

# The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved



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**Abstract** In terms of the French constitutional culture, the Constitution (of the Fifth Republic), adopted in 1958, grew out of specific circumstances relating to the previous regime, with the aim to ensure the primacy of the executive. Fundamental rights protection emerged later and is mainly based on the ECHR; the main domestic instrument is the 1789 Declaration of the Rights of Man and of the Citizen. The possibility for individuals to challenge the constitutionality of legislative provisions that violate their rights was introduced by a constitutional amendment of 2008 establishing *ex post* control of constitutionality. Judicial review is regarded as deferent to the political institutions. With regard to EU law, the Constitution has extensively been amended, typically following a finding by the Constitutional Council that a new treaty affects ‘the essential conditions for the exercise of national sovereignty’. The report observes a reluctance of French institutions to fully participate in a dynamic dialogue with the EU integration process. Although this has recently changed with a more constructive approach on the part of the Constitutional Council, the report observes deficiencies in democratic

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deliberation and the reluctance to push for a solid fundamental rights protection in the EU. The report advocates a so-called *pro homine* clause, which has been considered in France, to guarantee that the individual would always benefit from the highest level of protection, whether it is provided for by European, international or national instruments. The report also notes a more general concern amongst a part of the French population about a barefaced economic liberalism in the EU and its effect of deteriorating their living conditions.

**Keywords** The French Constitution of the Fifth Republic · Constitutional amendments regarding EU and international co-operation · The Constitutional Council · Constitutional review · Fundamental rights and the ECHR · European Arrest Warrant and the time limits for appeals · Data Retention Directive and implementation by a governmental regulation · Judicial dialogues · Judicial deference · Sovereignty · Supremacy · Referendum · *Koné* · International extradition treaties and political offences · *Pro homine* clause

## 1 Constitutional Amendments Regarding EU Membership

### 1.1 *Constitutional Culture*

**1.1.1** The French Constitution of 4 October 1958 grew out of a ‘set of circumstances’<sup>1</sup> which include the following. First, in 1958, Algeria was a French department in crisis due to the outbreak of an insurgency at the end of 1954. This war revealed flaws in the Constitution of the Fourth Republic, and led to the birth of the Constitution of the Fifth Republic. The regime did not have the necessary institutional strength to deal with the consequences of the insurgency. Politically, the regime was unable to forcefully assert that the Fourth Republic could come out of such a crisis. As regards the economy, mention should be made of the numerous difficulties successive Governments encountered in voting the budget.

Secondly, these developments resulted in conflicting relationships between the Government and Parliament and help to explain the agony of the Fourth Republic. This Republic was characterised by a weak Constitution, in which ministerial crises and governmental instability reigned without apparent remedy. In other words, Parliament was all-powerful and it determined the Government’s birth and survival. From the mid-1950s, most politicians were convinced that a major revision of the Constitution was needed in order to put an end to the gradual paralysis of the decision-making mechanisms.

Finally, the birth of the Fifth Republic can also be explained by the *coup de grâce* delivered by General De Gaulle. In his 16 June 1946 Bayeux Speech, General De Gaulle showed his hostility towards a regime such as the one established by the

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<sup>1</sup> Carcassonne 2013, p. 17 (as translated by the authors).

Fourth Republic. Thus, his lack of support for the Fourth Republic in 1958 was not a surprise. A number of Gaullists worked for the return of De Gaulle, notably providing him with the support of the army. By succeeding in presenting himself as the providential man for the French people, his intervention became increasingly essential.

Thus, the Constitution of the Fifth Republic is the result of an ‘adjustment of the previous regime’.<sup>2</sup> The current Constitution is characterised by a real *parlementarisme rationalisé*: by disciplining the legislative power, the Government has the necessary means to carry out its mandate.

**1.1.2** According to Art. 16 of the French Declaration of the Rights of Man and of the Citizen, ‘any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution’.<sup>3</sup> Pursuant to this fundamental provision, the Constitution sets up a separation of powers between the legislature, the executive and the judiciary (horizontal separation of powers) on the one hand, and between the state and sub-national entities (vertical separation of powers) on the other. It also guarantees the rights and freedoms of the people, ensuring effective protection as a corollary.<sup>4</sup>

Title 1 of the Constitution deals with sovereignty. Although some provisions relate to organisation of the state, they are not essential. Nevertheless, the constituent power initially wished to avoid repeating the mistakes of previous regimes, and therefore sought to ensure the primacy of the executive over the legislative power by giving specific attention to the rules governing the separation of powers. Originally, the space reserved for the protection of rights and freedoms seemed to be secondary. It was not until a decision of 16 July 1971 delivered by the Constitutional Council that the situation evolved.<sup>5</sup> According to the *Liberté d’association* ruling, the Constitutional Council acknowledges the constitutional value of the Preamble of the Constitution and, in doing so, to the texts that are referenced in this Preamble – the French Declaration of the Rights of Man and of the Citizen, the Preamble of the Constitution of the Fourth Republic and, more recently, the Charter for the Environment. In this way, the control of constitutionality is exercised against the yardstick of the *bloc de constitutionnalité*, i.e. a set of norms at the top of the hierarchy of norms. Thus, as it has been commented, ‘the Constitutional Council changes ... roles: it is not only the regulator of the activities of the public powers, it especially becomes, according to the usual wording, the guardian of rights and freedoms against the legislative will of a governmental majority’.<sup>6</sup> The constitutional amendment of 23 July 2008 took a step in this direction, and can be

<sup>2</sup> Ibid., p. 19 (as translated by the authors).

<sup>3</sup> As translated on the Constitutional Council’s website. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html>.

<sup>4</sup> Gicquel 2013, p. 57.

<sup>5</sup> Constitutional Council, 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d’association*, Decision No. 71-44 DC.

<sup>6</sup> Rousseau 2013, p. 36 (as translated by the authors).

considered from that day forward as proof of the prominent place of the protection of rights and freedoms in the French constitutional order. This constitutional amendment introduced an *ex post* control of constitutionality, the so-called priority preliminary reference mechanism on issues of constitutionality, into French constitutional law, allowing individuals to challenge the constitutionality of provisions violating their rights.

## ***1.2 The Amendment of the Constitution in Relation to the European Union***

**1.2.1** In France, the Treaties establishing the European Communities were ratified by the President of the Republic with the consent of Parliament in accordance with the relevant provisions of the Constitution of the Fourth Republic.<sup>7</sup>

Starting with the Treaty on the EU and the subsequent constitutional amendment of 1992, the French Constitution has been regularly amended with a view to ‘authorise the process of European integration and to strengthen the control of the French Parliament over the activities of the European Union’.<sup>8</sup> To date there have been seven constitutional amendments more or less linked with the development of the European construction, the content of which will be explored in greater detail in Sect. 1.2.3. By way of a summary, the amendments are as follows:

- The Constitutional Law of 25 June 1992 related to the Treaty of Maastricht created a new title entitled ‘On the European Communities and the European Union’, adding Arts. 88-1 to 88-4 to the Constitution;
- The Constitutional Law of 25 November 1993 related to international agreements in the field of asylum concerning the Schengen Agreement created Art. 53-1 of the Constitution;
- The Constitutional Law of 25 January 1999 related to the Treaty of Amsterdam changed some provisions in Arts. 88-2 and 88-4, and added a second paragraph to Art. 88-2 of the Constitution;
- The Constitutional Law of 25 March 2003 related to the European Arrest Warrant further amended Art. 88-2 of the Constitution (see below Sect. 2.3.2);
- The Constitutional Law of 1 March 2005 related to the Treaty establishing a Constitution for Europe created Art. 88-5 and changed Art. 88-1 of the Constitution;
- Finally, the Constitutional Laws of 4 February 2008<sup>9</sup> and 23 July 2008,<sup>10</sup> adopted several months apart, close this list.

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<sup>7</sup> Rideau 2010, p. 1224.

<sup>8</sup> Boyron 2013, p. 220.

<sup>9</sup> Constitutional law No. 2008-103 of 4 February 2008 modifying Title XV of the Constitution.

<sup>10</sup> Constitutional law No. 2008-724 of 23 July 2008 to modernise institutions of the Fifth Republic.

It should be borne in mind that Art. 53-1 of the Constitution, which refers to agreements with European states in the field of asylum, does not concern the EU amendments listed above, contrary to a large number of provisions contained in Title XV.

Title XV, entitled 'On the European Union', currently reads:

Article 88-1: The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

Article 88-2: Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.

Article 88-3: Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.

Article 88-4: The government shall lay before the National Assembly and the Senate drafts of or proposals for European Community and European Union acts as soon as they have been transmitted to the council of the European Union.

In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union Institution.

A committee in charge of European affairs shall be set up in each parliamentary assembly.

Article 88-5: Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the president of the republic.

Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the bill according to the procedure provided for in paragraph three of article 89.

[Article 88-5 is not applicable to accessions that result from an Intergovernmental Conference whose meeting was decided by the European Council before July 1, 2004].

Article 88-6: The National Assembly or the Senate may issue a reasoned opinion as to the conformity of a draft proposal for a European Act with the principle of subsidiarity. Said opinion shall be addressed by the President of the House involved to the Presidents of the European Parliament, the Council of the European Union and the European Commission. The Government shall be informed of said opinion.

Each House may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity. Such proceedings shall be referred to the Court of Justice of the European Union by the Government.

For the purpose of the foregoing, resolutions may be passed, even if Parliament is not in session, in the manner set down by the Rules of Procedure of each House for the tabling and discussion thereof.

Article 88-7: Parliament may, by the passing of a motion in identical terms by the National Assembly and the Senate, oppose any modification of the rules governing the passing of Acts of the European Union in cases provided for under the simplified revision procedure for treaties or under judicial cooperation on civil matters, as set forth in the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on December 13, 2007.<sup>11</sup>

**1.2.2** A distinction must be drawn between the normal constitutional amendment procedure provided by Art. 89 of the Constitution, and a procedure, developed on the basis of Art. 11, that is not expressly laid down in the text of the Constitution.

In the light of Art. 89, the right of initiative is shared and belongs to the President of the Republic on a proposal from the Prime Minister (hereinafter Government Draft), as well as to parliamentarians (hereinafter MP Draft). An initiative requires a vote in identical terms by the National Assembly and the Senate, which is followed by an approval stage. A referendum is compulsory in the case of an MP Draft. The situation is different in the case of a Government Draft, where the President of the Republic has a choice. He can decide to adopt a constitutional amendment either by referendum, or he can submit it to Parliament convened in Congress, i.e. a joint session of both Houses. In this latter scenario, the bill is approved if it is supported by a three-fifths majority of the votes cast.

Out of a total of 24 constitutional amendments undertaken since 1958, 22 have been approved pursuant to Art. 89 of the Constitution. It should also be noted that 21 constitutional amendments have been ratified in Congress. The seven constitutional amendments linked with the European construction have been adopted under Art. 89 of the Constitution and approved by Congress.

The controversial use of Art. 11 of the Constitution is noteworthy in this respect. The latter allows the President of the Republic to submit a bill on several matters to a referendum. This procedure provides the President of the Republic with the advantage of circumventing potential parliamentary opposition. Although it was used twice by General De Gaulle in 1962 and 1969, Art. 11 should nonetheless not be considered as an appropriate procedure for amending the Constitution.<sup>12</sup>

**1.2.3** By way of background to the EU-related constitutional amendments, the Constitutional Law of 25 January 1999 enabled France to ratify the Treaty of Amsterdam after the Constitutional Council found the Treaty to be unconstitutional. In a decision of 31 December 1997, the Constitutional Council, seized by both the President of the Republic and the Prime Minister, indicated that several provisions of the Treaty of Amsterdam – in particular those providing for the transition from unanimity to qualified majority rule and for the procedure of co-decision for some measures related to asylum, immigration and the crossing of the internal and external borders of the Member States – ‘affect the essential conditions for the

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<sup>11</sup> As translated on the Constitutional Council’s website. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>.

