

DELEGATING STATE POWERS:

The Effect of Treaty Regimes on Democracy and Sovereignty

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Chapter Eleven

A French Constitutional Perspective on Treaty Implementation

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On January 22, 1999, the French *Conseil Constitutionnel* issued a decision by which it

Decides:

Article 1: Authorization to ratify the Treaty incorporating the Statute of the International Criminal Court demands a revision of the Constitution.¹

This means that the French Constitution must be amended before France ratifies the Statute of Rome, as it has been amended twice during recent years in order to enable ratification of the Treaties of Maastricht and Amsterdam,² which create and strengthen the European Union.

This calls for some explanations about the relations between the French Constitution and international law, and more specifically, treaties.

According to paragraphs 14 and 15 of the Preamble to the Constitution of 1946, which is made part of the Constitution of October 4, 1958, by the Preamble to the latter:

The French Republic, faithful to its tradition, shall observe the rules of public international law [international public law]. . . .
Subject to reciprocity, France will consent to such limitations of sovereignty as are necessary to the realization of the defense of peace.³

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¹ Decision No. 98-408 DC, not yet published. My translation.

² See discussion, *infra*.

³ Unless otherwise indicated, translations of the French texts are from a booklet edited by the *Conseil constitutionnel: Constitutional Case Law: Community Law and Immigration Acts*, (Paris, 1998). It states: "The English translation does not have official standing"; my own objections to these translations are mentioned between square brackets.

However, these very general principles are specified in the body of the 1958 Constitution itself, at least as far as treaties are concerned.⁴ The relevant rules are included in Articles 52 to 55, included in Title VI, "Treaties and International Agreements."⁵

According to these provisions, a treaty is negotiated by the President of the Republic (or in his name) and ratified by him (Article 52), if necessary "in pursuance of an Act in Parliament" (Article 53⁶) or after a referendum (Articles 11 and 53, paragraph 2). Then,

From the moment of their publication, treaties or agreements duly ratified or approved shall prevail over Acts in Parliament subject, for each agreement or treaty, to reciprocal application by the other party.⁷

⁴ By contrast, the silence of the Constitution regarding the statute of international customary law is a source of difficulties and uncertainties. While, curiously, the *Conseil constitutionnel*, which, in contradiction with the clear text of art. 55 of the Constitution (see below), does not secure respect for the superiority of treaties over acts in Parliament (see, e.g., Decision No. 74-54, Jan. 15, 1975, "Abortion Case," *CC Rep.* 19; see comments by G. Druesne, *R.M.C.* 1975.285; L. Favoreu and L. Philip, *R.D.P.* 1975.187; C. Franck, *R.G.D.I.P.* 1975.1070; Hamon, *D.* 1975.529; A. Pellet, *G.P.* Jan. 14-15, 1976, at 9; J. Rivéro, *A.J.D.A.* 1975.134 and D. Ruzié, *J.D.I.* 1975.249), it does check that Acts in Parliament are not inconsistent with general principles of international law (see, e.g., Decisions No. 75-59, Dec. 30, 1975, Case concerning *Mayotte*, *CC Rep.* 26; see also comments by L. Favoreu, *R.D.P.* 1976.537; Hamon, *D.* 1976.538; *G.P.* 1976.II.480; J.C. Maestre, *R.D.P.* 431; L. Philip, *R.D.P.* 1976.995; F. Sudre, *R.G.D.I.P.* 1976.163; D. Ruzié, *J.D.I.* 1976.405 and Decision No. 82-139, Feb. 11, 1982, Case concerning *Expropriations*, *CC Rep.* 31; see also comments by L. Favoreu, *R.D.P.* 1982.377; B. Goldman, *J.D.I.* 1982.275; Hamon, *D.S.* 1983, chron.79; Nguyen Quoc Vinh, and Franck, *R.G.D.I.P.* 1982.349; Rivéro, *A.J.D.A.* 1982.202). On the contrary, the *Conseil d'État* has recently decided that international customary rules do not prevail over acts in Parliament (see e.g., CE, Ass., *Aquarone*, *R.G.D.I.P.* 1997.596; see also conclusions of G. Bachelier, *id.* and *R.F.D.A.* 1997.585 and comments by D. Alland, *R.G.D.I.P.* 1998.207 and D. Chauvaux and T.X. Girardot, *A.J.D.A.* 1997.482).

⁵ According to the French Constitution, treaties are subject to ratification properly said; international agreements are "approved" by the Government. I will focus here on "treaties."

⁶ Art. 53 enumerates the kinds of treaties (or international agreements) which must be first referred to the Parliament; they are: "Peace treaties, trade agreements, treaties or agreements concerning international organizations [in the French text, "organisation" is in the singular], those implying a commitment of national resources, those amending rules of a legislative nature, those concerning personal status, and those calling for the transfer, exchange or annexation of territory"; see my comment in F. LUCHAIRE AND G. CONAC, *LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE*, 1005-1058 (1987).

