3] In that case, they had refused to review a bill that was the mere transposition of a European directive, considering that France's Constitution could not form an obstacle to such a transposition unless it is contrary to an 'explicit constitutional provision'. This exception appeared to be hardly compatible with the primacy of European law as proclaimed in Article I-6 of the European Constitution.

The *Conseil*, neither wishing nor compelled to find in November the contrary of what it had determined in June, kept silent on that specific issue and focused instead on the meaning of Article I-6. It cited Article I-5, according to which the European Union shall respect the national identities of member states 'inherent in their fundamental structures, political and constitutional'. Then, it deduced from a combined interpretation of the Articles I-5 and I-6 that the latter does not alter the present day relationship between European and national law (Point 12):

> Article 1-1 of the Treaty states that 'Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member states confer competences to attain objectives they

[3] Decision 2004-496 DC.

> have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it'; pursuant to article 1-5, the Union shall respect the national identities of Member States 'inherent in their fundamental structures, political and constitutional'; pursuant to Article 1-6 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'; a declaration annexed to the Treaty shows that this Article does not confer on the principle of primacy any greater scope than that which it previously had.

In other words, as Article I-5 excludes, implicitly but necessarily, that Europe becomes a real federation, Article I-6 cannot be interpreted as introducing substantial changes with regard to the actual state of affairs, which it merely expresses more clearly.

Primacy is not exactly synonymous with superiority; two different separate but co-ordinated legal orders will continue to co-exist at the European and national levels; the European Court will stick to its role of disregarding or by-passing national constitutions, while national constitutional courts will do their part – largely successful thus far – of enforcing their own constitution without breaching the European one.

To the relief of all the supporters of the Treaty, the *Conseil* adopted this careful and pragmatic approach. It concluded that, to the extent that the Treaty maintains the previous balance (Point 13), there would be no need to amend the French Constitution in this respect.

The Charter of fundamental rights

In respect of the Charter, the *Conseil* had, again, to deal with the co-existence of principles that do not necessarily share the same inspiration, but nonetheless found in the Treaty itself sufficient scope to reconcile any potential incompatibilities.

They stressed, in the first instance, paragraph 4 of Article II-112 according to which 'Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'. This enabled the *Conseil* to find, through a very elliptic and implicit reasoning, that equality belongs undoubtedly to those common traditions, while the way it is implemented may differ from one country to another, which leaves room for national traditions, whatever they are, provided that they respect the common principle. Therefore, according to this interpretation, the Charter forms no obstacle to the French tradition, expressed by the Articles 1 to 3 of the National Constitution, that forbids the granting of any type of collective rights to any group on the basis of ethnic, cultural, linguistic or religious distinctions (Point 16):

> (...) paragraph 4 of Article II-112 of the Treaty provides that, insofar as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, 'these rights shall be interpreted in harmony with those traditions'; the rights defined in Articles 1 to 3 of the Constitution, which proscribe any recognition of collective rights of any group defined by origin, culture, language or beliefs are thus respected.

In France, only individuals have rights, shared equally by all, and the European Constitution will allow France to maintain this principle by refusing any distinctions between individuals forming collectively the same People.

The second, highly sensitive issue dealt with by the *Conseil* was that of freedom of religion. Several politicians, adversaries of the European Constitution, had proclaimed during the Socialist campaign that Article II-70 would undermine the French concept of secularism ['laïcité'] and, consequently, the recent Act of Parliament forbidding the wearing of 'ostentatious symbols of religious affiliation' on school premises.[4]

It would have been easy to point out that, in reality, this article replicates the main elements, even the wording, already present in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which France agreed over fifty years before, and which has not raised any particular problems since. However, the judges preferred a more elaborate reasoning that led them to an interesting innovation.

They quoted the part of the preamble of the Charter stating that it 'will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention'. They subsequently observed that paragraph 7 of Article II-112 adds that 'The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by courts of the Union and of Member States' (Point 17). They then noted that the commentary of the Praesidium specifies that Article II-70 has the same meaning and the same range as Article 9 of the European Convention.[5] Finally, they stressed that the European Court of Human Rights has constantly interpreted this article in a way that authorises member states to take into due consideration their own constitu-

[4] Act No. 2004-228 of 15 March 2004 regulating, on the basis of the principle of laïcité, the wearing of signs or dress which manifest religious affiliation in public schools, colleges and high schools [Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes de signes ou de tenues manifestant une appartenance religieuse dans les écoles, colleges et lycées publics].