<sup>12</sup> Pierré-Caps 1998, pp. 412–416. For an overview of this controversy, see Fekl 2008, pp. 43–49.

exercise of national sovereignty' and must therefore be declared unconstitutional.<sup>13</sup>

In order to ratify the Treaty of Amsterdam, the Government Draft allowed for transfers of competence regarding the free movement of persons. The draft was passed by Parliament in identical terms and approved in Congress by 759 parliamentarians, whereas the required majority would have been attained with 522. It is noteworthy that the Government Draft only addressed the issues of unconstitutionality raised by the Constitutional Council. Some members of the National Assembly considered nonetheless that the draft needed to be expanded. A large number of amendments were proposed, including one adopted by a National Assembly Commission and approved by the Senate. This was amendment No. 19, aimed at revising Art. 88-4 of the Constitution to extend the obligations of the Government to inform the parliamentary assemblies.<sup>14</sup> This parliamentary intervention brought to light the role played by Parliament in the constitutional amendment procedure, which cannot be reduced to a mere chamber of registration of the will of the executive power.

The Constitutional Law related to the European Arrest Warrant of 25 March 2003 enabled the transposition of the Framework Decision<sup>15</sup> into French law. In an advisory opinion of 26 September 2002, the Council of State, seized by the President of the Republic (rather than the Constitutional Council, which confers a rather unique aspect on this constitutional amendment) was asked whether the transposition of the Framework Decision might collide with obstacles based on constitutional principles and rules. The Council of State declared this transposition to be in conformity with the constitutional rules, but noted that the Framework Decision did not seem to ensure the principle that the state ought to reserve the right to refuse extradition in respect of political offences.<sup>16</sup> In order to allow for the adoption of the rules on the European Arrest Warrant (EAW), a Government Draft was tabled in Parliament, passed in identical terms and approved in Congress by 826 parliamentarians (the minimum required was 525 votes).

The Constitutional Law of 1 March 2005 aimed at bringing the Constitution in line with the Treaty establishing a Constitution for Europe. By way of background, in a decision of 19 November 2004, the Constitutional Council, seized by the President of the Republic, declared that a constitutional amendment was necessary on the grounds that some provisions hindered the essential conditions for the exercise of national sovereignty and that the new prerogatives granted to Parliament by the Treaty, in respect of subsidiarity and the simplified revision procedure, called

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<sup>13</sup> Constitutional Council, 31 December 1997, *Traité d'Amsterdam modifiant le Traité sur l'Union européenne, les Traités instituant les Communautés européennes et certains actes connexes*, Decision No. 97-394 DC.

<sup>14</sup> National Assembly, Report on the constitutional amendment bill modifying Art. 88-2 of the Constitution, No. 1212, 20 November 1998, available at: <http://www.assemblee-nationale.fr/11/rapports/r1212.asp>.

<sup>15</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

<sup>16</sup> Council of State, 26 September 2002, Advisory opinion No. 368-282.

for the intervention of the constituent power to implement them into French law. Based on this decision and with a view to overcoming the unconstitutional provisions identified by the constitutional judge, a Government Draft was tabled in Parliament, passed in identical terms and approved in Congress by 730 parliamentarians (with the required minimum having been 478 votes).

It should, however, be noted that this constitutional amendment ‘partially remained in suspension’.<sup>17</sup> Indeed, the Constitutional Law basically consisted of two parts: one establishing the participation of France in the European Union and one creating the duty to hold a referendum for the accession of any new state to the European Union after Croatia. This provision is not a consequence of the decision of the Constitutional Council, but purely aims to ‘reassure French people about the prospect of a potential accession of Turkey by enabling them to decide ultimately on this accession’.<sup>18</sup> Legal doctrine voiced criticism with regard to this provision.<sup>19</sup> Secondly, the Constitutional Law provided for a new wording of the dispositions contained in Title XV of the Constitution, notably including two articles allowing the Parliament to exercise the new rights recognised by the Treaty. These modifications were conditional on the ratification of the Treaty, which was submitted to a referendum. As the Treaty was rejected, this part did not see the light of day.

The Constitutional Law of 4 July 2008 enabled France to ratify the Treaty of Lisbon. In a decision of 20 December 2007, the Constitutional Council, seized by the President of the Republic, took the same position as reached in its previous decision related to the Treaty establishing a Constitution for Europe. Given that some provisions hindered the essential conditions for the exercise of national sovereignty and new prerogatives granted to Parliament called for the intervention of the constituent power, the constitutional judge declared that the ratification of the Treaty must be preceded by an amendment of the Constitution.<sup>20</sup>

In order to ratify the Treaty of Lisbon, a Government Draft was tabled with amendments of a scope beyond the observations expressed by the Constitutional Council. The draft was passed in identical terms and approved in Congress by 560 parliamentarians, whereas the required majority would have been attained with 445.

Finally, the Constitutional Law of 23 July 2008 aimed at modernising the institutions of the Fifth Republic by improving the control of the executive power, strengthening the powers of Parliament and allocating new rights to citizens. This constitutional amendment was unusual in the sense that it was the only amendment to be adopted spontaneously, without being a consequence of a decision of the Constitutional Council or an advisory opinion of the Council of State.<sup>21</sup> The Constitutional Law was narrowly approved in Congress by 539 parliamentarians

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<sup>17</sup> Rideau 2010, p. 1238 (as translated by the authors).

<sup>18</sup> Dero-Bugny 2009, pp. 1957–1958 (as translated by the authors).

<sup>19</sup> Ibid., pp. 1956–1963. See also Carcassonne 2013, p. 386.

<sup>20</sup> Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l’Union européenne et le traité instituant la Communauté européenne*, Decision No. 2007-560 DC.

<sup>21</sup> Rideau 2008.



(the minimum required was 538 votes). The amendment further enhanced the involvement of the Parliament in the EU decision-making process. Indeed, the Government's duty to inform Parliament was extended by deleting the sole reference to provisions of legislative nature. As a consequence, Parliament may scrutinise any future EU act, regardless of its content. Moreover, this constitutional amendment softens the duty to hold a referendum for the accession of any new state to the EU. Henceforth, Parliament may authorise accession according to the procedure applicable for adoption of a Government Draft to amend the Constitution.

**1.2.4** Strictly speaking, there are no EU-related amendment proposals that have not materialised in practice. It is however possible to evoke the particular case of the ratification of the Treaty establishing a Constitution for Europe. Most of the approval process in Congress for the Constitutional Law aimed at bringing the French Constitution in line with this Treaty had been completed. However, in order to complete ratification, the President of the Republic decided to submit the Government Bill to a referendum of the French people. On 29 May 2005, 55% of voters responded 'No' to the question: 'Do you approve the bill authorising the ratification of the Treaty establishing a Constitution for Europe?'. Several more and less rational arguments have been offered to explain this failure. For part of the population, the EU is considered as a cause of their deteriorating living conditions and the expression of an economic liberalism they fear. Moreover, the very expression 'European Constitution' has opened a Pandora's Box, spreading fears of a general loss of national sovereignty. There are also external considerations, such as the Turkish accession issue. Despite the introduction of a duty to hold a referendum for any future accession of a state to the EU in the constitutional text, fear of Turkish accession undoubtedly had an impact on the outcome of the referendum.

### ***1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers***

**1.3.1–1.3.4** It seems appropriate to us to give a single response to the questions in this sub-section.

With a view to European integration, the French Constitution has been significantly adjusted in order to allow transfers of competences to the European Communities and the European Union. In this regard, Art. 88-1 is now viewed as the 'basis for participation in the European Union and transfers of competences'.<sup>22</sup> The consent for these transfers is considered to be at a basic level, beyond which all new transfers of competences that are not covered by this provision call for a constitutional amendment. The role of the Constitutional Council appears essential. Based on the relevant case law of the constitutional judge, its position can be outlined as follows. First of all, the relevant case law is cited to recall the

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<sup>22</sup> Ibid. (as translated by the authors).

constitutional provisions related to the principle of national sovereignty. The constitutional judge then typically sets out the ability of France to consent to limitations of sovereignty.<sup>23</sup> In other words, such a limitation exists, particularly in the light of the participation of France in the European Union, as integrated into the French Constitution through its now omnipresent Art. 88-1. In its case law prior to 1992, the constitutional judge used to draw a distinction between *limitations* of sovereignty which were allowed, and *transfers* of sovereignty which were not. In a decision of 9 April 1992 on the Treaty of Maastricht, as well as in subsequent decisions, the constitutional judge abandoned this rather theoretical distinction.<sup>24</sup>

However, this is far from giving blanket approval to any transfers of competences. The Constitutional Council holds that respect for national sovereignty does not preclude France from consenting to transfers of competences, with the requirement that there be no contradictory constitutional provisions and so long as such transfers do not constitute a breach of the ‘essential conditions of the exercise of national sovereignty’.<sup>25</sup> To test this, the constitutional judge looks at the matter under review, the extent of the transfer as well as the safeguards protecting the exercise of sovereignty. Put in another way, as Boyron has clearly stated,

the test of ‘the essential conditions of the exercise of national sovereignty’ has therefore two aspects: a substantive one – whether the subject matter of the transfer compromises national sovereignty – and an institutional one – whether the institutional design still guarantees the exercise of sovereignty. This two-stage reasoning helps the Council identify the concrete implications of transfers or limitations of competences and avoid vague theoretical pronouncements.<sup>26</sup>

The primacy of EU law over national law has to be considered from two different points of view. On the primacy of EU law over French law, there is indeed no longer any debate.<sup>27</sup> The relationship between EU law and the Constitution is, however, to be defined in a different way. In this context, both the Council of State<sup>28</sup> and the Court of Cassation – especially in its *Fraisie* ruling<sup>29</sup> – have rejected the primacy of international norms, including EU law, over the Constitution. However, the way in which the *Fraisie* ruling is commonly understood may be nuanced. While the Court of Cassation explicitly rejected the primacy of international commitments in general over the Constitution, the Court of Cassation only concluded that the right relied on by the applicant did not fall within

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<sup>23</sup> Paragraph 15 of the Preamble of the 1946 Constitution states that ‘[s]ubject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace’.

<sup>24</sup> Boyron 2013, p. 220.

<sup>25</sup> Rideau 2010, p. 1230.

<sup>26</sup> Boyron 2013, p. 222.

<sup>27</sup> Court of Cassation, 24 May 1975, *Société des cafés Jacques Vabre*, No. 73-13556; Council of State, 20 October 1989, *Nicolo*, No. 108243.

<sup>28</sup> Council of State, 30 October 1998, *Sarran et Levacher*, No. 200286, 200287.