⁷ After a long period of hesitation, the *Cour de Cassation* (Cass. Civ1, Ch. mixte, *Société "Café Jacques Fabre"*, *Bull.* 6; see also conclusions by J. Touffait, *D.* 1975.J.497 and comments by J. Boulouis, *A.J.D.A.* 1975.567; G. Druesne, *R.M.C.* 1975.1; Jeantet, *J.C.P.* 1975.II.18180; Nguyen Quoc Dinh, *A.F.D.I.* 1975.859; J. Piroette-Gerouville, *R.T.D.E.* 1976.215; R.C., *G.P.*, 2, p. 470; Ch. Rousseau, *R.G.D.I.P.* 1976.960 and D. Ruzié, *J.D.I.* 1975.801) then the *Conseil d'État* (C.E., Ass., 20 Oct. 1989, *Nicolo*, *Leb.* 748; see also conclusions by Friedman, *id.*; *J.C.P.* 1989.II.21371; *R.F.D.A.* 1989.813 and *R.G.D.I.P.* 1989.1043 and comments by J. Boulouis, *R.G.D.I.P.* 1990.91.; Clavet, *J.C.P.* 1990.13429; Chabanol, *G.P.* Nov. 12, 1989; J. Dehaussy, *J.D.I.* 1990.5; Genevois, Favoreu and Dubouis, *R.F.D.A.* 1989.824, 993 and 1000; Honorat et Baptiste, *A.J.D.A.* 1989.576; G. Isaac, *R.T.D.E.* 1989.771; Kovar, *D.* 1990.57; Lachaume, *A.F.D.I.*

In the meantime, it may happen that the *Conseil constitutionnel* be consulted on the ground of Article 54 of the Constitution:

If, upon the request of the President of the Republic, the Prime Minister or the President of one or other House or sixty deputies or sixty senators, the Constitutional Council has ruled that an international agreement contains a clause contrary to the constitution, the ratification or approval of this international agreement shall not be authorized until the Constitution has been revised.

This is an interesting attempt to avoid a contradiction between international commitments entered into by France and the constitutional requirements:⁸ Article 54 does not impede France to conclude treaties which are at variance with the Constitution at the time of their signature; but if this happens, the treaty in question may be ratified only after an amendment of the Constitution, which must be passed by both Houses of Parliament and becomes effective after approval by referendum or by the "Congress" (that is the two Houses of Parliament meeting together) by a three-fifths majority of the votes cast.⁹

The above-mentioned decision in the case concerning the Rome Statute¹⁰ is based on Article 54 of the French Constitution and is motivated by incompatibilities found by the Council between some Articles in the Statute of the International Criminal Court (hereafter "I.C.C.") on the one hand and several Articles in the Constitution on the other hand. Article 68 of the Constitution provides for the immunity of the President of the Republic except in case of high treason, in which instance he can only be tried by the High Court of Justice after an indictment by the two Houses of the Parliament; Article 68-1 gives exclusive jurisdiction to the Court of Justice of the Republic in order to try Members of the Government for certain criminal acts performed in the exercise of their duties; while, by virtue of Article 26, Members of the Parliament enjoy a special regime of penal liability and judgment. All these provisions were declared incompatible with Article 27 of the Statute of the I.C.C. which recognizes no immunity before the International Criminal Court for Heads of States or of Governments or Members of Government or Parliament by virtue of their official position.

Similarly, while the Council did not see any constitutional problem regarding those provisions of the Statute of the Court that relate to the "complementarity" between its own jurisdiction and that of the national Courts, it sees conflict

1990.945 and *R.M.C.* 1990.384; Lagarde, *R.C.D.I.P.* 1990.125; Négrier and Touchard, *R.D.P.* 1990.767; P. Rambaud, *A.F.D.I.* 1989.91; Sabourin, *D.* 1990.135; D. Simon, *A.J.D.A.* 1989.788; Touchard, *R.D.P.* 1990.801) have made treaties prevail over acts in Parliament, even if the latter were subsequent in time.

⁸ However, there is no automaticity: it could happen that none of the authorities entitled to refer a treaty contrary to the Constitution to the Constitutional Council. In such a case, the Constitution will prevail before French Courts (see *infra* note 55).

⁹ Art. 89 of the Constitution.

¹⁰ See *supra* note 1.

between the Constitution and other provisions of the Statute which make subject to the Court's jurisdiction persons who committed acts covered by amnesty or prescription according to French law. The Constitutional Council also saw a potential conflict between French constitutional law and Article 99, paragraph 4, of the I.C.C. Statute, which allows the Prosecutor of the Court to set up investigations on French territory without the participation of the French judicial authorities. In both cases, it declares that these provisions are "of a nature such as to jeopardize the essential conditions for the exercise of national sovereignty."¹¹

This formulation of the Council's objections is not new. It entered into the French constitutional *corpus* with another and more innocuous decision of the Constitutional Council in 1970, when it declared that "the Decision [of the Council of the EEC] of April 21, 1970, relating to the replacement of the financial contributions of Member States by the Communities' own resources can, neither by its nature nor by its importance, jeopardize the essential conditions for the exercise of national sovereignty."¹² The same formula has subsequently been inserted in several (but not all) decisions made by the Council relating to the constitutionality of treaties. It features in the only two other decisions by which it declared that treaties signed by France were not in conformity with the Constitution. In each instance, the French Constitution had to be amended before the treaties (*viz.* the Treaties of Maastricht¹³ and Amsterdam¹⁴ modifying the EC Treaty) could be ratified.

