

# The Constitutional Council and the Transformation of the Republic

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The 1958 Constitution is France's fifteenth since the Great Revolution. Over two centuries of turmoil and change, one feature of French constitutionalism remained remarkably stable: the sovereignty of *la Loi* within the juridical order. In the Republican tradition, Parliamentary acts were understood to incarnate *la Volonté générale*, and *la Volonté générale* comprised its own higher law ideology. Separation of powers doctrines subjugated the courts to legislative authority, prohibiting the judicial review of statutes. Under the Fifth Republic, Parliament lost its centrality, but legislative sovereignty remained intact in an important formal sense. Statutes could only enter into force with the consent of Parliament and, once promulgated, no law could be challenged before a judge. On July 22, 2008, legislative sovereignty died a painless death, when Deputies and Senators gave the *Conseil constitutionnel* the power to review the constitutionality of laws on the books, in collaboration with the *Cour de cassation* and the *Conseil d'état*. The Council will now become a bonafide member of the family of European constitutional courts.

The 2008 constitutional revision completes the "transformation"<sup>1</sup> of the Fifth Republic, a process initiated by the Council's 1971 "freedom of association" decision.<sup>2</sup> The political parties have, in effect, ratified the "*juridical coup d'état*" that took place when the Council successfully incorporated a charter of rights into the Constitution.<sup>3</sup> In this brief article, I examine the effects of this transformation on the exercise of legislative and judicial power, focusing on the authority of the Council within the constitutional order. Looking ahead, the 2008 revision will open a new phase in the evolution of the Fifth Republic, one of pluralism and fragmented authority in the process of protecting and developing fundamental rights.

## I The Council and Legislative Power

The founders of the Fifth Republic gave the Council veto powers, within legislative processes, in order to secure the executive's dominance over Parliament and the production of *la Loi*. The Council's role fundamentally changed when its rights jurisprudence combined with the 1974 constitutional revision (granting the *saisine* to the Opposition) to enhance the political system's capacity to generate constitutional disputes. The target of control would no longer be the Parliament, *per se*, but the legislative agenda of the Government and its Majority. During the crucial 1974-88 period, successive Oppositions activated the Council, with increasing fervor, and the Council reacted by developing an increasingly sophisticated jurisprudence.

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<sup>1</sup> For a theory of juridical "transformation," and its application to France, see Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 31 (1999): 147-84.

<sup>2</sup> Décision 71-44, *Recueil des décisions du Conseil constitutionnel* (1971): 29.

<sup>3</sup> Alec Stone Sweet, "The Juridical *Coup d'État* and the Problem of Authority," 8 *The German Law Review* 10 (2007): 915-28.

My approach to the study of the Council<sup>4</sup> – and all European constitutional courts<sup>5</sup> – is based on a simple two-part thesis. First, when the Council exercises abstract review powers, it operates as a specialized legislative chamber. Second, whenever Parliament debates and takes formal decisions on the constitutionality of *projets de loi*, it behaves as a kind of constitutional judge.

### A. The Council as a Specialized Legislative Chamber

The Council's legislative powers have thus far been limited to the abstract review of laws adopted by Parliament, prior to their promulgation, upon referral by politicians. Typically, it is the Opposition that activates the Council. Parliamentary minorities are attracted to the Council because it is the *only* stable "veto point" in the legislative process. Referrals lengthen this process, adding another stage: a final, "constitutional reading" of the law by the Council. We thus have good reason to conceptualize the Council as a specialized legislative chamber ("specialized" because its work is meaningfully restricted to decisions about constitutionality.)

In my research, I traced every law adopted during the 1974-88 period through each stage of the legislative process in order to assess the influence of the Council and its jurisprudence on the work of the Government and Parliament.<sup>6</sup> The Council's impact proved to be profound and multi-dimensional. In annulling legislative provisions (which it did in more than half of its decisions during this period), the Council functions, in Kelsen's terminology, as a "negative legislator."<sup>7</sup> The authority to veto and to amend statutes comprises only one dimension – *immediate and negative* – of the Council's impact. The Council's legislative power also extends to a second dimension: *prospective and creative*. When the Council lays down *strict réserves d'interprétation*, it rewrites, or amends, legislation, to the extent that its interpretation meaningfully differs from that of the government and the majority. When ministers and parliamentarians draft, revise, and repeal laws in order (1) to comply with the Council's jurisprudence, or (2) to anticipate the direction of future Council decisions, they ratify the pedagogical authority of the Council within the legislative process. In the 1980s, the Council emerged as a powerful "positive legislator," and a new "constitutional politics"<sup>8</sup> institutionalized. In these politics, legislators take decisions in light of the Council's jurisprudence, and in the "shadow" of the *saisine*. By the end of the period, it was no longer possible for an

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<sup>4</sup> Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press, 1992).