<sup>29</sup> Court of Cassation, 2 June 2000, *Fraisie*, No. 99-60274.

the scope of Community law. It is not clear how the Court of Cassation would have reacted if the alleged right had fallen within this scope.<sup>30</sup>

For the constitutional judge, the French Constitution is the supreme norm in the domestic legal order, which is clear from the decision of the Constitutional Council on the Treaty establishing a Constitution for Europe.<sup>31</sup>

The case law of the Constitutional Council in relation to the transposition of EU directives is important in this regard. In a 2004 decision, the Constitutional Council considered that the transposition of directives into internal law results from a constitutional requirement, but added that a conflict with an 'express clause of the Constitution' can constitute an obstacle.<sup>32</sup> Two years later,<sup>33</sup> the Constitutional Council rephrased this reservation in response to criticism of the previous wording.<sup>34</sup> Thus it held that transposition results from a constitutional requirement unless it is in contradiction with 'a rule or a principle inherent to the constitutional identity of France, except when the constituent power consents thereto'. The Council of State shares this view.<sup>35</sup> The scope of the constitutional identity is not easy to define. Most legal scholars mention the principle of religious neutrality (the famous French *laïcité*), without further clarification. The above development in the case law can be considered as a reaffirmation of the primacy of the French Constitution over EU law for two reasons. First, the duty to transpose directives, and thus the primacy of EU law over national law, is based on Art. 88-1 of the French Constitution. The place of the Constitution at the top of the Kelsenian pyramid of norms is not called into question. Secondly, the reservation as formulated by the constitutional judge provides the constitutional judge with the possibility to set aside the primacy of EU law, and in so doing to stress the 'kingdom of the Constitution'.<sup>36</sup>

Finally, the *IVG* case law of the Constitutional Council should be mentioned.<sup>37</sup> Since this decision, the constitutional judge has held that assessing the compatibility of Union law with French law is not a matter of constitutional control, and has left this control to the ordinary courts. However, this does not mean that the judge sits

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<sup>30</sup> Roux 2010, p. 265.

<sup>31</sup> Constitutional Council, 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Decision No. 2004-505 DC. See also, for example, Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*, Decision No. 2007-560 DC; Constitutional Council, 3 December 2009, *Loi organique relative à l'application de l'article 61-1 de la Constitution*, Decision No. 2009-595 DC.

<sup>32</sup> Constitutional Council, 10 June 2004, *Loi pour la confiance dans l'économie numérique*, Decision No. 2004-496 DC.

<sup>33</sup> Constitutional Council, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Decision No. 2006-540 DC.

<sup>34</sup> Burgorgue-Larsen 2011, p. 216.

<sup>35</sup> Council of State, 22 February 2007, *Société Arcelor Atlantique et Lorraine*, No. 287110.

<sup>36</sup> Camby 2004, p. 888 (as translated by the authors).

<sup>37</sup> Constitutional Council, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse*, Decision No. 74-54 DC.

in an ivory tower, totally impermeable to EU law. In this regard, the so-called *Melki* saga is evidence of a conciliatory attitude towards EU law. Indeed, after the Court of Cassation requested a preliminary ruling but before the Court of Justice of the European Union (CJEU) responded as to whether the French priority preliminary ruling procedure on the issue of constitutionality violates EU law, the constitutional judge attempted to give an interpretation of this new French mechanism that would not conflict with EU law principles, and was successful.<sup>38</sup>

## 1.4 Democratic Control

**1.4.1** The power of Parliament relating to the EU decision-making process has increased following a number of constitutional modifications enshrined in Arts. 88-4 to 88-7 of the Constitution.

On the one hand, the Government has a duty to inform Parliament, which has steadily increased. Indeed, the Government must lay before the National Assembly and the Senate EU drafts or proposals for acts, whether or not they are legislative acts,<sup>39</sup> on which these Assemblies may adopt a so-called European resolution. Although Parliament is ever more involved in the EU decision-making process, the normative value of such resolutions remains weak. Thus, as Professor Carcassonne has pointed out, ‘even though their content clearly indicates to the executive power the position of one Assembly on the subject ..., they have no legal effects, and are not in the nature of a mandatory instruction sent to the Government’.<sup>40</sup>

On the other hand, two other provisions introduce new rights for the parliamentary assemblies. First, Parliament checks respect of the subsidiarity principle. For this purpose, the French Parliament can pursue a direct dialogue with the European Parliament, the Council of the European Union and the European Commission by issuing a reasoned opinion as to the conformity of the relevant proposal for a European act with the subsidiarity principle. Moreover, if a European act breaches the subsidiarity principle – or is suspected of doing so – the French Parliament can bring an action before the ECJ.<sup>41</sup>

Finally, under Art. 88-7 of the Constitution, Parliament is granted the possibility to oppose the modification of rules governing the passing of certain EU acts by reference to the simplified procedure or to judicial cooperation in civil matters, by means of adopting a motion voted by both Assemblies in identical terms.

The role that could be played by Parliament in any future accession of a state to the EU should also be underlined. In order to short-circuit the duty to hold a

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<sup>38</sup> Constitutional Council, 12 May 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*, Decision No. 2010-605 DC.

<sup>39</sup> Jacqué 2014, p. 231.

<sup>40</sup> Carcassonne 2013, p. 384 (as translated by the authors).

<sup>41</sup> *Ibid.*, p. 289.

referendum, the constitutional amendment of 23 July 2008 provides that Parliament may issue authorisation for any accession by passing a motion adopted in identical terms by a three-fifths majority.

**1.4.2** Since the adoption of the Constitution of 4 October 1958, nine referendums have been held. Three of them have stood out due to their European subject matter.

The first such referendum was held on 23 April 1972, in order to authorise the accession of Denmark, Ireland and the United Kingdom to the European Communities. The explanation for the choice to submit these accessions to popular approval may be found in the conflicting relationships reigning between France and the United Kingdom at that time, after the first accession attempt had been refused by General De Gaulle in 1961. French voters were asked whether they approved of Denmark, Ireland and the United Kingdom joining the EEC. The wishes of President Georges Pompidou in favour of massive support were apparently heard, as the accession of these states was approved by some 60% of the votes. It should be mentioned that the use of Art. 11 of the Constitution in this context was contested in French legal doctrine according to which this accession did not alter the functioning of French institutions.<sup>42</sup>

In 1992, France was one of the few Member States that chose a referendum in order to ratify the Treaty of Maastricht. On 20 September 1992, the Treaty was narrowly approved with 51% of the votes. A lack of consensus within the French political class may explain the nearly tied result. The boundaries were clearly set between those who considered the ratification to be necessary for a step further in the integration process, and those who understood ratification as a step towards a loss of national sovereignty and galloping economic liberalisation.

In 2005, France was again one of the few Member States to require a referendum for ratification of the Treaty establishing a Constitution for Europe. A favourable consensus seemed to reign this time within the political class, apart from some deviant voices coming from traditional parties and the classic hostility coming from the radical left and right. Although a positive result had been expected, the No side collected some 55% of the votes at the referendum organised on 29 May 2005. The reasons for this failure have already been identified. Some were recurrent, such as a loss of national sovereignty and barefaced economic liberalism.

To predict whether future referendums will be organised is a bit like staring into a crystal ball. It should, however, be stressed that in principle any new accession of a state to the EU is to be approved by a referendum, as already explained above. While this requirement has been moderated by the constitutional amendment of 23 July 2008, it remains entirely possible.

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<sup>42</sup> Dero-Bugny 2009, p. 1957.

## ***1.5 The Reasons for, and the Role of, EU Amendments***

**1.5.1** Most of the constitutional amendments related to the EU in France have been the consequence of judicial decisions. Professor Rideau has summed up the situation as follows: ‘A total of five constitutional amendments out of seven are due to decisions of the Constitutional Council, one was considered as necessary following an advice of the Council of State, only the last one [the constitutional amendment of 23 July 2008] was adopted spontaneously’.<sup>43</sup> Traditionally, if a competent judicial body identifies inconsistencies between the French Constitution and an EU Treaty, the constituent power puts an end to this conflict by proceeding with a constitutional amendment.

Such a technique is only effective with a flexible Constitution. It is thus necessary to highlight the link between the frequency of constitutional amendments in this context and the ease with which the Constitution can be amended.

It is difficult to assert that the opinion of legal scholars has been taken into account. It is however possible to mention a plausible exception. The constitutional amendment of 25 March 2005 introduced the duty to hold a referendum on any further accessions of a state to the EU into the constitutional marble. This provision, which provides a good example of the ‘inclusion of politics into the legal field’,<sup>44</sup> incited the wrath of a significant proportion of legal scholars, as emphasised above. The constitutional amendment of 23 July 2008 came to soften this duty by providing for parliamentary authorisation under certain conditions. In this respect, it is not unreasonable to think that the legal doctrine may have had an impact on this adjustment.

**1.5.2** Not applicable.

**1.5.3** It is imperative that constitutional norms gradually adjust to the progress of the European construction, while nevertheless ensuring that Parliament does not see its role reduced to a minimum. Overall, we find that the French Constitution responds to these goals satisfactorily.

In France, the constitutional amendments in relation to the growing impact of EU law can be understood by the role played by the Constitutional Council. Indeed, when the constitutional judge finds an incompatibility between an EU Treaty and the French Constitution, the constituent power is expected to correct it. It is in this way that all European treaties negotiated since the Treaty of Maastricht have required an amendment of the Constitution, with the exception of the Treaty of Nice.

In this context it may be worth mentioning that there has been a long-standing proposal to introduce a ‘general Europe clause’ in the Constitution. Such a provision would be consistent with the previous observation. Professor Carcassonne has set out the problem in the following terms: as ‘France has clearly made its choice

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<sup>43</sup> Rideau 2008.

<sup>44</sup> Dero-Bugny 2009, p. 1956 (as translated by the authors).

[to participate in the EU], would it not be better to put this in the Constitution once and for all?'.<sup>45</sup> However, as Professor Carcassonne has also pointed out, the psychodrama of the failure of the ratification of the Treaty establishing a Constitution for Europe has disturbed the apparent quietude around the EU. To this day the proposal continues to be part of a long-running story. We fully share the opinion of Professor Carcassonne that 'when the situation is stabilised, there will still be time to ... introduce the "general Europe clause". Until then, Europe merits some hesitation in Versailles or some referendums, even if they are not successful.'<sup>46</sup>

Another proposal, which will be further explained in Part 3 (Sect. 3.1.4), may also be worthy of mention here. It relates to the introduction of a *pro homine* clause in the Constitution, which aims to guarantee an extensive protection of human rights to every individual.

## 2 Constitutional Rights, the Rule of Law and EU Law

### 2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

**2.1.1** The Preamble of the French Constitution contains a direct reference to the protection of fundamental rights by proclaiming recognition of the rights enumerated by the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble of the 1946 Constitution and the 2004 Charter for the Environment. Even though they are not formally incorporated in the Constitution, these rights have a constitutional rank. Indeed, the Constitutional Council declared in its 1971 *Liberté d'association* decision that it conceived itself as the guardian of fundamental rights,<sup>47</sup> and thus deployed the full potential of the reference contained in the Preamble. These guarantees are developed by a case law that has manifestly been inspired by the judgments of the European Court of Human Rights (ECtHR).

Protection is not limited to the rights contained in the aforementioned instruments, since the Constitutional Council also declared that it would protect the *principes fondamentaux reconnus par les lois de la République* (fundamental principles recognised by the laws of the Republic), which receive constitutional rank by virtue of the recognition of their particular importance by the judge. Other general principles, such as proportionality, are elements of the judicial review performed by the constitutional judges. As the French Republic has opted for a concentrated constitutionality control, it is the Constitutional Council that enforces these rights. Since the 2008 revision of the Constitution, this type of control is

<sup>45</sup> Carcassonne 2013, pp. 377–378 (as translated by the authors).

<sup>46</sup> Ibid., p. 378 (as translated by the authors).

<sup>47</sup> Constitutional Council, 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*, Decision No. 71-44 DC.

triggered either before the entry into force of a legislative act, if 60 members of the Senate or the Parliamentary Assembly or the President of the Republic seize the Council, or *a posteriori*, if a citizen invokes the violation of his rights as guaranteed by the Constitution during judicial proceedings.

