Strasbourg, 23 September 2004
CCS 2004/07

Restricted
CDL-JU(2004)054
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL COURT OF BELARUS

International Scientific and Practical Conference

"Constitutional control and development of a social state ruled by law"

Minsk, 9 - 10 September 2004

THE FRENCH CONSTITUTIONAL COUNCIL AND SOCIAL RIGHTS

Report

by
Mr Jean-Pierre MASSIAS
Dean of the Faculty of Law of Clermont-Ferrand, France

This document will not be distributed at the meeting. Please bring this copy.
Ce document ne sera pas distribué en réunion. Prière de vous munir de cet exemplaire.

This report intends to take a closer look at the protection of social rights by the Constitutional Council in France. The protection of social rights remains a burning topic in France and in Europe at large, in the context of the pensions reform. It is necessary to first define "social rights" and then see how they have been protected in France.

* **Theoretical definition of "social rights".** Social rights are often described as "rights of second generation", but they also represent a complex issue for jurists. At the very beginning of the XXth century, Georg Jellinek, a German Jurist attempted to enlighten the debate and proposed a classification of what he called "the subjective public rights". He distinguished the active status, where the recipient of the rights gets the right to participate to the normative production, and the negative status, where the subject has the right to protect himself from a state intervention, and finally the positive status, where the subject has the right to ask the state to intervene in his favor. It was an interesting theory since it was a translation of the three political dimensions of fundamental rights. It was also a precursor of the "droits-creances" , rights which require a positive and exclusive intervention of the state. For this report, we will retain a wider definition of social rights, inclusing besides the droits-creances, all rights relating to the social scene, such as the right to strike or unionize.

We must ask what kind of protection is proposed by the French system: what is the source of law and what judge are relevant ?

* **The Constitutional sources and specificity of the 1958 French Constitution**. The fundamental rights are enounced in one text only: the 1958 Constitution, and particularly in its Preamble. The catalogue of rights reveals a more complex system as two differents texts exist, which reflect different contexts and centuries, and therefore different conceptions of the rights. The first text is the 1789 Declaration, adopted after the french Revolution and which proclaims civil and political rights. This is an adhesion to political liberalism which postulates the preservation of the freedom of the citizen against the State. The second catalogue of rights is the Preamble of the 1946 Constitution, adopted during the post-war socialism. Those rights - mainly social – illustrate the desire for a stronger solidarity within the community.
Those two contrary conceptions within the same text can be explained by the context of post-World War II, which led to a compromise between opposite political forces, such as the Communists or the Democrats. This 1946 compromise was reproduced in the 1958 Constitution putting the constitutional judge in a difficult position.

* Written in the Constitution, the social rights are also guaranteed since 1958 by the Constitutional Council, guarantor of the Constitution. Here again, one must underline the **specificity of the French Constitutional Council**. This institution is entitled to exercice a previous and abstract review of draft laws. According to its decision concerning abortion adopted on January 15, 1975 (n°74-54 DC), the Council refuses to use international norms as norms guiding its judgment. Its review is therefore a strict review of conformity to the Constitution. There is no individual complaint. One must add that sometimes the role of the Constitutional Council is challenged by the administrative judge, the Council of State, which is also considered as the protector of freedoms of the citizen.

All these elements reveal the conceptual paradox of social rights and constitutional justice in France. Therefore we consider two points: the question of the identification of social rights (the constitutional judge plays a very active role – in the kelsenian sense - in order to reveal the list and the content of the social rights) (I) and the question of the definition of the social rights (here, the constitutional judge plays a more passive role) (II).

I The French Constitutional Council and identification of Social Rights

With social rights, the French Constitutional judge has to determine how many social rights exist and how to identify them. This function – quite simple in appearance – is much more complex due to the French constitutional context. Indeed, the French constitutional text raises two questions that the constitutional judge has to consider.

A) Questions raised by the Constitution

Included in the Preamble of the Constitution and more precisely in the 1946 Preamble, social rights raise two questions:
- Can we rely on the concept of the **fundamental principles acknowledged in the laws of the Republic**[1]?
- What is the real meaning (in regard to social rights) of **political, economic and social principles especially necessary to our times**[2] ?