This Constitutional Council's formulation constitutes a commendable attempt to reconcile the French Constitution's text with the requirements of international cooperation in the modern world. It also seeks to reconcile the "domestic notion" of sovereignty with the meaning of the same concept under international law.

As a matter of fact, the word "sovereignty" does not have the same meaning in the framework of international society as it has within the State. While, at the national level, there is only *one* sovereign (whether the people, the nation, the

¹¹ My translation.

¹² Decision No. 70-39, *Luxembourg Treaty of 22 April 1970 modifying budgetary provisions in the Treaties instituting the European Communities*, C.C. Rep. 15; see also comments by Ch. Rousseau, *R.G.D.I.P.* 1971.241 and D. Ruzié, *J.C.P.* 1970.1.2354; my translation.

¹³ Decision 92-308, Apr. 9, 1992, C.C. Rep. 55; in English: CC, *Constitutional Case Law* (fn. 3), at 47; see also comments by C. Blumann, *R.M.C.U.E.* 1994.393; R. Etien, *Rev. adm.* 1992.126; L. Favoreu, *R.F.D.C.* 1992.334 and 389 and *R.G.D.I.P.* 1993.39; P. Gaia, *R.F.D.C.* 1992.398; B. Genevois, *R.F.D.A.* 1992.373; J.P. Jacqué, *R.T.D.E.* 1992.251; F. Luchaire, *R.D.P.* 1992.589; B. Mathieu and M. Verpeau, *Les Petites Affiches*, June 26, 1992, at 6; E. Picard, *R.F.D.A.* 1993.47 and *A.J.D.A.* 1993.151; J. Rideau, *R.A.E.* 1992, No.3, at 7; D. Simon, *Europe*, mai 1992; and N. Van Tuong, *J.C.P.* 1992.II.21853.

¹⁴ Decision No. 97-394, Dec. 31, 1997, C.C. Rep.344; in English: CC, *Constitutional Case Law* (fn. 3), at 62; see also comments by L. Baghestani-Perrey, *P.A.* June 22, 1998, at 15; P. Bon, *id.*, June 19, 1998, at 17; F. Chaltiel, *R.M.C.U.E.* 1998.73; P. Gaia, *R.F.D.C.* 1998.142; T. Larzul, *D.A.* 1998-2.17; F. Luchaire, *R.D.P.* 1998.331; A. Pellet, *Cahiers C.C.* 1998, No. 4, at 113; D. Richard, *G.P.* June 17-18, 1998, at 2; J.E. Schoettl, *A.J.D.A.* 1998.135; *varii*, "Le Traité d'Amsterdam face aux constitutions nationales," *Doc. F.*, 1998.

King or the State itself does not matter here: the fact is that *the* sovereign is one and only one), on the other hand, the international society is made up of some two hundred "sovereigns." As the Arbitration Commission for Former Yugoslavia noted: "the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority, . . . such a State is characterized by sovereignty."¹⁵ In other words, in the sphere of international law, sovereignty is the very criterion of statehood; a sovereign entity is a State and, as a matter of definition, a State is a sovereign entity.

This makes a phenomenal difference. Inside the State, sovereignty means a supreme and (legally) unchallenged power and, as Professor Prosper Weil put it in his outstanding introduction to French administrative law, "the very existence of an administrative law is a kind of miracle."¹⁶ By contrast, at the international level, sovereignties are equal which necessarily implies that each State's jurisdiction is limited by the equal rights belonging to all other States.

This contrast is reflected in the French Constitution.

While Article 3 declares: "National sovereignty resides in the people who exercise it through their representatives and by the way of referendum," paragraph 15 of the Preamble to the 1946 Constitution contemplates that France may "consent to such limitations of sovereignty as are necessary to the realization of the defense of peace."¹⁷

The first quoted provision confirms that inside the State there is only one sovereign: "the people." On the other hand, at the international level, France recognizes possible "limits" to its sovereignty.

Indeed this is not a very convincing wording: as explained above, sovereignty is the very criterion of statehood; it can be neither "transferred" nor "limited." A State cannot be "half-sovereign"; if it is a State, it enjoys sovereignty; if it transfers its sovereignty, it is no more a State. As the Permanent Court explained in its first Judgment, "the right of entering into international engagements is *an attribute of State sovereignty*" and "the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act [cannot be seen as] an abandonment of sovereignty."¹⁸ In other word, sovereignty is the basis of state competencies and, by concluding a treaty, a State does not limit, or abandon, or transfer its sovereignty; it exercises the rights deriving from its sovereignty.

For this same reason, I have some reservations regarding the title of this study. States may delegate powers, or, rather, the exercise of some of their powers, but they cannot "delegate" their sovereignty.¹⁹

¹⁵ Advisory Opinion No. 1, Nov. 29, 1991, I.L.M. 1992.1494 [emphasis added].

¹⁶ *Le droit administratif* 3 (16th. ed. 1994, with D. Pouyaud); my translation.

¹⁷ See full text, *supra* note 3.

¹⁸ S.S. Wimbledon Case, P.C.I.J., (ser. A) No. 1, at 25 [emphasis added].