Furthermore, the Council of State can invalidate governmental and administrative acts if they violate constitutional rights without having any legislative basis. If such acts do have a legislative basis, a violation of fundamental rights can only be neutralised either by interpreting the act in conformity with the Constitution or a general principle of law, or with reference to violation of similar rights protected by a treaty. The Court of Cassation enforces constitutional rights as well as general principles of law in civil and criminal trials. General principles of law (which are to be distinguished from the category of ‘fundamental principles recognised by the laws of the Republic’) can be invoked against governmental or administrative acts, but not against statutory laws.

**2.1.2** The relevant constitutional instruments expressly provide for some restrictions that can be imposed on rights, for example Art. 1 guaranteeing the principle of liberty and equality. However, absolute rights such as the right to life or the right not to be subjected to torture or inhumane or degrading treatment cannot be subject to exceptions.

A general principle can be derived from Art. 4 of the Declaration of the Rights of Man and of the Citizen, which provides that ‘the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.’<sup>48</sup>

In practice, however, the Constitutional Council as well as the administrative, civil and criminal jurisdictions apply a relatively classical test to verify the adequate, necessary and proportionate character of a restriction, similar to the analysis conducted by the CJEU.

**2.1.3** The French concept of *État de droit* is comparable to the rule of law.<sup>49</sup> It is firmly grounded in Art. 16 of the Declaration of the Rights of Man and of the Citizen, which provides that ‘any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution’.

Since the Declaration of the Rights of Man and of the Citizen, dating from 1789, was incomplete, its Art. 16 became the basis for important evolutions. This was particularly true for the right to a fair trial and the procedural safeguards deriving from it, which the Constitutional Council found to be implicitly guaranteed by Art.

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<sup>48</sup> As translated on the Constitutional Council’s website. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html>.

<sup>49</sup> For a comparative analysis, cf. Heuschling 2002.



16.<sup>50</sup> This firmly established case law confirms the strong link between the concept of *État de droit* and the notion of *justiciabilité* or access to courts.

Laws come into force on the condition of their prior publication. Article 34 of the Constitution determines the matters that can only be regulated by statute, including the imposition of obligations, administrative charges or penalties and criminal punishments. While matters that are not included in the list set out in Art. 34 fall, according to Art. 37 of the Constitution, into the domain of regulations, the Constitutional Council sanctions cases of *incompétence négative*, that is, the failure of the legislative power to fully respect its competence as determined by Art. 34 by failing to provide sufficient guarantees to ensure the respect of individual rights.

The granting of constitutional rank to legal certainty has evolved implicitly through case law, as the Constitutional Council has progressively recognised derivatives of the principle of legal certainty: it has consecrated the principle of clarity and intelligibility of statutes,<sup>51</sup> promoted codification as a tool for the rationalisation of legislation and censured non-normative provisions.<sup>52</sup> Although the principle of non-retroactivity is a constitutional principle, there have been some problems in fully guaranteeing its effectiveness, especially concerning tax law. While the Constitutional Council does allow some limitations of the principle of non-retroactivity, a sufficient general interest is required to validate a retroactive provision. Furthermore, the French legislative power has sometimes tried to discard case law that it does not agree with by passing so-called validation laws, basically stating that an interpretation given by a judge has been erroneous. The Constitutional Council has accepted these laws on six conditions: (i) respect of the principle of separation of powers and *res judicata*; (ii) respect of the right to an effective remedy; (iii) respect of the principle of non-retroactivity of criminal sanctions; (iv) existence of a sufficient general interest or a constitutional obligation; (v) the validation law cannot be based on an unconstitutional law; and, finally (vi) rigorous definition of its scope.<sup>53</sup> Since the *Zielinski* case before the ECtHR sanctioned this French practice,<sup>54</sup> the Constitutional Council has applied a stricter control oriented towards legal certainty and the guarantee of fundamental rights.<sup>55</sup>

<sup>50</sup> Constitutional Council, 20 January 2005, *Loi relative aux compétences du tribunal d'instance, de la juridiction de proximité et du tribunal de grande instance*, Decision No. 2004-510 DC.

<sup>51</sup> Constitutional Council, 12 January 2002, *Loi de modernisation sociale*, Decision No. 2001-455 DC.

<sup>52</sup> Constitutional Council, 29 July 2004, *Loi organique relative à l'autonomie financière des collectivités territoriales*, Decision No. 2004-500 DC.

<sup>53</sup> Cf., *inter alia*, Constitutional Council, 21 December 1999, *Loi de financement de la sécurité sociale pour 2000*, Decision No. 99-422 DC.

<sup>54</sup> *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.

<sup>55</sup> Valembos 2005.

## 2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

**2.2.1** We have not found any relevant national case law on this issue. No preliminary ruling dealing with the balancing of fundamental rights with economic free movement rights has been sent to the ECJ by French courts. Nevertheless, it is entirely possible that this will happen in the near future.

Having said that, there is no doubt that such a balancing has raised constitutional issues. Over the years, the Court of Justice has faced several doctrinal criticisms that its rulings give prominence to economic aspects, which needless to say are inherent in the European construction, over fundamental rights. These assertions may not necessarily result from a permanent fanatical dogma of the CJEU, but rather from a case by case analysis. The reasoning of the CJEU, developed in *Schmidberger*,<sup>56</sup> is eloquent in this respect. In this case, the Court of Justice stated that the rights in question, the free movement of goods on the one hand and the right to demonstrate on the other hand, allow restrictions where these are justified. Thus, it has been noted that ‘as the rights at stake were derogable, the Court of Justice considered this as an opportunity to use the balance of interests technique and to check the respect of an appropriate balance between them’ in order to know if ‘an overriding requirement of protection of fundamental rights [is able to] justify restrictions imposed on the exercise of a fundamental freedom guaranteed by the Treaty’.<sup>57</sup> Such was the case here, which leads us to believe that the Court of Justice would listen to demands for an effective consideration of fundamental rights when faced with requirements resulting from the enjoyment of basic freedoms. However, another commentator has added certain nuances to this, since ‘it is reasonable to think that if the demonstration had been banned by the Austrian authorities on grounds of the respect of the principle of free movement of goods, the Court of Justice would have been sensitive to assessments made by the national authorities’.<sup>58</sup> More broadly, and as Professor Marguénaud has clearly stated, it is up to the Court of Justice to establish, in the light of the special circumstances of each case, the right balance between the interests in issue.<sup>59</sup>

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<sup>56</sup> Case C-112/00 *Schmidberger* [2003] ECR I-05659.

<sup>57</sup> Rigaux and Simon 2003, p. 16 (as translated by the authors).

<sup>58</sup> Belorgey and al. 2003, pp. 2150–2151 (as translated by the authors).

<sup>59</sup> Marguénaud 2003, pp. 773–774.

## 2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

### 2.3.1 *The Presumption of Innocence*

**2.3.1.1** There has been no substantial debate in France concerning the presumption of innocence and the European Arrest Warrant. The departure from the classical extradition procedure certainly implies a departure from a political to a judicial reasoning based on the principle of mutual trust, and thus to an increased tendency to accept arrest warrants. However, as we will explain in the next section, the Court of Cassation has also provided for the possibility to refuse to abide by an arrest warrant if there is a threat to the individual's rights.

**2.3.1.2** In general, according to the principle of mutual recognition enshrined in the EAW Framework Decision, judicial review is minimal.<sup>60</sup> However, the Court of Cassation decided to provide for an additional guarantee when it declared that arrest warrants would be refused if the fundamental rights of the individual or the fundamental principles of Art. 6 TEU were violated.<sup>61</sup>

It should be noted, however, that the arguments of the applicant would have to be substantial, since simple allegations would be rejected. Furthermore, a judge's grounds for refusing the execution of an EAW could be strictly controlled by the Court of Cassation and should therefore be well developed. This can be illustrated by the case law of the criminal chamber, which censured the decision of an appellate court that had refused to surrender an individual prosecuted by Belgium unless its authorities guaranteed that he would be offered psychiatric care, a condition that is not included in the Framework Decision.<sup>62</sup>

### 2.3.2 *Nullum crimen, nulla poena sine lege*

**2.3.2.1** French judicial authorities as well as legal commentary have been particularly sensitive to the risk of a politicisation of certain types of offences. Indeed, a specific provision regarding the EAW had to be included in Art. 88-2 of the Constitution, worded as follows: 'Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions of the European Union.'<sup>63</sup> This is due to the fact that one of the 'fundamental principles recognised

<sup>60</sup> Chavent-Leclere 2010, p. 33.

<sup>61</sup> Thellier de Poncheville 2013 p. 292.

<sup>62</sup> Court of Cassation, criminal chamber, 28 February 2012 – AJ pénal 2012. 425.

<sup>63</sup> As translated on the Constitutional Council's website. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleXV>.

by the laws of the Republic' prohibits extradition on political grounds, a condition that is not included in the EAW Framework Decision, which has therefore been criticised by the Council of State.<sup>64</sup> Thus, there is indeed a risk that individuals prosecuted on political grounds will be extradited, which should be carefully monitored. To fully guarantee the respect of mutual recognition while at the same time substantially relying on this principle, the offences should be determined more precisely to ensure a uniform approach to the European arrest warrant.

### **2.3.3 Fair Trial and *In Absentia* Judgments**

**2.3.3.1** After the finding of a breach of Arts. 6(1) and 6(3)c) of the European Convention on Human Rights (ECHR) by the European Court of Human Rights in the *Krombach* case,<sup>65</sup> France replaced its legislation on *in absentia* judgments with a more suitable procedure in the Perben II law of 9 March 2004.

Concerning the execution of a European Arrest Warrant by French authorities in the case of an *in absentia* judgment, recent case law stresses the vigilance of the Court of Cassation. Indeed, in one case an individual had been condemned in Florence to seven years in prison for a drug-related offence.<sup>66</sup> The accused had not been present at the trial because he had not been properly notified of the date and place of the hearing. The Italian authorities issued an EAW for the execution of the sanction, and assured that Italian criminal procedure would allow for the applicant to request a new trial. Although the applicant asserted that the possibility of a retrial was uncertain, the Court of Cassation confirmed the decision of the appellate court to execute the arrest warrant. Thus, the arguments of the applicant were examined seriously and the principle of mutual recognition came into play only after the Italian authorities had provided additional information.

### **2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad**

**2.3.4.1** In France, individuals subject to an EAW can benefit from a state-appointed lawyer to challenge the warrant in court. We suggest that legal aid should be available in the state that receives the arrest warrant as well as the state to which the person risks being extradited.

**2.3.4.2** To date we have not been able to gather sufficient statistical data on extraditions.

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<sup>64</sup> Council of State, 26 September 2002, advisory opinion No. 368-282.

<sup>65</sup> *Krombach v. France*, no. 29731/96, ECHR 2001-II.

<sup>66</sup> Court of Cassation, criminal chamber, 15 October 2013 – AJ pénal 2014. 193.

### **2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters**

**2.3.5.1** There have been no similar constitutional issues regarding the principle of mutual recognition.

**2.3.5.2** There has been no thorough debate about a generalisation of the *Cassis de Dijon* principle of mutual recognition to criminal law and civil and commercial disputes. However, as the European Arrest Warrant as well as the mechanism of the Dublin Convention show, the principle of mutual recognition is at the centre of the new areas of EU law. This expansion, although a necessary step for further collaboration, cannot exclusively be met with enthusiasm. Indeed, NGO reports on matters such as the incarceration of asylum seekers and the state of detention facilities in other Member States clearly show that focusing exclusively on mutual recognition is not an adequate response to every scenario. Thus, before the principle of mutual recognition can be generalised, there would first need to be a thorough evaluation of the prevailing standards in all Member States, as well as regular screenings and an alert mechanism in case of a degradation of the relevant standards regarding criminal law and civil and commercial disputes. Member States should also have the right to refuse to respect or to suspend the principle of mutual recognition where there are sufficient grounds to do so (for example on the basis of NGO reports or case law regarding prevailing conditions in prisons or juridical proceedings).