1/ The question of the relation between fundamental principles recognized by the laws of the Republic and social rights means that we must consider the two following elements:
- First, **the socio-political origin of the fundamental principles acknowledged by the laws of the Republic is very unclear and controversial**. On one hand, the official speech made by Deputy Maurice Guérin, a Socio-Democrat, "favours and underlines the social work of the Third Republic (the laws on the 40 hour week, on paid vacations, on the protection of work) and on the other hand, the political reality was such that the Marxist majority had to be convinced to vote in this direction, while this was aimed at protecting the freedom of religion and education.

- **The structure of these rights raises further questions**. As Jean Rivero expressed it very well: " Which principles/, Which laws?, Which Republic?" For a long time, French jurists even question the very existence of such rights, which belong to a legal category without real content. On July 16, 1971, the Constitutional Council recognizes the theory with its decision Freedom of Association (n° 71-44 DC). It recognizes Freedom of Association as a fundamental right recognized by the Laws of the Republic (FRRBLR) which has to be respected by the legislator. The FRRBLR thus gain constitutional recognition.
Nevertheless the FRRBLR are used very carefully by the Constitutional Council. Since 1971, it has only recognized eight principles, and mostly in the public liberties domain rather than in the social law field. As such, such principles are supported by a text within the law, but often the Constitutional Council proceeds by affirmation, without any reference, which strengthen their ambiguity.

2/The relation between the political, economic and social principles especially necessary to our times and social rights is obviously much stronger since social rights are mentioned expressly in the 1946 text. This new category presents new questions as well:
- because of its heterogeneous quality. Some dispositions are "droits-creances"(right to employment) some are of a more classic nature (freedom to unionize). One must question the legal validity of such rights given such a wide diversity.

- Social rights are presented in the 1946 Preamble as being particularly necessary to our times. The question is whether the list of these rights with constitutional value is really an exhaustive one ?

[1] *Principes Fondamentaux reconnus par les lois de la République* in French.
[2] *Principes politiques, économiques et sociaux particulièrement nécessaires à notre temps*, in French.

The answer is brought forth by the constitutional judge in two parts.

B/The response of the constitutional judge: recognition of social rights

1) The foundation of social rights is found in articles 3 to 18 of the Preamble to the 1946 Constitution. French constitutional judges have developed since 1971 a jurisprudence which led to the constitutional recognition of many social rights. Because of their constant use, dispositions relative to the social rights received a constitutional force which is binding for the legislative power. We can give many examples such as alinea 5 (-right to work-), alinea 6 (-freedom to unionize-), alinea 7 (-right to strike-), alinea 8 (-participation of workers to collective determination of work conditions-), alinea 10 (- protection of the family-), alinea 11 (-social protection-), alinea 12 (- solidarity in bearing the burden resulting from national calamities-).

As such, in its decision n° 87-230 DC of July 28, 1987, the Constitutional Council declared unconstitutional the dispositions of the law which would impair the constitutionally guaranteed right to strike.

In its decision n° 98-401DC of June 10, 1998, concerning the "Aubry Act of the 35 hour work week", the Constitutional Court recognized that if the legislative power is entitled to determine the legal length of the work week, as according to article 34 of the Constitution, however, it must still respect the principles and rules of constitutional value, particularly those concerning rights and freedoms recognized to employers and employees. Among such rights and freedoms, we must quote *the right to employment, the right to unionize, and again the right of workers to participate in the collective determination of their work conditions, and the running of their corporation.*

2) The constitutional judge went further and widened this list, showing creativity. He added to the Preamble list in two ways: either by writing a disposition, or by stressing out a specific objective with constitutional value.

- First, by his interpretation, he developed several dispositions such as alinea 8 of the 1946 Preamble. Thus, in his decision n° 93-328 of December 16, 1993, relating to the 5-year law on work, employment, and professional training, the French constitutional judge indicated that the respect of alinea 8 (- every worker shall participate through its representatives, to the collective determination of the working conditions as well as the company management-) implied that such representatives be given the necessary information to be able to participate in such decisions.

-Second, the use of objectives with constitutional force enabled the judge to reinforce his jurisprudence policy in terms of social rights. In his decision n° 94-359 DC of January 15, 1995, regarding "housing diversity", the Constitutional Council declared as an objective with constitutional value, the access of any person to decent housing. This objective was supported by alineas 10 and 11 of the 1946 Preamble, combined with the principle of protection of human dignity. The Constitutional Council uses such notion on rare occasions and - contrary to the aim of the authors of this text-, it did not use it to support fundamental rights.
However, it allows the Constitutional Council to establish principles relating to social rights.