¹⁹ In this respect, the I.C.J. declared that Morocco, while under the French protectorate, had "retained its personality as a State in international law" (Judgment of Aug. 27, 1952, U.S. Nationals in Morocco, I.C.J. Rep. 1952, at 185 [emphasis added]). I have doubt that this is in keeping with the modern definition of statehood.

In this respect—though, in France as in other States, the debate is often phrased in terms of loss of sovereignty by the extreme right political parties—the question is relevant to France's Membership of the European Union. By delegating progressively more and more powers to the Communities and/or the E.U., in important and more and more diversified fields, will there not be a point when the “sovereignty” of Member States will become an empty shell for want of “attributes”?²⁰

This sort of argument was made by the Senators who initiated the second referral concerning the Treaty on the European Union (Maastricht II), after the revision of the Constitution enacted in accordance with the decision in *Maastricht*.²¹ They proceeded “from the concept that the French constitutional order is constructed around the central notion of national sovereignty to ask the Constitutional Council how far it is possible to go with revisions of the Constitution to effect successive inroads into ‘the essential conditions for the exercise of sovereignty.’”²² In this case, the Council was able to avoid confronting their implied argument against broad grants of powers to the supranational system on the ground that “Article 54 of the Constitution . . . confers jurisdiction on the Constitutional Council solely to ascertain whether a given international agreement referred to does or does not contain clauses contrary to the Constitution.”

It is, however, the view of the present writer: first, that the question cannot be disregarded forever and an answer eventually will have to be given; and, second, that, for the moment, Member States of the European Union are still sovereign, if only because they retain their monopoly in the use of forced coercion; but that, in the long run, the Communities structure will move towards federalism. At this stage, which has not yet been reached, Members of the Communities will have ceased to be States in the word's international legal meaning. Member States, then, will not have “delegated” their sovereignty; they will simply and purely have transferred it to a new state entity.²³

After years of approximate and questionable formulations, this analysis is shared by the *Conseil constitutionnel* since Maastricht I. In this decision, the Council said:

It follows from these various institutional [*sic*- constitutional?] provisions [²⁴]that respect for national sovereignty does not preclude France,

²⁰ See *supra* note 18.

²¹ See *supra* note 13.

²² Decision No. 92-312, Sept. 2, 1992, *CC Rep.* 76; in English: CC, *Constitutional Case Law* (n. 3), at 55; see also comments by L. Favoreu, *R.F.D.C.* 1992. 408 and *R.G.D.I.P.* 1993.39; B. Genevois, *R.F.D.A.* 1992.937; F. Luchaire, *R.D.P.* 1992.1587; B. Mathieu and M. Verpeaux, *P.A.* Dec. 9, 1993, at 13 and N. Van Tuong, *J.C.P.* 1992.II.1943.

²³ See Alain Pellet, *Les fondements juridiques internationaux du droit communautaire*, in *V.-EUROPEAN LAW ACADEMY, FLORENCE, RECUEIL DES COURS* 193-271, especially at 225-231 (1997).

²⁴ Said provisions are: 1. Preamble to the 1958 Constitution referring to the Declaration of Human and Civic Rights of 1789 and the Preamble to the Constitution of 1946 (see *supra*, para. 2; 2. para. 3 of the 1789 Declaration: “All [?] sovereignty inheres in the Nation”; 3. art. 3 of

acting in accordance with the Preamble to the Constitution of 1946, from concluding international agreements in view of its participation in the establishment or development of a permanent international organization enjoying legal personality and decision-making powers on the basis of *transfers of powers* decided on by the Member States, subject to reciprocity.²⁵

Such a formula (“transfers of powers”) is, indeed more convincing than the text of the Preamble to the 1946 Constitution itself (“limitations of sovereignty”²⁶) even though it might seem rather paradoxical that the *Conseil constitutionnel* rewrites the wording of the Constitution it is supposed to apply. This new formulation was, however, introduced into the Constitution by an amendment adopted following this decision. The new Article 88-2 states:

Subject to reciprocity^[27] and in accordance with the terms of the Treaty on European Union signed on February 1992, France agrees to the *transfer of powers* necessary to the establishment of European economic and monetary union and for the determination of rules relating to the crossing of the external borders of the members States of the European Community.²⁸

Article 88-1, also added to the Constitution after Maastricht I by Constitutional Law of June 25, 1992, is drafted along the same lines. It defines the European Communities and the European Union as “consisting of States, which,

the Constitution of 1958 (see *supra* note 17); 4. para. 14 of the Preamble to the Constitution of 1958 (see *supra* note 3); 5. para. 15 of this same Preamble (see *id.*) and 6. Art. 53 of the 1958 Constitution: according to which “treaties and agreements relating to international organization . . . may only be ratified or approved in pursuance of an act of Parliament” (see also *supra* note 6).

²⁵ Decision of Apr. 9, 1992, *supra* note 13 [emphasis added]. In its Decision of Jan. 22, 1999, regarding the Statute of the I.C.C. (*supra* note 1), the *Conseil constitutionnel* set aside this condition of reciprocity. It rightly notes that, in consideration of its purpose, that is, “to promote world peace and security and to secure respect for general principles of international public law,” “obligations proceeding from such commitments are imposed on each State Party independently of the way they are implemented by other States Parties; therefore, the reservation concerning reciprocity mentioned in art. 55 of the Constitution is not to be applied” (my translation). See text of art. 55, *supra*.