**2.3.5.3** In our opinion, the principle of mutual recognition certainly risks transforming the role of the judge into a more passive one. However, this transformation is not inevitable and should in any case not be easily accepted by the judges themselves. Continuous attention to NGO reports, requests for additional information by local authorities as well as the definition of general standards regarding the effective respect of human rights in the other Member States should ensure that loyal cooperation does not trump the protection of fundamental rights.

**2.3.5.4** Although there have been no specific discussions about reintroducing national judicial review, the ability to refuse to surrender an individual on the grounds of a possible human rights violation should be included in the concept of the right to a fair trial.

### **2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law**

One particularly important case regarding the right to an effective remedy has been widely discussed in France.<sup>67</sup> Jeremy F., a teacher who was criminally charged for

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<sup>67</sup> See also Burgorgue-Larsen and Bruck 2014.

child abduction after leaving the UK with an underage student, was the subject of a European arrest warrant addressed to the French authorities. Furthermore, the British authorities sought consent to surrender also with regard to new criminal proceedings for acts of sexual activity with a child under the age of 16. Although Arts. 27 and 28 of the EAW Framework Decision provide for a maximum period of 30 days to reply to an EAW, there were no precise rules as to the possibility of a suspensive appeal. Pursuant to Art. 88-2 of the Constitution, the Constitutional Council held that it had to determine whether the Framework Decision precluded national authorities from providing for such an appeal before addressing constitutional issues. The Grand Chamber of the CJEU<sup>68</sup> heard the case under the urgent preliminary ruling procedure and held that the wording of the Framework Decision did not preclude Member States from providing for a right to appeal. However, it also stated that ‘to ensure the consistent application and interpretation of the Framework Decision, any appeal with suspensive effect provided for by the national legislation of a Member State ... must, in any event, comply with the time-limits laid down in Art. 17 of the Framework Decision for making a final decision.’<sup>69</sup> Thus, the judgment of the CJEU hinted at practical difficulties that the Constitutional Council failed to address in its request for a preliminary ruling. The Constitutional Council concluded that the absence of any right of appeal in the given context was unconstitutional.<sup>70</sup>

The case was immediately praised as an example for judicial dialogue. As a first gesture of judicial cooperation, this approach of the Constitutional Council must indeed be welcomed, as opposed to its usual refusal to go beyond a defensive attitude insisting on respect of the French constitutional identity.

However, one cannot but notice the limited consequences of the Constitutional Council’s request for a preliminary ruling for the evolution of judicial dialogue as well as for substantive EU law fostering human rights guarantees. First, the President of the Constitutional Council insisted on the very specific basis of the decision, i.e. Art. 88-2 of the French Constitution.<sup>71</sup> In no way does the approach in *Jeremy F.* guarantee a more proactive use of Art. 267 TFEU in any other context than the EAW.<sup>72</sup> Furthermore, the CJEU only accepted the request for the urgent procedure in light of the personal situation of *Jeremy F.*,<sup>73</sup> not because of the delays imposed on the Constitutional Council. Finally, although the brief period imposed on judicial authorities to take a decision makes it virtually impossible to provide for an appeal, the Constitutional Council purposely refused to question the validity of this EU provision. This restraint can be explained by the fact that the Constitutional

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<sup>68</sup> Case C-168/13 PPU *F.* [2013] ECLI:EU:C:2013:358.

<sup>69</sup> *Ibid.*, para. 74.

<sup>70</sup> Constitutional Council, 14 June 2013, *Jérémy F.*, Decision No. 2013-314 QPC.

<sup>71</sup> Debré 2013, p. 5.

<sup>72</sup> Except perhaps for cases relating to the Constitutional Council’s aforementioned competence as an electoral judge.

<sup>73</sup> Case C-168/13 PPU *F.* *supra* n. 68, paras. 29–32.

Council does not consider itself as a judge concerned by Art. 267 TFEU.<sup>74</sup> It takes more than just one preliminary reference to participate in a constructive dialogue.

## 2.4 The EU Data Retention Directive

**2.4.1** In France, the constitutionality of Directive 2006/24<sup>75</sup> has not been challenged before the Constitutional Council. The Directive had to be implemented into national law by no later than 15 September 2007; for certain aspects the transposition deadline was extended until 15 March 2009. For once, France did not take long to transpose the directive. It has been noted that ‘the reason is that France still has a national legislative package dealing with data retention; the publication of the decree of 24 March 2006 is to be seen as a continued development’.<sup>76</sup> Thus, in France, Directive 2004/26 was transposed by decree. For this reason an action against the decree – a *recours pour excès de pouvoir* – was brought before the Council of State. In its ruling, delivered under the ambit of the Directive amongst other rules, the Council of State rejected the claims. The applicants notably relied on the principle of *nullum crimen, nulla poena sine lege*, and on a disproportionate interference with the right to privacy. As regards the first ground, the Council of State stated that

the duty to keep traffic data is based on precise rules, which deliberately exclude the retention of information on the content of communications exchanged; the decree distinguishes in a sufficiently clear and precise manner the categories of data which have to be stored, and those which have to be erased or made anonymous.

As regards the second ground, the Council of State stated that ‘the challenged decree does not affect the right to privacy in a manner that is disproportionate to the public security objectives pursued and does not consequently infringe the provisions of Art. 8 of the European Convention on Human Rights’.<sup>77</sup>

It is difficult to clearly know what the position of the Constitutional Council would have been in a purely domestic context without the constraints of the EU legal order. It should be noted that in a domestic context, such national measure would be in the form of a statute, which would likely be challenged before the constitutional judge, who would check its conformity with the Constitution. A decision of the Constitutional Council of 22 March 2012 may hint at a likely

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<sup>74</sup> Debré 2013, p. 5.

<sup>75</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

<sup>76</sup> Lorrain and Mathias 2006, p. 36 (as translated by the authors).

<sup>77</sup> Council of State, 7 August 2007, *Association des fournisseurs d'accès et de services internet*, No. 293774 (as translated by the authors).

solution. In this particular case, the constitutional judge was asked to check the constitutionality of the Identity Protection Act. Two provisions were challenged from the viewpoint of the right to respect for private life. Under the first provision, the Act provided for the establishment of a database containing personal data in order to facilitate the collection and conservation of data required for the issuing of French passports and national identity cards. The second challenge provision of the Act enabled officers from the national police departments to gain access to the database for the purpose of preventing or punishing several offences, such as acts of terrorism. The reasoning followed by the Constitutional Council is interesting to the extent that it echoes the reasoning used by the Court of Justice in its *Digital Rights Ireland and Seitlinger* ruling.<sup>78</sup> In the view of the Constitutional Council, ‘the collection, registration, conservation, consultation and communication of personal data must be justified on grounds of general interest and implemented in an adequate manner, proportionate to this objective’. Having said that, the constitutional judge stated that the establishment of a database containing personal data pursues a general interest, since it notably improves the efficiency of the fight against fraud. However, ‘having regard to the nature of the data registered, the scope of this processing, its technical characteristics and the conditions under which it may be consulted, the provisions [under review] violate the right to respect for privacy in a manner which cannot be regarded as proportionate to the goal pursued’.<sup>79</sup> As a consequence, these provisions were ruled unconstitutional.

If we go back to the premise of a specific national measure dealing with the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the right to respect for private life, the right to freedom of expression and possibly the right to presumption of innocence could be raised by applicants. The constitutional judge could effectively protect these constitutional requirements.

However, we cannot fully guarantee that the approach adopted by the constitutional judge would be followed as such in this hypothetical case. Indeed, some decisions of the Constitutional Council are open to criticism with regard to the protection of human rights and freedoms. In this respect, the police custody saga serves as an example. Indeed, the constitutional judge declared some important challenged provisions to be unconstitutional, yet simultaneously stated that its finding of unconstitutionality would only take effect one year later.<sup>80</sup> This had not been the position adopted by the Court of Cassation.<sup>81</sup> Thus it can be said that the Constitutional Council, unlike some of its European counterparts, frequently exercises excessive judicial restraint.

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<sup>78</sup> Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger* [2014] ECLI:EU:C:2014:238.

<sup>79</sup> Constitutional Council, 22 March 2012, *Loi relative à la protection de l'identité*, Decision No. 2012-652 DC.

<sup>80</sup> Constitutional Council, 30 July 2010, *M. Daniel W*, Decision No. 2010-14/22 QPC.

<sup>81</sup> Court of Cassation, 15 April 2011, No. 10-30316; 10-30242; 10-17049.



In any case, it is not unreasonable to think that if the French constitutional judge were to check the constitutionality of such a national measure, the judge would without much difficulty conclude that a legitimate general interest exists, but that some provisions cannot be regarded as proportionate to the goal pursued. It would remain to be seen whether this finding of unconstitutionality would take effect immediately or at a later time.

Finally, there are grounds to question whether all French legislation respects EU law, since the Directive has been declared invalid by the CJEU. In a communication, the French Data Protection Authority (CNIL) stated that ‘competent authorities have to examine in full detail the impact of the ruling of the CJEU on national law’.<sup>82</sup> In any event, the French legislation is fragile, for example because it provides for a blanket rule on the retention of data.

## 2.5 *Unpublished or Secret Legislation*

**2.5.1** It is worth noting that the CJEU ruling on *Heinrich* did not lead to controversial discussions within French legal doctrine.<sup>83</sup> This may be explained by the fact that the solution proposed by the Court of Justice in this case is not that different from the French practice on this matter. As Dupont-Lassalle has stated, ‘the failure to publish an act makes it unenforceable. This is the traditional approach in the case law of the French Council of State’.<sup>84</sup> The Council of State, in a decision delivered on 24 February 1999, confirmed this analysis:

In the absence of a decision by the government which prescribes the immediate application of the order, the publication of the act in the Official Journal of 30 November 1996 could not have brought about its entry into force by 30 November 1996 at noon. However, the measures envisaged by this order had also been made public on 29 November 1996 by a *communiqué*. In the circumstances in question, both in view of the urgent nature of the measures and of their subject, this type of publication made them immediately enforceable.<sup>85</sup>

More broadly, as Bobek has stated, in France ‘the publication of legislation is a condition for its enforceability, but not for its validity’. According to Bobek,

[t]he condition for the validity of an act is its promulgation by the President of the Republic, not its publication. The publication is just a necessary condition for the latter imposition of an obligation on the individual on the basis of the act (*opposabilité*). Even if not published

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<sup>82</sup> CNIL, ‘La directive 2006/24/CE contraire aux articles 7 et 8 de la Charte des droits fondamentaux de l’Union européenne’, 18 avril 2014, available at: <http://www.cnil.fr/nc/linstitution/actualite/article/article/la-directive-200624ce-contre-aux-articles-7-et-8-de-la-charte-des-droits-fondamentaux-de-lun/> (as translated by the authors).

<sup>83</sup> Case C-345/06 *Heinrich* [2009] ECR I-01659.

<sup>84</sup> Lassalle 2009, p. 11 (as translated by the authors).

