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"NO CONSTITUTIONAL REVIEW FOR AMENDMENTS TO THE CONSTITUTION, A FRENCH EXCEPTION?"

REPORT
by

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In France, it is not possible for the Constitutional Court, named Constitutional Council, to review the constitutionality of an amendment to the Constitution. You must certainly think that I should stop my presentation right now because I have nothing to say!
However, I won't do that because the members of the Georgian constitutional court who have invited me as a member of the Venice Commission as well as a former member of the Constitutional Council, are well aware of this situation and I am sure they want me to examine why such a situation exists in my country and if there is a harm resulting of this kind of "French exception".

I will firstly say a few words on the background of the Constitutional Council.
As you probably know, it is only in 1958, with the Constitution of the V° Republic, that **a** Constitutional Court was created in France. This Court was competent for examining the conformity to the Constitution of a law passed by the legislature but not promulgated (ex ante review). Before that, it was not possible to challenge any law, promulgated or not.

Indeed, the judiciary could not verify the constitutionality of any law applicable to cases they had to judge. All the laws passed by the legislature were considered to express the general will and as the legislature represented the people, who are sovereign, the judiciary had the duty to implement the law even if they thought it was not consistent with the Constitution.
JJ Rousseau theorizes this idea of the absolute supremacy of the law voted by the representatives of the people in his well-known book "le contrat social" published in1762. This theory has had a great influence on the main actors of the 1789 Revolution. This was also the case for the founders of the 3rd Republic (1870-1940) as well as for the founders of the fourth Republic (1946-1958)

This changed substantially with the 5th Republic.

The constitutional review of laws began very shyly: in 1958, only the four most important political officials could bring a law to the Conseil, after its definitive vote and before its promulgation. These officials were the President of the Republic, the Prime minister, and the Presidents of each legislative assembly.

In 1974, constitutional adjudication had been expanded to 60 members of each parliament chamber and since 2008, individuals have now also been allowed to refer a statute law, which is applicable to their case, to the Conseil if it deals with their fundamental rights or liberties (ex post review). This last reform came into force on the 1st of March 2010. These two reforms, added to the 1971 landmark decision by which the Declaration of the Rights of Man and the Citizen of 1789 and economic and social rights enumerated in the Preamble of the 1946 Constitution had been integrated in the constitutional norms of reference, have transformed the Constitutional Council into a real Constitutional Court, like other European Courts.
But, strangely, the laws modifying the Constitution still remain out of the realms of constitutional review, in its procedural rules of adoption as well as in its substantial rules.
We are now going to examine this French situation.

1 – Constitutional review of procedural rules in relation to the adoption of amendments to the Constitution

As you know, in all democratic countries, the Constitution is, of course, at the top of the hierarchy of legal norms. But this does not mean that a constitution cannot be modified. On the contrary: all democratic constitutions provide special rules for the adoption of amendments modifying them.

In this way, article 89 of the French Constitution firstly provides that "The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution". The next provisions of this

article state that the discussion of the bill is possible only after a period of six weeks following its filing and it must be voted in the same wording by the two chambers of Parliament. Therefore, the National Assembly does not have the last word, as would normally be the case for ordinary or organic laws.

The amendment shall take effect after approval by referendum except in the case of a government bill, when the President of the Republic can decide to submit to Parliament convened in Congress. The bill shall then be approved by a three-fifths majority of the votes cast. Finally, no amendment procedure shall be commenced or continued in any case where the integrity of national territory is in jeopardy.

The Italian constitution contains similar procedural provisions in its article 134, the basic Law of Germany as well. It is also the same in the US Constitution, where article V imposes a rather complicated procedure which can only be initiated by a majority of two thirds of each Houses or two thirds of the several States. Then, a Convention is convened for the adoption of the proposed Amendments which must be ratified by the Legislatures by three quarters of the several states or by three quarters of the conventions of the States.

The French Constitution, similarly to the Italian or German constitution, does not have any rules permitting its constitutional courts to check if these procedural provisions have been respected. Nevertheless, Italian and German courts have with time, decided to examine this question of due process of the constitutional revision procedure.

But the French Constitutional council did not adopt the same attitude and interpreted in a very strict manner article 61 of the Constitution, which determines the competencies of the CC, when this question was raised for the first time in 1962. This article 61 provides that “Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the House**s** of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, (…)”. The laws amending the Constitution, which are usually called “revision laws”, are not expressly mentioned in this article, which refers to acts of Parliament.

I have to specify, at this stage that nevertheless, prior to the bill being filed before the legislature, the Conseil d’Etat must examine it. The Conseil d’Etat gives legal advice on this bill, which is not binding for the government and it is not published except if the government decides it. This advice is obligatory in all cases regarding government bills which would be adopted by referendum or by Congress.

In any case, in regards to their consistency to the Constitution, a distinction must be made between revision laws adopted by Congress and revision laws adopted by referendum.
Even though the French Constitution has been modified 24 times since 1958, the Constitutional Council rendered only three rulings in this matter, all of them denying its competence.