[5] This provision is not substantially different from what has always been proclaimed, far more laconically, in Art. 10 of the French Declaration of Human Rights of 1789.

tional tradition, enabling them to reconcile freedom of religion with the principle of secularism, when applicable. Therefore, France may, without breaching Article II-70, continue to adhere to her own concept of secularism which, according to this decision 'forbids anyone to invoke his religious beliefs in order to escape the common rules governing the relationship between public entities and individuals' (Point 18):

> In particular, if the first paragraph of Article II-70 recognises the right of everyone, whether individually or in community with others, to manifest religion or belief in public, the explanations of the Praesidium specify that the right guaranteed by this article has the same meaning and same scope as the right guaranteed by Article 9 of the European Convention for the protection of Human Rights and Fundamental Freedoms; this right is subject to the same limitations, in particular those involving public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others; Article 9 of the Convention has been constantly applied by the European Court of Human Rights, on the latest occasion in the decision referred to hereinabove, in harmony with the constitutional traditions of each Member State; the Court has thus given official recognition to the principle of secularism recognized by various national constitutional traditions and leaves States considerable leeway to define the most appropriate measures, taking into account their national traditions, to reconcile the principle of freedom of religion and that of secularism; the provisions of Article 1 of the Constitution whereby 'France is a secular republic' which forbid persons to profess religious beliefs for the purpose of non compliance with the common rules governing the relations between public communities and private individuals are thus respected.

All arguments to the contrary, either in good or, more frequently, in bad faith, were turned down.

The innovation stems from the fact that the *Conseil* decided to mention explicitly a decision made by a supranational jurisdiction. Among the 'visas' (legal bases) of its own decision, the *Conseil* has included 'the judgment of the European Court of Human Rights n° 4774/98 (case Leyla Sahin v. Turkey) of 29 June 2004'.

This genuine openness to supranational decisions, though significant in itself, is somewhat problematic as the decision the *Conseil* cites is not final, having been referred to the Grand Chamber. Should the Grand Chamber overturn the decision, this would undoubtedly alter the analysis made by the French *Conseil constitutionnel* and it could ultimately undermine French consent to the European Constitution.

Fortunately, this does not seem likely. As the first decision was unanimous, it would be very surprising if the case were to be overturned on the same issue by a

negative majority of the Grand Chamber. On the other hand, one can suppose and hope that the *Conseil* sounded out the European Court on the matter before drafting its own decision.

Having delicately settled this difficult question, the *Conseil* addressed a few more issues before finally determining that there is no need to amend France's Constitution before ratifying the Charter.

Policies and functioning of the Union

Policies and functioning are two different matters, even though they are now closely related. With regard to policies, the decisions taken by the *Conseil* on the treaties signed in Maastricht[6] and Amsterdam[7] had already defined a rather clear criterion: the acceptance of any clause which would 'jeopardise the essential conditions for the exercise of national sovereignty' would require a prior amendment of France's Constitution.

Yet, the relevance of this criterion is not paramount any more given that the new rules of functioning, such as established by the European Constitution, may lead the Union to extend qualified majority voting in the Council and to extend the application of the ordinary legislative procedure laid down in Article III-396 without agreeing on a new treaty.

Consequently, the *Conseil constitutionnel* may not be able, in the future, to verify whether a new transfer is compatible with the French Constitution. Thus, the Conseil considers that it cannot accept blindly such a virtual transfer and states, therefore, that only a prior amendment to the Constitution can do so. And anyway, for the present, it is clear that the 'area of freedom, security and justice' has already been subject to many transfers (Point 26) that could be characterised as jeopardising 'the essential conditions for the exercise of national sovereignty'.

The decision then cites examples in four different situations (transfers of competence in new fields, new ways of exercising competences already transferred, passage to qualified majority in application of future decisions, simplified revision procedures of Articles IV-444 and IV-445), all demonstrating the necessity of a French constitutional revision in order to make the ratification possible.

But the most interesting aspect of this part of the decision does not concern its substance, which is neither surprising nor disputable in any way but, rather, its wording and the necessary consequences following from it.

The fact of the matter is that in four instances (Points 26, 27, 30 and 31), the *Conseil* chose not to list all the potential contradictions of the European Constitu-

[6] Decisions 92-308 DC, 9 April 1992, and 92-312 DC, 2 Sept. 1992.
[7] Decision 97-394 DC, 31 Dec. 1997.

tion with France's Constitution, but rather to cite particular examples *especially* ['notamment'] relating to one issue or the other.

It is easy to see that, in doing so, the judges avoided a fastidious enumeration of all the subjects that might potentially be involved, the exhaustive list of which would have uselessly covered many pages and wasted much paper (in contradiction with the principle of sustainable development ...).

However, this approach to the problem anticipates the amendment of the French Constitution: either the constitutional power has to do the work itself, listing all the possible areas for amendment and authorising each of them, or it has to adopt a catch-all formula, which will dispense with a lengthy exhaustive list and avoid the risk of leaving something out.

While the latter technique has already been chosen for former amendments of the French Constitution,[8] it is the first time that the *Conseil,* in issuing a decision, has so strongly guided the hand of those who will draft future amendments on this issue: even if the precise wording is not yet known, it will most certainly not include a list of competences actually or possibly transferred, and all the necessary changes induced by the clauses relating to the policies and functioning of the Union will be referred to in a general provision.[9]

New competences given to national Parliaments

The rationalisation of Parliament has been the most conspicuous, effective (and somewhat excessive) innovation brought about by the Fifth Republic. The *Conseil constitutionnel* itself contributed to this innovation by a strict interpretation of the Constitution in its early decisions on the subject.