<sup>85</sup> Council of State, 24 February 1999, *Alain X*, No. 188154 (as translated by the authors).

in the *Journal Officiel*, the act is valid by virtue of its promulgation. It is binding upon the public administration and administrative acts adopted on its basis are lawful, although they cannot be enforced against an individual (*ne sont pas opposables*).<sup>86</sup>

## **2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality***

**2.6.1** We have not found any relevant case law with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality in France in relation to EU measures.

## **2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State***

**2.7.1–2.7.2** In France, the ratification of the Treaty establishing the European Stability Mechanism (ESM Treaty) has been less controversial than in other states. A bill was presented to the National Assembly on 8 February 2012 by the Government, which had opted for an accelerated procedure. The bill stresses that ‘this Treaty does not affect the essential conditions for the exercise of national sovereignty: it does not lead to transfer of competences and does not limit the sovereignty of Member States’.<sup>87</sup> The discussion held before the parliamentary bodies, particularly before the National Assembly, has been rightly qualified as ‘heated’.<sup>88</sup> Members of Parliament (MPs) mainly debated the necessity of the Treaty, as opposed to the financial implications at stake, which were largely ignored. A handful of MPs of the extreme left expressed their concerns to the National Assembly about an unacceptable questioning of national sovereignty and a democratic regression,<sup>89</sup> without this being discussed further. A motion to reject the Treaty was refused by a large majority. Ultimately, an overwhelming majority passed the bill both in the National Assembly and the Senate.

Some developments regarding the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union can be mentioned insofar as this Treaty was brought in front of the Constitutional Council

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<sup>86</sup> Bobek 2009, pp. 2081–2082.

<sup>87</sup> Draft law authorising ratification of the Treaty establishing the European Stability Mechanism, No. 4336, available at: <http://www.assemblee-nationale.fr/13/projets/pl4336.asp>.

<sup>88</sup> Demunck 2012 (as translated by the authors).

<sup>89</sup> To that effect, see the statements of both Mr. Brard and Mr. Lecoq in the course of the discussion in open session held on 12 February 2014 available at: <http://www.assemblee-nationale.fr/13/cr/2011-2012/20120133.asp>.

before the relevant law was drafted. In a decision of 9 August 2012, the constitutional judge, seized by the President of the Republic, stated that the ratification of the Treaty did not necessitate a constitutional amendment.<sup>90</sup> Two points deserve to be highlighted. On the one hand, as regards the rules on balanced public finances, the Constitutional Council indicated that respect of the rules on budgetary discipline did not affect the essential conditions for the exercise of national sovereignty – especially since France already had the duty to respect such rules by virtue of the Treaty of Maastricht. On the other hand, as regards the application in national law of the rules on balanced public finances, the Constitutional Council examined the option laid down in Art. 3(2) of the Treaty on Stability, Coordination and Governance, according to which these rules shall come into force ‘through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes’. The foregoing shows two diametrically opposed consequences as to the need to amend the Constitution: in the first case an amendment of the Constitution is necessary; in the second case, it is not required.<sup>91</sup>

**2.7.3** France has not been subject to a bailout and austerity programme.

## **2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review**

**2.8.1** Based on the data available in French official sources, it has not been possible for us to identify the number of cases in which applicants have requested a preliminary ruling with regard to the validity of an EU measure since 2001. From 2006 to the time of writing in January 2015, thirteen preliminary rulings on validity have been sent to the CJEU by French courts. Among these, two cases have been struck off the register of the Court of Justice.<sup>92</sup> In one case the CJEU held that the action was manifestly inadmissible,<sup>93</sup> and in a further case the CJEU found that it clearly did not have jurisdiction to reply to the questions referred by the *Prud'homie de pêche* of Martigues.<sup>94</sup> Nevertheless, it should be noted that the validity of a Directive was questioned in four cases,<sup>95</sup> the validity of a Regulation

<sup>90</sup> Constitutional Council, 9 August 2012, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*, Decision No. 2012-653 DC.

<sup>91</sup> For more information on this ruling, see Oliva 2012; Roux 2012; Levade 2012.

<sup>92</sup> Joined cases C-411/09 to C-420/09 *Tereos* [2010] ECLI:EU:C:2010:156, and Case C-618/12 *Société Reggiani* [2013] ECLI:EU:C:2013:211.

<sup>93</sup> Case C-368/12 *Adiamix* [2013] ECLI:EU:C:2013:257.

<sup>94</sup> Case C-109/07 *Pilato* [2008] ECR I-03503.

<sup>95</sup> Case C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-09895; Case C-59/11 *Association Kokopelli* [2012] ECLI:EU:C:2012:447; Case C-618/12 *Société Reggiani* [2013] ECLI:EU:C:2013:211; Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

was questioned in six,<sup>96</sup> and the validity of a Decision of the European Commission was questioned in three of the cases from this period.<sup>97</sup> It is important to first highlight that only one reference regarding validity was truly initiated by an individual<sup>98</sup> and secondly, that only one EU measure, namely a decision of the European Commission, has been declared invalid by the CJEU. Of the thirteen preliminary rulings on validity identified, two merit particular attention.

First, in *Arcelor*, Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community<sup>99</sup> was under challenge. Although the preliminary ruling of the Council of State did not have the effect of declaring Directive 2003/87 invalid, it is noteworthy that the equal treatment principle was involved.<sup>100</sup> In this particular case, a company seized the Council of State for annulment of the decree transposing the Directive. Pursuant to the decree, the scheme for greenhouse gas emission allowance trading was applicable to installations in the steel sector, but not to aluminium and plastic companies. The Council of State referred a question on validity on the grounds of the equal treatment principle to the Court of Justice for a preliminary ruling. As Professor Simon has explained, ‘the difficulty lay in the fact that in EU law, the general principle of equality of treatment includes the prohibition of different treatment in identical situations and of an identical approach to different situations, whereas the French principle, as interpreted on the basis of the relevant constitutional provisions, does not preclude an identical approach to different situations’.<sup>101</sup> This was unproblematic. The Court of Justice simply noted in this regard that ‘the reference for a preliminary ruling therefore relates solely to the question whether the Community legislature breached that principle by applying unjustifiable different treatment to comparable situations’.<sup>102</sup> In response to the preliminary ruling, the CJEU first noted that steel, aluminium and plastic companies faced similar situations and, secondly, that the difference of treatment between them is likely to involve a disadvantage for steel companies. However, the Court of Justice found that this difference of treatment can be justified. Thus, ‘by opting, at least in the initial phase, for a sector-specific

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<sup>96</sup> Case C-109/07 *Pilato* [2008] ECR I-03503; Case C-466/06 *Société Roquette Frères* [2008] ECR I-00140; Joined cases C-175/07 to C-184/07 *SAFBA* [2008] ECR I-00142; Joined cases C-362/07 and 363/07 *Kip Europe* [2008] ECR I-09489; Joined cases C-411/09 to C-420/09 *Tereos* [2010] ECLI:EU:C:2010:156; Case C-348/11 *Thomson Sales Europe* [2012] ECLI:EU:C:2012:169.

<sup>97</sup> Case C-333/07 *Regie Networks* [2008] ECR I-10807; Case C-368/12 *Adiamix* [2013] ECLI:EU:C:2013:257; Case C-202/14 *Adiamix SAS* [2014] ECLI:EU:C:2014:2420.

<sup>98</sup> Case C-109/07 *Pilato* [2008] ECR I-03503.

<sup>99</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32.

<sup>100</sup> Council of State, 8 February 2007, *Société Arcelor Atlantique et Lorraine*, No. 287110.

<sup>101</sup> Simon 2009, p. 14 (as translated by the authors).

<sup>102</sup> Case C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-09895.

differentiation ... the Directive has not breached the principle of equal treatment guaranteed as a general principle of Community law'.<sup>103</sup>

Lastly, the preliminary ruling sent by the Administrative Court of Appeal of Lyon<sup>104</sup> deserves mention with regard to the result reached. In this particular case, the applicant company claimed a refund of sums it had paid under the heading of a tax levied in order to finance an aid scheme in favour of local radio stations. The applicant company alleged that the decision of the European Commission (State aid No N 679/97 – France), in which the Commission decided not to raise any objections against this aid scheme, was invalid. Seized of this issue, the Court of Justice stated that the tax under examination formed an integral part of the aid scheme which that charge was intended to finance.<sup>105</sup> As a consequence, the contested decision was invalid.<sup>106</sup>

**2.8.2** As we have previously explained, the French Constitutional Council is not known for a particularly activist approach. However, we still think that a number of cases – challenging the EU Returns Directive<sup>107</sup> and the Dublin Regulation<sup>108</sup> – show a certain reluctance by the CJEU to fully play its role as a guardian of fundamental rights. This is especially true for the naïveté with which the Court of Justice appears to ignore the practical impact of directives, and validates them based on a general reference to the respect of fundamental rights. Instead, the Court of Justice could adopt a strategy similar to the doctrine of *incompétence négative* in French law, that is, it should sanction the EU legislator for failure to provide for sufficient guarantees for the protection of fundamental rights in order to ensure that the application of a directive or regulation and of the principle of mutual recognition respects the Charter of Fundamental Rights.

**2.8.3** As we have previously stated, French judges are not known for a particularly vigorous approach to fundamental rights protection, unlike some of their European counterparts. However, there are some unique instruments, such as the ‘fundamental principles recognised by the laws of the Republic’ that are welcome signs of a will to guarantee rights corresponding to core values. Furthermore, the administrative jurisdiction, which is also an advisor to the executive, is stereotypically considered to be more deferential than the judiciary. Indeed, Art. 66 of the Constitution only mentions the judicial authority as the guarantor of fundamental

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<sup>103</sup> Simon 2009, p. 15.

<sup>104</sup> Administrative Appeal Court of Lyon, 12 July 2007, *Régie Networks*, No. 06LY01447.

<sup>105</sup> Case C-333/07 *Régie Networks* [2008] ECR I-10807.

<sup>106</sup> *Idot* 2009, pp. 37–38.

<sup>107</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

<sup>108</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31.

rights. In the end, although there are sometimes divergent approaches due to jurisdictional dualism, there is no solid scientific data by which to measure the degree of vigour or deference of either one of these judges.

**2.8.4** We refer to our previous explanations concerning the primacy of EU law as well as the various human rights requirements established in French case law.

**2.8.5** Although the standard of review practised by the Constitutional Council is not particularly progressive and can at times, especially concerning fundamental rights, be rather deferential, the general standard of review by the CJEU still has to be criticised. Indeed, the fairly low level of national judicial review, combined with the presumption of equivalence established by the *Bosphorus* judgment of the ECtHR, result in a clear gap in judicial review. The review of the CJEU should fully honour its role as a guardian of the respect of human rights, an approach that should be combined with a non-deferential control by the ECtHR once the accession of the EU to the ECHR is completed.

**2.8.6** A judgment delivered by the Council of State has provided some clarification on the issue of equality.<sup>109</sup> In the case in question, a decree of 1980 exclusively granted charge of all restoration work on classified monuments to the chief architects of historical monuments. France, warned by the European Commission of the lack of compliance of this provision with the freedom of movement, had to re-examine its position in a decree of 28 September 2008. The decree provided that restoration works on classified monuments belonging to public law persons other than the state or private persons could be carried out by architects from other Member States. In doing so, however, this provision excluded architects established in France. The Council of State found in favour of the applicant with a historical handling of the equal treatment principle, by which it pointed out that the difference in treatment had nothing to do with the purpose of the decree, and that there were no general interest reasons to justify it.<sup>110</sup> It has been commented that, with the annulment of this provision on the basis of the equal treatment principle,

the Council of State has drawn the necessary conclusions from the gradual shift of the Court of Justice towards a reduction of purely internal situations and towards the suggestion sent to the national courts to impose sanctions in cases of reverse discrimination pursuant to the equal treatment principle as enshrined in the national constitutional or administrative law.<sup>111</sup>

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<sup>109</sup> Council of State, 6 October 2008, *Compagnie des architectes en chef des monuments historiques*, No. 310146.