²⁶ See *supra* note 3.

²⁷ On this unnecessary mention, see *supra* note 25.

²⁸ Emphasis added. On Jan. 18, 1999, the Congress (made of the two Houses of Parliament meeting together—see *supra*) adopted a new constitutional amendment, adding a second paragraph to art. 88-2 according to which, “Under these same reservation and according to the modalities provided for in the Treaty instituting the European Community, in its drafting resulting from the Treaty signed on Oct. 2, 1997, *transfers of powers* necessary to the determination of rules relating to the free movement of persons and related matters may be agreed upon”; my translation, emphasis added. This amendment was adopted in compliance with the Decision of the Constitutional Council on the Treaty of Amsterdam, *supra* note 14.

by means of the constitutive treaties, have voluntarily resolved to exercise some of their powers in common."²⁹

This new formulation, reiterated in the Council's decisions concerning Amsterdam³⁰ and the Statute of the I.C.C.,³¹ is far more satisfactory than formulas used in previous decisions.

In its Decision of December 30, 1976, on the *Election of the Assembly of the Communities by universal direct suffrage*, the Constitutional Council had asserted that, notwithstanding the wording of the 1946 Preamble,³² which it quoted, "no provision of a constitutional nature authorizes transfers of sovereignty as a whole or in part, to any international organization whatsoever."³³ It again used the expression "transfer of sovereignty" in its Decision of July 25, 1991, relating to the Agreement for the Enforcement of the Schengen Convention of 1985. But, showing ambivalence, it put these words in quotation marks although, in the same decision, it also referred to alleged "abandonment of sovereignty," even though denying that such an abandonment was implied by the Convention.³⁴

By moving from the concept of "limitation," "transfer" or "abandonment of sovereignty" to that of "transfers of powers," the Council has nuanced its jurisprudence in a most sensible direction. It now takes into account the real meaning of sovereignty in modern international law while avoiding the impression that sovereignty can be transferred (or limited, or "delegated") in part or in whole by ... a sovereign State, which, to reiterate my view, would mean that the transferring power has ceased to be a State.

This approach, which fits with sovereignty in its international definition, has to be reconciled with the meaning of the word in French domestic law as embodied in Article 3 of the Constitution.³⁵ Here the notion of "essential conditions for the exercise of national sovereignty" proves helpful.

As noted above,³⁶ the Constitutional Council coined this expression as early as 1970, and refers to it in order to appraise whether a treaty "jeopardizes" the sovereignty of the people which, constitutionally, has to be exercised "by their representatives [that is the Members of Parliament and, probably, the President of the Republic] and by the way of referendum."

The problem raised by this concept (and probably its value) lies in its haziness and subjectivity, all the more because nowhere does the Constitution

²⁹ Emphasis added.

³⁰ Decision of Dec. 31, 1977, *supra* note 14.

³¹ Decision of Jan. 22, 1999, *supra* note 1.

³² See *supra* p. 279.

³³ Decision No. 76-71, my translation, emphasis added. See also comments by J. Boulouis, *Cah. Dt. eur.* 1977.458; J. Darras and O. Pirotte, *R.T.D.E.* 1977.697; L. Favoreu and L. Philip, *R.D.P.* 1977.129; C. Franck, *J.C.P.* 1977.II.18704; R. Kovar and D. Simon, *R.T.D.E.* 1977.697; L. Hamon, *D.* 1977.201; D. Ruzié, *J.D.I.* 1977. 66 and M. de Villiers, *J.C.P.* 1978.I.2895.

³⁴ Decision No. 91-294, *CC Rep.* 91. See also comments by P. Gaia, *R.F.D.C.* 1991.703 and *R.R.J.-Droit prospectif*, 1992, No. 1, p. 25; L. Hamon, *D.* 1991.617; F. Luchaire, *R.D.P.* 1991.1499; X. Prétot, *R.T.D.E.* 1992.187 and G. Vedel, *R.F.D.A.* 1992.173.

³⁵ See *supra* note 17.

³⁶ See text accompanying note 12.

make a distinction between the essential and the non-essential conditions of sovereignty.³⁷

On some occasions however, the Constitutional Council has attempted to clarify the criterions for the notion. Thus, in its Decision of 1970, it held that "the replacement of the financial contributions of Member States by Communities own resources can, neither by its nature nor by its importance, jeopardize the essential conditions for the exercise of national sovereignty."³⁸ In 1985, it gave a list of some elements which could be of such "nature" or "importance" but concluded that:

Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms relating to the abolition of the death penalty, which is not incompatible with the duty incumbent on the State to secure respect for the institutions of the Republic, continuity of the life of the Nation and protection of the rights and freedoms of the citizens, therefore does not jeopardize the essential conditions for the exercise of national sovereignty.³⁹

The Council reproduced this same list in its Decision of July 25, 1991, and concluded, on this basis and after a meticulous analysis, that the Agreement for the Application of the Schengen Convention of 1985 was in conformity with the Constitution.⁴⁰