<sup>5</sup> The thesis has also been applied to the constitutional courts of Central and Eastern Europe, see Wojciech Sadurski, (2005), *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central And Eastern Europe* (Dordrecht: Kluwer Academic Publishers).

<sup>6</sup> *The Birth of Judicial Politics in France*, op cit.

<sup>7</sup> For a discussion of Kelsen's distinction between the positive and negative legislator as applied to the Council and other constitutional courts, see Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5 (2007), pp. 69-92, and Alec Stone Sweet, "Constitutional Courts and Parliamentary Democracy," *West European Politics* 25 (2002), pp. 77-100.

<sup>8</sup> Alec Stone Sweet, "La politique constitutionnelle," in B. François and R. Drago, eds., *La légitimité de la jurisprudence du Conseil constitutionnel* (Paris: Economica, 1999), pp. 117-40.

observer to understand how French law was made without paying close attention to how the Council interacts with the legislator.

## **B. Parliament as a Constitutional Judge**

After the 1971 decision, *la Doctrine* gradually abandoned its hostility to the Council. A consensus emerged to the effect that the Council constituted a “jurisdiction” worthy of doctrinal respect and attention because it produced an authoritative jurisprudence on the legality of Parliamentary acts.<sup>9</sup> It is now forgotten that, during the Third Republic, jurists used virtually identical arguments to claim that Parliament functioned as a constitutional judge whenever it debated the lawfulness of its own activities, under the *question préalable* procedure.<sup>10</sup> In the Fifth Republic, this argument is much stronger. Under the standing orders of the Assembly and Senate, deputies and senators may raise a *motion d’irrecevabilité*, which require them to debate and vote on a bill’s constitutionality. During these debates, they cite constitutional texts, invoke legal scholarship, and rehearse relevant Council jurisprudence. If the motion passes, the bill is rejected as unconstitutional. From 1981 through 1987, the National Assembly alone debated and voted on 94 such motions, a figure to be compared with 93 Council decisions. The standard arguments of French doctrine compel us to conclude that the Assembly, not the Council, was the more active constitutional judge.

Parliamentarians, too, have thought of themselves as constitutional judges, and of the Council as a legislative chamber. Debating a *motion of irrecevabilité* against the Socialists’ Nationalisation bill in 1981, the Vice-President of the Senate declared that Parliamentarians were judges of the first instance, under the control of the Council, just as trial judges are controlled by the *Cour de cassation*.<sup>11</sup> One parliamentary supporter of the Council, writing in the *Revue politique et parlementaire* in 1986, described the Council as a “chamber of appeal” for Parliament, or a “second parliament” that organizes the work of the “first parliament.”<sup>12</sup> Later that same year, an unhappy Jacques Toubon called the Council “a parliament of judges.”<sup>13</sup>

My thesis is not meant to provoke controversy. It is meant to describe a reality, and this reality is not limited to the French case. On the contrary, the more any constitutional court exercises abstract review powers in a minimally effective manner, the more the legislator will be induced to behave as a constitutional judge.

## **II The Council and Judicial Power**

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<sup>9</sup> *The Birth of Judicial Politics in France*, op cit., chapter 4.

<sup>10</sup> Marcel Waline, “Eléments d’une théorie de la juridiction constitutionnelle,” *Revue du droit public* 45 (1928), pp. 441-62.

<sup>11</sup> Etienne Dailly, *Debats*, Senate, 20 novembre 1981.

<sup>12</sup> Pierre Pascallon, “Le Conseil constitutionnel: un deuxième parlement,” *Revue politique et parlementaire* 925 (1986), p. 3.

<sup>13</sup> *Le Monde*, 5 Septembre 1986.

The founders of the Fifth Republic explicitly opposed the creation of a constitutional court. In 1958, during the *Travaux préparatoires*, they rejected the proposal of the *Comite consultatif constitutionnel* to permit the *Cour de cassation* and the *Conseil d'état* to refer laws to the Council for a ruling on their conformity with the new constitution. They also refused to grant the Council jurisdiction over fundamental rights. To decide otherwise, Michel Debré and Raymond Janot insisted repeatedly, would be to establish a “government of judges.”<sup>14</sup>

When the Council began behaving as if it were a constitutional court, it inevitably raised questions about the nature and scope of its authority. The orthodox presumption in Europe is that constitutional courts hold – or ought to hold – the ultimate authority to determine how constitutional norms are to be interpreted and applied. Further, the decisions of the constitutional judge are – or ought to be – binding on every other organ and actor in the system. In France, however, the Council’s capacity to determine how the Constitution and rights will evolve cannot be presumed.