One of these decisions, only the second taken in its history,[10] stated that the French Constitution prohibits any vote of the Chambers, other than according to the procedures of confidence or no-confidence, that would seek to '*direct or control*' the policy defined or implemented by the Government. In other words, the Chambers can decide whatever they want, within their competence, but they cannot simply express a wish, desire, regret, refusal, be it political or not. This accounts for the absence in French parliamentary law of any procedure by which an assembly could express anything else than a decision (about bills or censure of the Government).

[8] For instance, on the International Criminal Court, in Art. 53-2 such as adopted by the Constitutional Bill 99-568 of 8 July 1999.

[9] Note of the editors. The constitutional amendment of 1 March 2005 proves the author entirely right. As far as is relevant here, it simply states that 'Elle peut participer à l'Union européenne dans les conditions prévues par le traité établissant une Constitution pour l'Europe signé le 29 octobre 2004' [France may participate in the European Union under the conditions set down in the Treaty establishing a Constitution for Europe signed 29 October 2004].

[10] Decision 59-2 DC, 17, 18 and 24 June1959

The first breach in this thick concrete wall of constitutional order was made by the second paragraph of Article 88-4, which was adopted when the French Constitution was amended in order to ratify the Maastricht Treaty.[11] Since that time, each Chamber can table and carry motions about drafts of European acts, which have to be submitted to them by the Government.

This procedure, however, does not accord with the new situation created by Articles I-11, section 3[12] and IV-444[13] of the European Constitution, in which national Chambers will be allowed to make their opposition known, of their own motion, without any intervention on the part of the executive branch.

Even though the detailed procedure for the expression of such opposition will probably not appear in the French Constitution itself, an amendment will at least have to define a framework for something that will be quite new in French parliamentary law, and the *Conseil* could not but emphasise this necessity.

Beyond all this, finally, the judges decided that no other clause of the Treaty would need prior amendment of the French Constitution. Their decision has been very easily accepted – no polemic, no violent opposition, hardly any reaction in the media. Only specialists have appeared interested, demonstrating on the whole the remarkable success of a decision on such a controversial issue.

Unresolved problems

The decision, however, leaves two problems unresolved. The first is that of the future revision of the French Constitution. Considering the awfully bad technical work that has been done on it recently,[14] one has reason to be concerned about what proposals will come forward from the Government. The process of amending a constitution is difficult enough in itself and needs careful drafting. This is made all the more difficult by the utterly absurd presidential decision to make a referendum compulsory for any new enlargement coming after those already en-

[11] Constitutional Act 92-554 of 25 June 1992.

[12] Which gives national parliaments the right to ensure compliance with the principle of subsidiarity by the institutions of the Union in accordance with the procedure set out in the Protocol on the application of the principles of subsidiarity and proportionality.

[13] Which gives national parliaments the right to oppose decisions of the European Council allowing the Council to decide by qualified majority in certain cases or areas or allowing the adoption of European laws or framework laws in accordance with the ordinary legislative procedure.

[14] The revision, on 28 March 2003, about decentralisation, and the Charter of Environment, inserted into the Constitution on 1 March 2005, even if good in principle, have been drafted so oddly that they certainly do not match the rest of the text and may create more problems than they solve.

gaged.[15] Unfortunately, all readers of the French Constitution have reasons for anxiety.

The second problem still unresolved concerns the future of the control exercised by the French *Conseil constitutionnel*. Up to this point, it has always refused to verify whether bills are compatible with European law, thus on the one hand limiting the scope of its own review to compatibility with the French Constitution and, on the other, relying on ordinary courts to refuse the implementation of bills that would prove to be contrary to European law. Thus, for reasons that are, at least partly, understandable,[16] the *Conseil* has sat on the fence. But the question, from this point on, is to know whether this self-restraint will survive the adoption, if it happens, of the European Constitution. Taking into consideration the wording of the new Article 88-1 of the French Constitution together with the constitutional character of the Treaty, it might appear odder every day that the *Conseil constitutionnel* does not take its due part in fighting French laws that would not respect the European Union law and would, by doing so, breach simultaneously the European and French Constitutions. The *Conseil* will, sooner or later, have to open the possibility to cancel, under certain conditions,[17] at least the legislative articles that would be grossly contrary to any European rule. It would be the minimal improvement required when, and if, the European Constitution is actually implemented.

[15] As everyone knows, it is Turkey, when the time comes, that is targeted, but Monaco, Andorra, Iceland or Switzerland might also be impacted some day!

[16] The main difficulty in exercising adequate control is procedural. Art. 61 of the Constitution allocates only one month to the *Conseil* to make its decisions, which certainly makes it almost impossible to check the compatibility of French bills with every single element of swarming European texts

[17] *See* Guy Carcassonne, 'Faut-il maintenir la jurisprudence issue de la décision n° 74-54 DC du 15 janvier 1975?', *Les cahiers du Conseil constitutionnel* No. 7 (1999), p. 93.