Referendum

As I have said, a referendum is compulsory only if the constitutional revision results from a private member bill. In other cases, the President of the Republic could decide to defer the law to Congress. The first ruling on this matter was rendered in 1962. That year, the head of State, General de Gaulle, wanted to modify article 6 of the Constitution which deals with the way the president of the Republic is elected: he wanted universal suffrage to be adopted.

Instead of following the procedure imposed by article 89, which relates to the revision of the Constitution and provides that the amendment must be first adopted by both chambers of the legislature before being submitted to a referendum, he decided to directly submit the reform to a referendum. The Senate was not in favor of this reform and it was obvious that it would never accept such an amendment to the Constitution. The head of state therefore managed to bypass the Senate's opposition by relying on the provisions of article 11 of the Constitution. However, this article could not be used in regards to an amendment to the Constitution but was only applicable to a government bill which only touched on issues regarding the organization of public authorities and the ratification of certain treaties. Only this type of bill could be submitted directly to referendum without prior Parliament approbation.

Evidently, this article 11 could not be used for any issue regarding an amendment to the Constitution. Despite violent protestations from the opposition, the law modifying the manner in which the president of the Republic was elected was voted by a large majority, but the president of the Senate brought it before the Constitutional Council. The Council ruled that article 61 of the Constitution only applied to the laws passed by the legislature and not the laws adopted by way of referendum, so it judged that it was not competent to examine the case, even in its procedural aspects.

The historical circumstances of that time, i.e. the troubles following the end of the Algerian war and the assassination attempt against the General de Gaulle himself, explain this bypassing of Parliament. It did not have serious consequences but it is easy to imagine that, in a different period of time, such a violation of the Constitution would have been dangerous for the democracy.

This was because article 11 does not impose any restrictions on the use of a referendum, as opposed to article 89 whose restrictions are enumerated: no revision during the period of vacancy of the presidency of the Republic nor when the integrity of national territory is in jeopardy and of course, the restriction found in the last paragraph which prohibits any modification of the republican form of government. We will come back to this.
These provisions serve to protect the Republic from a temporary president or a president using the emergency powers who could take advantage of any situation and modify the Constitution to impose an authoritarian regime.

The Constitutional Council ruled for a second time on this issue on September 2nd 1992. This decision regarded a revision adopted by referendum of the law ratifying the Maastricht treaty. The CC stated that "Subject to the provisions governing the periods in which the Constitution cannot be revised (Articles 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 ("The republican form of government shall not be the object of an amendment"), the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit; there is accordingly no objection to insertion in the Constitution of new provisions which derogate from a constitutional rule or principle; the derogation may be express or implied". The Council interpreted the sentence of article 89 "no amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy" as implying that for any cause, and not only when the integrity of national territory is in jeopardy, so also including times when the emergency powers are being exercised, the Constitution cannot be revised.
Implicitly, the CC seemed to admit that the sovereign power of the constituent was limited by the provisions of the Constitution itself and also that implicitly, it pertained to the CC to check that these provisions had not been violated before the referendum took place.

I think that nothing precludes the CC from verifying that the recourse to a referendum procedure for a revision of the Constitution has been led in conformity with the constitutional provisions. It could then publish this advice, which would bind the government.

However, once the amendment to the Constitution is adopted by referendum, it is clear that a constitutional court cannot check whether the revision is conforming to the Constitution or not.

A revision of the Constitution adopted by congress

This is the second manner in which the Constitution can be modified. In 2003 the constitution was revised again. The first article was added to stating that the Republic is organized on a decentralized basis. Adopted by Congress, the revised law was deferred to the Constitutional Council.

This referral was rejected, following the same rationale of 1962, linked to the strict application of article 61 of the Constitution. It came to the same conclusion: the list of acts enumerated in article 61 is limitative and it considered that it was not competent to examine the constitutionality of amendments to the constitution which were not expressly mentioned in article 61.

The reasons invoked by the Constitutional Council are not satisfactory. In reality, it has a very large power when interpreting the Constitution. For instance, in many rulings it has previously declared a law compliant to the Constitution but has subjected this compliance to some reservations. There are no provisions in the Constitution which permits the Council to emit such reservations; article 61 only provides that it can declare a law as conform to the Constitution or not. Therefore, the CC could have been more daring and consequently could have decided to review the procedure by which the amendments to the Constitution are adopted by Parliament.

This permanent refusal to examine the procedural rules of the laws amending the constitution can be interpreted as a manifestation of the respect given to constituent sovereignty and the very wide conception we have of it in France.

2 - The review of substantial provisions of the Constitution

This is a more complicated issue as it raises the question of the supra constitutionality of some provisions and consequently addresses the question of a hierarchy between constitutional norms.
Some constitutions stipulate that some of their provisions cannot be modified by a simple review of the Constitution. The constituent power is limited in that way. These particular provisions pursue generally two kinds of aims: to maintain a special organization of the state, and to protect the citizens against any violation of their fundamental liberties or rights.