II The French constitutional judge and the extent of social rights

What are the repercussions of the constitutional value of a social right?

To respond to such issue, the jurisprudence of the French constitutional judge brings even further questions which still have not received any precise legal answers. One can summarize the issue as follows: Is the determination of the existence of a social right within the Constitution enough to give this same right full legal value and make it directly applicable? The answers which have been so far given by the French judge are extremely varied and bring forth another issue concerning the very nature of these rights and their evolution.

A) The jurisprudential limitation of social rights

Social rights are limited in their actions by the constraints facing both administrative and constitutional judges.

1/ Constraints originating from the State Council

For a very long time, the State Council had adopted a position toward the social dispositions of the 1946 Preamble that considered them as too incomplete to be applied directly by the judge. Social rights were mainly imprecise and general philosophical principles, and as such were not applicable directly.
Such an attitude led the French State Council to create a specific mechanism of application of these principles. The High Administrative jurisdiction, considering that social rights were not directly applicable, decided that it was able to draw from these rights applicable principles. The Preamble to the Constitution is only a source of inspiration for the creation of a jurisprudential norm. Thus, the State Council, by the 8th of December 1978 decision, GISTI, drew from the 1946 Preamble, a General Principle of the Right (GPR)[3] to led a normal family life. Such a position is intellectually interesting, however it can still be criticized on two points: first, it gives the judge the opportunity to rewrite the content of the social right; second, it juridically disqualifies the constitutional disposition by removing it to the level of a GPR, which, in France, has an infra-legislative force. The law is thus able to remove any given social right.

Such a position by the State Council, although recently changing, shows obviously the reluctance of the judge to fully apply the social rights guaranteed by the constitution. His reluctance is being diminished fortunately by the jurisprudence of the Constitutional Council, although limited in its protection role.

2/ Constraints imposed by the Constitutional Council

There are three types of limitations affecting the Constitutional Council.
- the **Legislator is free to implement any right it chooses**. For instance, the right to employment is an objective the State must strive to attain. "*The Legislative Power must work toward a set of rules ensuring the right for any citizen to gain employment, in order to facilitate the exercise of this right for the greater number.*" (10 June 1998 Decision, N°98-401-DC) The collective is given an obligation by the means, not by the results.

- **the necessary combination with other constitutional principles** may be done to the detriment of social rights. Thus the Constitutional Council considers that a text forcing an employer to reemploy workers previously fired for gross negligence is contrary to the principle of equality but also contrary to the freedom of enterprise of the employer. The latter, as responsible for the running of the business" must be able to choose his collaborators". (n°88-244DC, July 20, 1988).

[3] *Principe Général du Droit* (PGD), in French.

- the **limitation pertains to the very nature of the social right**: it is a "droit-creance" the judge cannot guarantee. The right to work, for instance, needs to be implemented by a positive intervention by the legislative power.

B/ The future issues

1) The social rights and the State

By nature, social rights are tributary and contingent upon the concept of the State. An interventionist state will be more likely to legislate in a more protective manner. Though this does not imply that a more liberal state will leave social rights unprotected. The constitutional judge becomes a key element in the debate. On many occasions, the French Constitutional Council intervened in the name of the right to work: with alinea 5, the legislative power was able to forbid the situation where a retirement pension was added to an active salary (n°81-134 DC of January 5, 1982) and if it was allowed, a "solidarity contribution " was required (n°83-186 DC).

As such, since nationalisation was justified to fight against unemployment, it was conforming to the fundamental principles of the DDHC and particularly to article 17. Thus, the law could also allow room to entice employers to reduce the work week, "*such a policy corresponding to alinea 5 of the Preamble, given the current unemployment rates*".

2) Evolution of social rights

Social rights can be protected from a liberal state or reinforced by the state. The protection of social rights can be reinforced in two ways by the constitutional judge to stop any state from overstepping its boundaries.

- The first technique is the "cliquet anti-retour"(no going-back policy) in reference to the modification to former laws. According to the Constitutional Council, "*if the legislative power can, at any time, modify former legislations, such power does not allow it to "delegalize" constitutional rights*". Such jurisprudence was applied regarding the right of protection of health (n°90-287DC of January 16, 1991)

- The second solution is a result of the jurisprudence associated with constitutional public services, which once created, cannot be removed from the law. Such public services established to allow the unemployed to look for new employment receive judicial protection.