However, with Maastricht I, the Council resumed a more empirical approach and assessed very subjectively the threats to the "essential conditions of the exercise of national sovereignty," which it asserts more than it proves by using the "importance" and "nature" tests. The Decisions in Amsterdam and the Statute of the I.C.C. are along the same lines but a new emphasis is given to the "field" of the treaty or the "conditions" of its enforcement.⁴¹

Applying these principles, the following treaties have been declared not to be contrary to the concept of national sovereignty as embodied in the French Constitution:

³⁷ This purely praetorian origin of the notion is made clear by the wording of the relevant decisions of the Constitutional Council, which precises that the authorization to ratify treaties requires prior amendment of the Constitution where they "contain a clause that is contrary to the Constitution, or where they jeopardize the essential conditions for the exercise of national sovereignty" [emphasis added] (see, e.g., Maastricht I, *supra* note 13; Amsterdam, *supra* note 14, Statute of the I.C.C., *supra* note 1—in this last case, the Council adds to the list "international commitments which jeopardize rights and freedoms secured by the Constitution"; my translation).

³⁸ See *supra* note 12; emphasis added.

³⁹ Decision No. 85-188, May 22, 1985, *CC Rep.* 15; see also comments by L. Favoreu, *A.F.D.I.* 1985.868 and *A.I.J.C.* 1985.430.

⁴⁰ See *supra* note 34.

⁴¹ See *supra* notes 14 and 1.

Decision of the Council of the Communities of April 21, 1970, relating to the replacement of the financial contributions of Member States by Communities own resources (contrary neither by its nature nor its importance to the "essential conditions of the exercise of national sovereignty");⁴²

Treaty of Luxembourg of April 22, 1970, modifying some budgetary rules in the Treaties instituting the European Communities (which does not change the balance between the Communities on the one hand, and its Member States on the other hand);⁴³

Franco-German additional Agreement of October 24, 1974, to the European Convention on judicial cooperation of 1959 (which preserves the jurisdiction of the French judicial authorities to implement in France the obligation of judicial cooperation it imposes and does not infringe the constitutional right of asylum);⁴⁴

Agreement of September 20, 1976, instituting direct universal suffrage for the election of the European Parliamentary Assembly (which does not "create a sovereignty" (*sic*) and does not infringe the powers and functions of the institutions of the Republic, nor the principle of indivisibility of the Republic);⁴⁵

"Kingston Agreements" of January 8, 1976, amending the Statutes of the International Monetary Fund (which entered in force in conformity with the proceedings provided for in said Statutes already ratified by France and which, in any case, leave Members States free to define their exchange parity);⁴⁶

Additional Protocol No. 6 to the European Convention on Human Rights of 1950 on the abolition of the death penalty of April 28, 1983, (which "is not incompatible with the duty incumbent on the State to secure respect for the institutions of the Republic, continuity of the life of the Nation and protection of the rights and freedoms of the citizens");⁴⁷

Agreement for the Application of the Schengen Convention of June 14, 1985 (which does not infringe the competence of the police in each European State, authorizes the Parties to grant asylum according to their own domestic laws and provides for cross-border investigations and pursuits only in urgent or exceptional circumstances).⁴⁸

⁴² CC, Decision of June 19, 1970, *see supra* note 12.

⁴³ *Id.*

⁴⁴ CC, Decision No. 80–116 of July 17, 1980, *CC Rep.*36; *see also* comments by L. Favoreu, *R.D.P.* 1980.1640 and Ch. Vallée, *R.G.D.I.P.* 1981.202.

⁴⁵ CC, Decision of Dec. 30, 1976, *see supra* note 33.

⁴⁶ CC, Decision No. 78–93 of Apr. 29, 1978, *CC Rep.*23; *see also* comments by D. Carreau, *R.G.D.I.P.* 1979.209; Hamon, *D.* 1979.542 and D. Ruzié, *J.D.I.* 1978.577.

⁴⁷ CC, Decision of May 22, 1985, *see supra* note 39.

⁴⁸ CC, Decision of July 25, 1991, *see supra* note 34. By a Decision No. 98–399 of May 5, 1998, the Constitutional Council decided, about the Act in Parliament (not a treaty) concerning entry and residence in France of aliens and the right of asylum, that "the presence of represen-

By contrast, the following treaties have been declared in part unconstitutional:

Treaty of Maastricht for European Union of February 7, 1992, since, through the right to vote in municipal elections granted to "European citizens" to municipal elections, it permits foreigners to participate in the elections of the Senators; by creating a single monetary and exchange policy it bears on "a matter which is vital to the exercise of national sovereignty"; and by providing for the adoption by a majority vote of a policy concerning the granting of visas "it could generate a situation in which the exercise of national sovereignty was [would be] jeopardized";⁴⁹

Treaty of Amsterdam of October 2, 1997, amending the Treaty on European Union and the Treaties establishing the European Communities, in that the transfer of powers authorized by this instrument in areas such as the abolition of controls of persons crossing internal or external borders, asylum, immigration or the granting of visas could affect the conditions essential for the exercise of national sovereignty;⁵⁰ and

Statute of the I.C.C. signed at Rome on July 17, 1998.⁵¹

A synthesis of this jurisprudence is difficult, partly because the case law remains limited even if it is growing rather rapidly; partly because, in conformity with the French judicial tradition, the Council does not elaborate the reasons for its decisions.