<sup>110</sup> Iliopoulou and Jauréguiberry 2009, pp. 132–144.

<sup>111</sup> Simon 2008, p. 1 (as translated by the authors).

## 2.9 *Other Constitutional Rights and Principles*

**2.9.1** Two points should be stressed. First, use by the Government of the procedure of delegated legislation in order to implement directives in due time has to be mentioned. This procedure, which is provided for by Art. 38 of the French Constitution, is an exception to the provisions of Art. 34. It empowers the Government to ‘ask Parliament for the authorization, for a limited period, to take measures by ordinance that are normally the preserve of statute law’. Ordinances ‘shall come into force upon publication’, but Parliament is not totally bypassed since the ordinances ‘shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act’. Secondly, directives may also be implemented by decree. This was the case, for example, with transposition of the EU Data Retention Directive 2006/24. While transposition of such a Directive by decree may, at first sight, seem misguided in view of the distinction drawn by the French Constitution between matters that fall under Arts. 34 and 37 of the Constitution (regulating matters that can only be dealt with by parliamentary statute), this choice is easily understood if one takes into account the fact that France already had a body of national legislation on the matter before the transposition (see Sect. 2.4). Therefore, the Directive was perceived not as an act imposing a duty to create legislation *ex nihilo*, but as a means to specify existing legislation.

## 2.10 *Common Constitutional Traditions*

**2.10.1** There has indeed been ‘a shift away from the national to the European context’. However, we believe that the ‘European consensus’ approach of the ECtHR is different due to the underlying conceptualisation of both legal systems. Indeed, the case law describing the EU as an autonomous legal order, integrated in the legal orders of the Member States, leads the way for the logical consequences in terms of the choice of the relevant ‘common constitutional traditions’. As the CJEU has stated in its *Internationale Handelsgesellschaft* judgment, ‘the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community’.<sup>112</sup> This clearly explains the reason for the shift from the national to the European context. In our opinion, the cardinal features of the common constitutional traditions are already enshrined in the Charter of Fundamental Rights of the EU (Charter). The next step is for the CJEU to develop them in dialogue with national judges. However, in the context of EU law, the highest possible level of protection is not a question of common constitutional traditions, but rather of a stricter and more progressive judicial review by the CJEU. The reaction of the

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<sup>112</sup> Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 01125, para. 4.

CJEU in the Data Retention case shows that it is perfectly capable of defending fundamental rights by referring solely to the Charter.

**2.10.2** We do not agree that there is insufficient comparative law analysis, especially since the research division of the CJEU frequently accomplishes this task. Rather, as previously explained, the CJEU simply chooses the standards it deems most appropriate for the EU legal order. In order to achieve a clear shift to higher standards of fundamental rights protection, the CJEU needs to fully understand its role in a post-Charter era and conceive this role as essential to an integration process that has ceased to be purely economic in nature.

## ***2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards***

**2.11.1** Although there have been no specific national cases regarding Art. 53 of the Charter, the *Melloni* judgment<sup>113</sup> in itself is reason enough to be critical of the approach of the CJEU. We believe there should be no opposition to stricter national standards, as well as tolerance towards *Solange* approaches by national judges in order to create a creative dynamic between the CJEU and national courts that will ultimately be beneficial to the protection of rights throughout the EU.

## ***2.12 Democratic Debate on Constitutional Rights and Values***

**2.12.1** Political debates on the European Arrest Warrant Framework Decision and on the EU Data Retention Directive were very limited, if not virtually nonexistent. The French situation thus unfortunately echoes the concerns of Fair Trials International.

According to the Council of State, a constitutional amendment was needed to introduce the EAW into French law. Based on the minutes of the proceedings in Parliament, it is apparent that the MPs preferred to simply follow the recommendations made by the Council of State, without engaging in a deeper discussion on constitutional rights. As the Robert Schuman Foundation has rightly stressed, this constitutional amendment ‘went largely unnoticed by the general public’.<sup>114</sup>

As mentioned above in Sect. 2.4, Directive 2006/24 was transposed into French law by decree, thereby denying Parliament of a potential democratic debate. Thus, one can hardly blame Parliament for its lack of activism. However, whenever

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<sup>113</sup> Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

<sup>114</sup> Boucher 2003 (as translated by the authors).



democratic review is possible, Parliament should not lose sight of its mandate to represent the People, and should not get involved in political squabbles. Democratic control is effective only if it is carried out conscientiously. Finally, some associations and authorities (such as the French Data Protection Authority) have an important warning role to play in supporting constitutional debate.

**2.12.2** In our opinion, concerns do not lie in the existence of room for democratic deliberation as such (even if for example the number of requests for a preliminary ruling on the validity of EU measures sent by French courts to the Court of Justice is low, or that democratic deliberations are poorly developed), but in the real effectiveness that such a space offers. On the one hand, we have already stressed that very few EU measures have been held to be invalid by the CJEU (see Sect. 2.8.1). On the other hand, although regrettable, this can be explained by the requirements for the immediate implementation of EU measures, and for uniformity in implementation. Without a relative elasticity of these two requirements, any room for deliberation cannot be used beneficially.

**2.12.3** In principle, we are supportive of a recommendation to suspend the application and carry out a review of EU measures, where important constitutional issues have been identified by a number of constitutional courts. Special attention should, however, be given to the conditions under which this could be applied.

First of all, there should be the requirement of an appropriate number of constitutional courts that raise a constitutional issue for an EU measure to be suspended, in order to avoid excessive threats of suspension but also the risk of the mechanism remaining inefficient if too many courts are required for a veto.

Another question to be addressed is whether suspension would have to be automatic once the necessary number of constitutional courts were involved. In our opinion, this would be unwise. It would also require consideration as to which institution, the European Commission or the Council, would have the right to initiate suspension, or if they would share this right.

In considering such a proposal, an important point to be discussed is whether the review of the EU measure would be a political review in the hands of the European Commission and the Council, or a judicial review before the Court of Justice. This second option would be preferable.

Finally, an intelligent coordination between this mechanism and the preliminary ruling procedure must be ensured, without diminishing the efficiency of the latter, which provides a direct, effective and essential dialogue between the national judge and the Court of Justice.

On the question of defences, if one bears in mind that the EU has an obligation to respect national and constitutional identities, the Commission should take a finding of unconstitutionality by a constitutional court into account as a valid defence. However, such a possibility would have to be subject to all necessary precautions so as to curb potential abuse.

It is up to the European Commission to assess which defences may justify failure to implement a directive, and the Commission should therefore elaborate an explicit

analysis grid for this purpose. This analysis grid could in particular allow the European Commission:

- to identify reasons for suspension. The consequence of this would be a distinction between minor and essential issues;
- to determine the position of the competent authorities following a declaration of unconstitutionality in order to respect their European obligations;
- to check whether the respective constitutional court has used the preliminary ruling procedure in order to reconcile the requirements of EU law and of the national constitution.

It follows from the above that the European Commission should take a case-by-case approach instead of rejecting this defence consistently.

Finally, assuming that the European Commission would consider such defence to be valid, the defence should not exempt the Member State from its obligations, but should be taken into account in order to reduce the amount of any penalty imposed.

### **2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law***

**2.13.1** As previously explained, we do share concerns about the reduction in the standard of protection of constitutional rights, especially due to the unnecessary self-restraint on the part of the CJEU.

**2.13.2** There has indeed been a substantial and in our view unjustified reduction in the standard of protection of constitutional rights in the EU. However, this is certainly not an inevitable process but rather the consequence of an excessive focus on the autonomy of EU law, the integration process and the necessity of a uniform application of EU law provisions. A stricter control by the CJEU on matters related to fundamental rights as well as more dedicated national judges would help raise these standards.

Once the accession of the EU to the ECHR is completed, the *Bosphorus* presumption of equivalent protection should be abolished and a strict external control ensured. As we have previously noted, the CJEU should not only apply a stricter control but also engage in a dialogue with the national courts – which should also proactively question the interpretation or validity of relevant EU law provisions. Furthermore, national parliaments in collaboration with NGOs, national bodies for the protection of fundamental rights and ombudsmen should monitor the application of EU law and debate its impact on fundamental rights. We do not think that an EU Constitutional Tribunal will be necessary once the CJEU and the national courts engage in a dialectic dynamic that is not strictly focused on questions of primacy.

**2.13.3** We agree with the criticism of an overly reluctant Court of Justice that is mostly concerned with defending the primacy of EU law, at the expense of human rights protection. The Court should make an effort to take the national points of view into account. One example of such dialogue is the previously mentioned *Melki* case, in which the Court engaged in direct dialogue with national judicial authorities. However, national judges also have a role to play.

Indeed, when the French Constitutional Council had the chance to seize the CJEU for a preliminary ruling request in the *Jeremy F.* case (see Sect. 2.3.6), it limited its question to the interpretation of the relevant dispositions. Its role at a European level would have been more constructive if, like the Spanish Constitutional Tribunal in the *Melloni* case, it had questioned the validity of the provision and thus engaged in a dynamic dialogue with the Court of Justice. Other judges should follow the Spanish example and opt for EU-wide vigilance to guarantee the respect of fundamental rights.

In our opinion, it is crucial to foster dialogue between the CJEU and the national judges in order to properly address national constitutional concerns. However, no tool can replace the necessity for the Court of Justice to apply a stricter standard of judicial review of EU measures.

**2.13.4** As previously mentioned, national judges should be more proactive and question not only the interpretation but also the validity of EU law provisions and systematically address the CJEU in this regard, while other institutions should play their monitoring role more effectively and address difficulties encountered in the application of EU law provisions.

### **3 Constitutional Issues in Global Governance**

#### **3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties***

**3.1.1** All matters related to the international commitments of the French Republic (except its membership in the EU) are dealt with in Title VI of the Constitution. Article 52 provides that the competence to negotiate and ratify treaties lies with the President of the Republic, while emphasising that the President must be kept informed of all negotiations concerning treaties which do not need ratification. Although the competence of the French President is not exclusive, it should be noted that due to the particular configuration of the Fifth Republic, the influence of the President is predominant.<sup>115</sup>

However, as provided by Art. 53, the ratification of ‘peace treaties, trade agreements, treaties or agreements relating to international organization, those

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<sup>115</sup> Isidoro 2009, p. 1306.

committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament'. The Act of Parliament referred to in Art. 53 entails authorisation to ratify, but is in itself an authorisation to ratify rather than the act of ratification itself, which is adopted by the executive.<sup>116</sup>

Article 53§3 provides for a supplementary condition, which can be viewed as a limit to transfers of competence, i.e. the necessity of a referendum for any proposal to cede, exchange or acquire territory. Furthermore, Art. 53-1§2 provides that although France can conclude agreements in the area of asylum, these agreements cannot deprive the French authorities of their right to examine any asylum case, regardless of whether they have competence in virtue of the agreements. Thus, France cannot consent to an international agreement that would lead to a relinquishment of this competence. However, the most important limit is set out in Art. 54, which provides that in the case of a finding of unconstitutionality by the Constitutional Council, a treaty cannot be ratified unless the Constitution is amended. In practice, the solution commonly adopted is a revision of the Constitution.