Special organization of the state

The last paragraph of article 89 of the French Constitution provides that “The republican form of government shall not be the object of any amendment” and this paragraph pertains to such a category, as it affects the special organization of the state.

This provision had been introduced in 1884 in one of the Constitutional Laws of the Third Republic to render impossible the re-establishment of monarchy. It made sense at the time, as republicans and monarchists were in violent squabbles. Today the meaning of this provision, which has been reintroduced with identical wording in the 1946 and 1958 Constitutions, is that an election is the only manner in which the people in power can be chosen; they cannot inherit their title. In the Italian constitution of 1947/1948, article 139 contains the same provision, for the same reasons as in France.

Before the French Constitutional Council a request has only once been founded on this last paragraph of article 89. This request was in relation to the decentralization of the state, a

subject we have discussed. The aim of the reform was to allow the legislature to vote laws which transferred State competencies to each separate region. The request emitted by the Senate was based on the contradiction of this amendment with the principle of the "indivisibility of the Republic", which is also proclaimed by the first article of the Constitution. This principle of indivisibility was considered by the Senate as forming an integral part of the "republican form of government", explicitly protected by the last § of article 89, and could not be subject to revision.

The request was argued especially on the grounds that if the Constitutional Council denied its own competence to assess the conformity of decentralization to the republican form of the government, it would be impossible for anyone to oppose a reform suppressing the Republic, this having been the case in 1940.

Nevertheless, the Council rejected this request, and followed the same interpretation that had been given regarding article 61 of the Constitution, in relation to a revision of the Constitution by referendum: laws revising the Constitution, adopted by the Congress, are not enclosed in the exhaustive list of acts subject to constitutional review. But an amendment to the Constitution is a law voted by the Congress which is a convention of the two chambers of Parliament!

Therefore, in France there is no possibility of reviewing an amendment to the Constitution, nor verifying whether constitutional procedure rules or substantial rules have been respected.

From my point of view, it would be more consistent with a democratic State that a constitutional court be able to examine whether the provisions found in the Constitution relating to its revision have been observed. It would have been easy for the Constitutional Council to rule, as suggested by a very famous law Professor, that «the power of revising the Constitution is only limited by the conditions of time, form and procedure laid down in the Constitution and by the last paragraph of article 89".

I would like to now add a few words regarding the protection of human rights and liberties enumerated in the Constitution, when it is confronted to a constitutional review.

Protection of human rights and liberties

In some States, fundamental rights and liberties are laid down in the Constitution itself and are declared not subject to revision; in other words they are intangible. The most typical example is the Basic Law of Germany where article 79 §3 prohibits any amendment affecting the principles found at articles 1 which deals with the principle of human dignity and 20 which deals with the basic principles of the state.

In Italy, it is the case law of the Constitutional court which declares that certain principles, such as the principle of secularism or the protection of Human rights, are considered as "supreme" and not subject to constitutional review.

In the proper text of the French Constitution there are very few provisions directly relating to liberties and fundamental rights. These are limited to: the principle of equality before the law, the principle of non-discrimination, the principle of secularism and a kind of "habeas corpus". It is in the Declaration of the Rights of Man and the Citizen of 1789 and in the Preamble of the 1946 Constitution, two texts to which the Preamble of the 1958 Constitution refers to explicitly, that all rights and liberties are enumerated. These two texts are considered as an inherent part of the Constitution by the Constitutional Council case law and therefore are protected in the same way as the other provisions of the Constitution: no more, no less.

Even though there is no provision declaring these principles as permanent, it would, in fact, be quite impossible to modify them. The period in which they were adopted is symbolic in the French history : 1789, the French revolution, 1946just two years after the end of Maréchal Petain authoritarian regime which had collaborated with the III Reich and the victory of the "France Libre". There is a broad consensus regarding these two texts to which French people are profoundly attached. There has never been any attempt to modify the Declaration of 1789. As for 1946 Preamble, a commission chaired by a very widely accepted woman, Ms Simone Veil, was erected in 2008, to discuss any modification or updates to the Preamble. It concluded that, except for the principle of human dignity, which could be defined more explicitly, there was no need for revision.

This means that even if there is no constitutional provision directly declaring these principles as untouchable, it appears that in practice, they are protected by what the doyen Vedel, former member of the Constitutional Council, called a "soul of transcendence". These rights, even though they are incorporated in positive law, appear to be universal and perennial.

On the other hand, declarations of intangibility are not so useful in practice either, simply because any constitution which would adopt such a provision never provides that this very provision is, in itself, intangible!

Conclusion

The primary point, here, focuses on the protection of human rights and liberties. Their constitutional protection is enhanced and ensured by the different international conventions such as the European Convention of Human Rights or the United Nations' International Covenant on Civil and Political Rights. These are efficient guarantees of human rights and liberties; in my country, any judge can decide to not apply a French law provision if he considers it is not consistent with an international convention ratified by France (assuming this convention has direct effect). This is a complementary and efficient protection for French citizens when French law is not able to protect them effectively.