Some of its main elements can be summed up as follows:

- (1) the adoption by a majority vote of decisions binding on Members States of an international organization in "important" matters;
- (2) the possibility for external authorities to investigate on the French territory; or
- (3) granting to foreigners a right to vote in national elections jeopardize the essential conditions for the exercise of national sovereignty.

tatives of the Office of the United Nations High Commissioner for Refugees, accounting for one third of each of the sections of the refugees Appeal Commission . . . , being a minority presence, does not jeopardize the essential conditions for the exercise of national sovereignty"; English text in CC, *Constitutional Case Law* (fn. 3), at 137; *see also* comments by N. Guimezanes, *J.C.P.* 1998.1.180; F. Julien-Lafferrière, *A.J.D.A.* 1998.1001; A. Peña-Gaia, *R.F.D.C.* 1998.634; J.E. E. Picard, *R.F.D.A.* 1998.620; Schoettl, *A.J.D.A.* 1998.489; C. Teitgen-Colly, *id.*1001; D. Turpin, *R.C.D.I.P.* 1998.521.

⁴⁹ CC, Decision of Apr. 9, 1992, *see supra* note 13. By its Decision of Sept. 2, 1992, (Maastricht II, *supra* note 22), the Constitutional Council took the view that the Treaty of Maastricht was in conformity with the Constitution as amended by the Constitutional Act of June 25, 1992 adopted after its Decision in Maastricht I.

⁵⁰ CC, Decision of Dec. 31, 1997, *see supra* note 14.

⁵¹ *See supra* note 1.

On the contrary, when

- (4) the power of decision is retained by the French authorities;
- (5) these authorities keep their monopoly of action on the French territory (even when duties are imposed on them to act in a particular way);
- (6) the decision-making power granted to international organizations or the right of foreign authorities to act on the French territory are related to minor problems;
- (7) or are temporary;
- (8) or are justified by urgency, the essential conditions for the exercise of national sovereignty are not jeopardized.

It goes without saying that these guidelines are most flexible. They allow the *Conseil constitutionnel* to strike a balance between the necessity of international cooperation and the protection of national sovereignty, and to adapt its control to circumstances in accordance with a test that is not without similarity to the principle of "reasonableness" (which, as such, is unknown in French constitutional law).

It can be noted that, in accordance with the above mentioned criteria, treaties such as the Charter of the United Nations, the Statute of the I.M.F., the European Convention on Human Rights or those establishing the European Communities would, most probably, have been found as being in conflict with the Constitution, had they been examined by the Constitutional Council.

This means that France is probably party to treaties that are contrary to the Constitution and which jeopardize the essential conditions of exercise of national sovereignty as defined by (or implied in) the Constitution. This has, of course, no consequence in international law: "from the standpoint of international law," domestic law, including national constitutions, are "merely facts."⁵²

Until very recently, the position was comparable in regard of French constitutional law: it flows from the French system of control of constitutionality that once they are in force, the validity of treaties can no longer be challenged.⁵³ Thus, the potential unconstitutionality of a treaty would not matter: the Constitutional Council could no longer be seized of the issue and "ordinary" judges, whether belonging to the administrative order (having the *Conseil d'État* at its head) or the judicial order (culminating in the *Cour de Cassation*), used not to review the conformity of treaties (or of acts in Parliament) to the Constitution.

⁵² See Polish Upper Silesia, P.C.I.J., (ser. A) No. 7, at 19.

⁵³ See CC, Decision of Apr. 29, 1978, *supra* note 46. *A fortiori*, when a treaty has been declared in conformity with the Constitution, a new treaty merely reproducing the provisions of the former cannot be challenged; see CC, Decision of Dec. 31, 1997, *supra* note 14.

This could well change with a decision of the General Assembly of the *Conseil d'État* of October 30, 1998, *in re Sarran et al.*⁵⁴ In this judgment, the Court came to these conclusions:

Considering that even though Article 55 of the Constitution provides that "from the moment of their publication, treaties or agreements duly ratified or approved shall prevail over Acts of Parliament subject, for each agreement or treaty, to reciprocal application by the other party", the supremacy thus conferred to international commitments does not apply, in the domestic order, to provisions of a constitutional nature.⁵⁵

The consequence of such a position is that, in the future, French judges might be led to disregard a treaty already in force, if they find it contrary to the Constitution and, in particular, with the principle of national sovereignty or the essential conditions for the exercise of sovereignty. And, apparently, this would be true whether the Treaty had been concluded before or after the present Constitution of 1958.