There are no formal guidelines as to the values and principles that ought to be upheld by states when participating in international cooperation. However, §14 of the Preamble of the 1946 Constitution – which is part of the set of provisions referred to in the control of constitutionality – provides that 'the French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people'. Furthermore, the Preamble of the 1958 Constitution reaffirms the commitment of the French Republic to human rights. These provisions relating to peace and human rights could in theory lead a judge to perform a particularly strict review of certain treaties. However, this has not been the case until now, with affirmation of the respect for public international law having only led to the consecration in Art. 55 of the primacy of international law over national laws.

There is only one constitutional provision regarding an international institution, i.e. Art. 53-2 which authorises the Republic to recognise the jurisdiction of the International Criminal Court (ICC) as defined by the Rome Statute.

**3.1.2** Article 53-2 providing for recognition of the jurisdiction of the ICC is the consequence of a declaration of unconstitutionality delivered by the Constitutional Council on 22 January 1999.<sup>117</sup> As a matter of fact, the very objective of the ICC's jurisdiction was problematic, since it allows for prosecution of any criminal, regardless of the person's official capacity. Thus, it could apply to the French President, which was contrary to Art. 68 of the Constitution. However, since the

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<sup>116</sup> Burgorgue-Larsen 2009, p. 1316.

<sup>117</sup> Constitutional Council, 22 January 1999, *Traité portant statut de la Cour pénale internationale*, Decision No. 98-408 DC.

French Constitution also declares its broader commitment to peace and human rights,<sup>118</sup> the Constitution was amended as a pledge in the fight against impunity.

**3.1.3** Along with the suggestion of a general reference to its commitment to the European Union, some scholars have highlighted the necessity of a general reference to the international commitments of France, particularly in the area of human rights. This proposition was in fact formally examined by a commission that was convened to identify potentially useful amendments to the preamble of the current Constitution, chaired by former minister and member of the Constitutional Council Simone Veil. However, in its report, the commission ultimately rejected the idea, since any special mention of European or international human rights law would create a specific constitutional obligation, giving the relevant treaties a privileged status.<sup>119</sup> Furthermore, it was feared that such mention would force the Constitutional Council to examine the compatibility of laws with the European Convention on Human Rights, although it had consistently delegated this competence to the ordinary jurisdictions. Finally, the authors of the report have surmised that any special mention of European and international human rights law would deprive the French Republic of the ability to maintain its constitutional specificities. It should be noted, however, that the refusal of the Constitutional Council to examine the compatibility of laws with European law has been severely criticised by some scholars.<sup>120</sup>

**3.1.4** As previously stated regarding European Union law (see Sect. 1.5.3), a clause determining the principles and values governing the participation of the French Republic in international co-operation could be useful. Indeed, such a clause would have a particular resonance in the context of international law, which is currently less efficient than are EU treaties. However, it should again be noted that, although symbolically important, such a clause would risk having no concrete effects in practice, since it is not clear how a judge would evaluate and sanction the violation of such a broad guideline.

Nonetheless, one type of clause, the so-called *pro homine* clause, seems particularly appealing. The consecration of such a clause would guarantee that the individual would always benefit from the highest level of protection, whether it is provided for by European or international treaties or national legislation. As underlined by the Veil Commission, a provision of this type could entail major consequences regarding the control performed by the Constitutional Council, while clearly attributing a privileged status to human rights. As to the threats to France's constitutional specificities, it is the experts' opinion that such specificities should never trump the Republic's commitments to human rights, which would be the sole objective of the *pro homine* clause.

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<sup>118</sup> We refer to §15 of the 1946 Constitution.

<sup>119</sup> Comité de réflexion sur le préambule de la Constitution, '*Redécouvrir le préambule de la Constitution: rapport au Président de la République*', 2009, p. 54.

<sup>120</sup> For example Carcassonne 1999, pp. 93–100.

### 3.2 *The Position of International Law in National Law*

**3.2.1** In conformity with §14 of the Preamble of the 1946 Constitution, according to which France respects the rules of public international law, Art. 55 of the Constitution provides that ‘treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party’. Thus, there are three conditions to the primacy of treaties in domestic law: formal ratification or approval, publication and reciprocity. However, it should be noted that the condition of reciprocity has been abolished for European Union law<sup>121</sup> as well as human rights treaties.<sup>122</sup> However, the Council of State has found that customary law does not benefit from primacy.<sup>123</sup> Most importantly, it has stressed that no treaty or international agreement, including EU law, can be superior to the Constitution.<sup>124</sup>

Whereas the Constitutional Council refuses to examine the conformity of domestic legislation to treaties and international agreements, arguing that this type of control falls foul of its competence<sup>125</sup> and should be exercised by courts of ordinary jurisdiction, the Court of Cassation as well as the Council of State have recognised the primacy of international treaties and agreements over domestic law, even law posterior to the agreement in question.<sup>126</sup> Concerning the application of treaties and with the exception of EU law provisions and the ECHR, which benefit from direct effect in the French legal order, the judge confronted with an international treaty will examine the nature of the invoked provision according to its precision, the intention of the authors, the general economy of the treaty as well as whether it may be directly applicable without an intermediate act.<sup>127</sup>

**3.2.2** According to the conditions determined by Art. 55 of the Constitution, a treaty or international agreement comes into force by virtue of its ratification and publication, without the need of its incorporation into the legal order by an act of domestic law. Thus, the French legal order identifies with the monist tradition. Formally, French law still insists on the absolute primacy of the Constitution. However, the constant practice of amending the Constitution rather than

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<sup>121</sup> Constitutional Council, 20 May 1998, *Loi organique déterminant les conditions d’application de l’article 88-3 de la Constitution*, Decision No. 98-400 DC.

<sup>122</sup> Constitutional Council, 22 January 1999, *Traité portant statut de la Cour pénale internationale*, Decision No. 98-408 DC.

<sup>123</sup> Council of State, 6 June 1997, *Aquarone*, No. 148683.

<sup>124</sup> Council of State, Ass., 30 October 1998, *Sarran et Levacher*, No. 200286, 200287.

<sup>125</sup> Constitutional Council, 15 January 1975, *Loi relative à l’interruption volontaire de la grossesse*, Decision No. 74-54 DC.

<sup>126</sup> Court of Cassation, 24 May 1975, *Société des cafés Jacques Vabre*, No. 73-13556; Council of State, 20 October 1989, *Nicolo*, No. 108243.

<sup>127</sup> Council of State, Ass., 11 Avril 2012, *GISTI et FAPIL*, No. 322326.

abandoning a conflicting international treaty is a sign of a *de facto* primacy of international law.

Concerning the distinction between monism and dualism, the experts are not entirely convinced of its complete irrelevance. The disadvantage is a focus on purely formalistic criteria regarding the incorporation of international law. In this sense, doctrines such as pluralism seem better able to conceptualise the relations between legal orders and systems, as they allow both to cooperate in the elaboration of a solution. However, pluralism provides no clear criteria as to what solution should prevail in the end, since the international as well as the national orders have an equally legitimate standing. This conception falls short on the fact that international courts are established for a reason, which is to guarantee the existence of an external control over domestic law.

In our opinion, a more substantial criterion should prevail, i.e. the development of international co-operation which in a sense would strengthen the protection of human rights. This would lead to a monist approach with primacy of international law, with one important exception, i.e. the *Solange*-scenario. Indeed, since the fostering of international co-operation is not an end in itself but a path chosen to provide for a harmonised guarantee of fundamental rights, national authorities would be legitimate in their refusal to apply international or European law whenever this goal is threatened. However, this exception needs to be conditioned by two limitations: first, a general scope limited to a broader protection of human rights, and secondly, a willingness for dialogue with other national authorities as well as regional and international organisations and institutions in order to trigger a dialectic process allowing for the elaboration of a more adequate rule.

### 3.3 *Democratic Control*

**3.3.1** According to Art. 52 of the Constitution, the President of the Republic has a negotiation competence that is shared with his Government, as well as in some cases with local authorities. Thus, the involvement of Parliament in the initial negotiation process is relatively minor. However, as stated before and according to Art. 53 of the Constitution, the consent of MPs is required for the ratification of ‘peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory’. It should be stressed that although MPs can debate at this stage, they cannot propose amendments. In the end, they generally vote for a single-article text simply stating consent to the ratification. Their last chance to intervene is if sixty members of the Senate or the *Assemblée nationale* seize the Constitutional Council to examine the conformity of the treaty with the Constitution. As explained above, a treaty can only validly come into force in the national legal order if there is no declaration of unconstitutionality or if such declaration is followed by an amendment of the Constitution.

**3.3.2** The referendums organised in France have been related either to strictly domestic constitutional matters (such as the election of the President of the Republic by direct universal suffrage or the reduction of the presidency to a five year term), to the accession of independence of former colonies or to EU-related matters. None have concerned international organisations or treaties. However, this does not mean that referendums on treaties are banned, since Art. 11 of the Constitution expressly mentions treaties as a possible subject of a referendum.

### 3.4 *Judicial Review*

**3.4.1** First of all, it should be mentioned that matters concerning diplomatic relations as well as the decision to negotiate a treaty or to refuse to do so cannot be subject to judicial review.<sup>128</sup> However, the validity of the ratification process, especially concerning the conditions of consent by Parliament for certain treaties, is examined by the Council of State<sup>129</sup> – although failure to abide by the Constitution is of course by no means a way for the state to be exonerated from international responsibility. As we have seen, a further option for judicial review of international treaties is to seize the Constitutional Council on the grounds of the unconstitutionality of some of its provisions, which would, however, in most cases lead to an amendment of the Constitution.

One particularly original technique (albeit rarely) used in France to refuse the application of an international treaty consists in stressing the necessity to abide by the *principes fondamentaux reconnus par les lois de la République* (fundamental principles recognised by the laws of the Republic). Indeed, although laws and treaties can trump general principles of law, the fundamental principles recognised by the laws of the Republic have constitutional rank, granting them primacy over treaties. A prominent example is the *Koné* case,<sup>130</sup> in which the Council of State refused to extradite an individual due to his being prosecuted for political reasons, with reference to said fundamental principles recognised by the laws of the Republic, although the extradition agreement between France and Mali had not addressed the issue. This can be seen as a concrete example of a best practice for a national *Solange* or *Kadi* approach focusing on the need to foster the protection of fundamental rights.

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<sup>128</sup> Council of State, 16 November 1998, *Lombo*, No. 161188; Council of State, Ass., 29 September 1995, *Association Greenpeace France*, No. 171277.

<sup>129</sup> Council of State, 18 December 1998, *SARL du parc d'activités de Blotzheim et SCI Haselaecker*, No. 181249.

<sup>130</sup> Council of State, Ass., 3 July 1996, *Koné*, No. 169219.



### 3.5 *The Social Welfare Dimension of the Constitution*

**3.5.1** Besides a mention of social objectives in national policy in the Preamble of the 1946 Constitution as well as a general declaration according to which France is a ‘democratic and social Republic’ (Art. 1), there are no guidelines as to the social values that the Republic must uphold in its international cooperation. However, while this latter provision could theoretically be mobilised in a proactive strategy concerning European and international treaties, French judges have to date been quite reserved in their judicial review. Again, one could suggest a general clause guiding the international cooperation of France, but its effect in practice would be uncertain.

**3.5.2** France has not been subject to a bailout and austerity programme.

### 3.6 *Constitutional Rights and Values in Selected Areas of Global Governance*

**3.6.1** In our opinion, the combination of a general conception allowing for monism with primacy for international law, with the exception of a broader national human rights protection, would be a suitable solution to most difficulties that are likely arise.

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