For its part, the *Conseil Constitutionnel* has recently held that the Refugees Appeal Commission, an administrative court established to review decisions of the French Office for the Protection of Refugees and Stateless Persons, is not prevented by the Constitution from including members representing the Office of the U.N. High Commissioner for Refugees (provided they are a minority).⁵⁶ It came to this conclusion in a rather tortuous way:

It follows from [Article 3 of the Declaration of Human and Civic Rights of 1979, Article 3 of the Constitution of 1958 and paragraphs 14 and 15 of the Preamble to the Constitution of 1946]⁵⁷ that as a matter of principle functions that are inseparable from the exercise of national sovereignty may not be entrusted to foreign nationals or to representatives of international organizations; this applies in particular to judicial functions since both the ordinary and the administrative courts act "in the name of the French people"; it may, however, be legitimate to depart from this principle to such extent as may be necessary to give effect to an international agreement entered by France,

⁵⁴ A previous judgment of the same General Assembly (the most solemn panel of the French *Conseil d'État*) had paved the way in this same direction: C.E., Ass., July 3, 1996, *Koné, Leb.* 255; see also conclusions of J.M. Delarue, *R.F.D.A.* 1996.870; and comments by D. Alland, *R.G.D.I.P.* 1997.238; C. Braud, *R.D.P.* 116.1751; D. Chauvaux and Th.-X. Girardot, *A.J.D.A.* 1996.722; L. Favoreu, P. Gaïa, H. Labayle and P. Delvolvé, *R.F.D.A.* 1996.882; F. Julien-Laferrière, *D.* 1996.509 and X. Prétot, *J.C.P.* 1996.II.22720.

⁵⁵ *A.J.D.A.* 1998.1039 with a commentary by F. Raynaud and P. Fombeur at 962; my translation.

⁵⁶ See *supra* note 48.

⁵⁷ Concerning the texts of these provisions, see *supra* note 24.

provided there is no impact on the essential conditions for the exercise of national sovereignty.⁵⁸

This statement is not easy to interpret. On the one hand, the Council seems to accept that an Act in Parliament may depart from constitutional principles in order to give effect to international agreements⁵⁹ (in the present case, the 1951 Geneva Convention on the Status of Refugees). On the other hand, it denies such a possibility if the Act jeopardizes the essential conditions for the exercise of national sovereignty, which implies that the *Conseil constitutionnel* too, in such a case, could proscribe the application of a treaty in force.

This review of the French constitutional law position, as interpreted by the courts, not on "delegating sovereignty," but on transferring powers deriving from sovereignty shows some inconsistencies. They are partly the result of the general attitude of French judges' being tempted to isolationism, making them reluctant to giving full effect to paragraphs 14 and 15 of the Preamble to the Constitution of 1946, by which "the French Republic, faithful to its tradition," declares that it "shall observe the rules of public international law" and "will consent to such limitations of sovereignty as are necessary to the realization of the defense of peace." They also result in part from tensions between the international meaning of sovereignty as opposed to its scope in national law, which the wording of the constitutional texts awkwardly mixes up.

However, the Council's invention of a notion of "essential conditions for the exercise of national sovereignty" probably constitutes an acceptable and rather successful attempt to reconcile and combine both meanings of the word "sovereignty."

But this shrewd and flexible intellectual construction has a price. First, by its subjectivity, it taints with uncertainty the assessment of virtually all important treaties' conformity with the Constitution. This makes the work of French negotiators at the international level more difficult since they cannot assess with certainty the decision that the Constitutional Council will take concerning the constitutionality of a future treaty. Second and more important, the recent findings by the Council that the Treaties of Maastricht and of Amsterdam were unconstitutional made it necessary to amend the Constitution twice⁶⁰ in order to

⁵⁸ CC, Decision of May 5, 1998, *supra* note 48.

⁵⁹ This is difficult to reconcile with the absurd jurisprudence of the Constitutional Council by virtue of which it refuses to control the conformity of an act in Parliament to the treaties in force in spite of the clear wording of art. 55 of the Constitution (*see text, supra*); cf. Decision of Jan. 15, 1975, *see supra* note 4.

⁶⁰ Following a whim of the then Minister of the Interior, Mr. Pasqua, a Constitutional Law of Nov. 25, 1993, also added a new art. 53-1 to the Constitution, supposedly to comply with the decision of the Constitutional Council No. 93-325 of Aug. 13, 1993 (CC Rep.224, English text CC, *Constitutional Case Law* (fn. 3), at 110; *see also* comments by D. Alland, *R.G.D.I.P.* 1994.205; B. Genevois, *R.F.D.A.* 1993.871; F. Luchaire and M. Rousseau, *R.D.P.* 1994.5 and 103; Mathieu and Verpeaux, *P.A.* 1994, No. 26, p. 10), which, legally speaking, did not impose such step.

make it compatible with the provisions of these accords.⁶¹ A new constitutional amendment will be necessary to ratify the Statute of the I.C.C. because it has been found to jeopardize in part the essential conditions for the exercise of national sovereignty.

This is not satisfactory. A Constitution is not a scrap of paper and it is deplorable that the French Constitution has to be changed every time France envisages the ratification of a treaty by which it transfers powers to an international organ. No doubt the Constituent Authority would be well advised to amend the Constitution in order to make such transfers "constitutional" once and for all. The odds, however, are that this will not be done on the occasion of the new amendment necessary in order to ratify the Statute of the I.C.C.

⁶¹ *See* Constitutional Law of June 25, 1992, adding a new title XV to the Constitution: "The European Communities and the European Union" (arts. 88-1 to 88-4) and Constitutional Law of Jan. 18, 1999, amending art. 88-2.