### A. Problems of Authority

The Council’s authority within legislative space is virtually perfect, to the extent that the Opposition acts as its agent, or “watchdog.” The Council exercises legislative powers that are both negative and positive, often simultaneously. When the Council annuls an important legislative reform, it typically provides guidance as to how *le projet* should have been elaborated in the first place. Such decisions provoke a “corrective revision” process: the Government redrafts the censured text, in conformity with constitutional jurisprudence, in order to secure promulgation. In such processes, the Council has already made its legislative choices explicit, and the Government’s compliance with the Council’s decision is assured by the threat of a second referral by the Opposition. The threat of referral comprises a (coercive) mechanism of compliance.<sup>15</sup>

In comparison, the Council’s authority within judicial space is quite imperfect, precisely because no watchdog, or any other coercive mechanism of compliance with its jurisprudence, exists. Famously, or notoriously, the *Conseil d'état* and the *Cour de cassation* long refused to recognize the authority of the Council’s reasoning. This situation became a problem during the 1980s, when the Council began issuing *réserves strictes d'interprétation*. The Council, supported by constitutional doctrine, insisted that its *réserves d'interprétation* were binding on all public authorities, judges in particular; to allow otherwise would be to permit a law to be enforced in an unconstitutional way.

The authority problem is obvious: the Council relies on the judiciary to enforce its positions, but it had not means to compel the courts to do so. Initially, the courts were hostile

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<sup>14</sup> *Travaux préparatoires de la Constitution du 4 octobre 1958, Avis et débats du Comité consultatif constitutionnel* (Paris: Documentation française, 1960), pp. 75-79, 101-102, 164-166 ; *Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958, tome I: Des origines de la loi constitutionnelle du 3 juin 1958 l'avant-projet du 29 juillet 1958* (Paris: Documentation française, 1987) pp. 388, 425.

<sup>15</sup> Unless the political parties are able and willing to revise the Constitution in order to reverse the Council’s decision, the Council will normally have *le dernier mot*.

to the idea of being placed under the Council's tutelage. In 1993, *l'Association Professionnelle des Magistrats* even released a *Communiqué* calling on judges and prosecutors to ignore binding interpretations, which they characterized as "trivial" gloss.<sup>16</sup> By the end of the 1990s (at the latest), senior judges on the *Cour de cassation* and the *Conseil d'état* had made the choice to accept the "persuasive authority" of the Council's interpretations. In my view, it was virtually costless for them to do so, at this point in time, given that the two supreme courts had already succeeded in asserting their own autonomous authority to protect rights, both under the Constitution<sup>17</sup> and under the European Convention on Human Rights (ECHR). In this context, the Council's *réserves* expand (rather than restrict) the menu of interpretive options available to the supreme courts.

## B. Constitutional Pluralism and Problems of Authority

In 1975, the Council made a massive strategic error: it declared that the ECHR fell outside the scope of its jurisdiction.<sup>18</sup> The Convention was eventually incorporated into French law with a status superior to *la Loi*; and the two supreme courts gradually began to enforce it in order (1) to defend themselves against censure at the hands of the Strasbourg court, and (2) to develop and consolidate new powers of judicial review.<sup>19</sup> Simplifying a complex process, over the past fifteen years, the *Cour de cassation* and the *Conseil d'état* became *de facto* constitutional judges. They authoritatively construct and apply both constitutional rights and the Convention, and they do so beyond the reach of the Council's – and the legislator's – control. Significantly, if litigants are going to plead rights against a statute before the courts, they are much more likely to plead the Convention than they are to plead the French constitution – which advantages the supreme courts, not the Council.

Today, the French legal order is characterized by a strong form of constitutional pluralism: multiple high courts exercise autonomous authority to develop and protect fundamental rights, and these rights are found in multiple sources of law (written, unwritten, French, European). In the German and Spanish systems, the constitutional complaint (the *Verfassungsbeschwerde* and the *amparo*) constitutes a relatively effective mechanism for ensuring the constitutional court's authority. With individuals acting as the watchdogs, constitutional courts are able to supervise how the judiciary interprets and enforces the ECHR, and they are able to determine if and how the constitutional order will adapt to the jurisprudence of the Strasbourg Court. The Council has no means of controlling how the *Cour de cassation* and the *Conseil d'état* apply the Convention. Further, each of the two

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<sup>16</sup> *Le Monde*, 9 August 1993.

<sup>17</sup> By the end of the 1980s, both supreme courts were in the process of learning how to interpret and use constitutional rights, for their own purposes, in ways that could not be derived from the Council's jurisprudence. See *Governing with Judges*, op cit., pp. 122-124.

<sup>18</sup> Décision 74-54 DC, *Recueil des décisions du Conseil constitutionnel* (1975): 19.

<sup>19</sup> The theory of *la Loi-écran* could not co-exist with the notion of the supremacy of EC/EU law in domestic systems; and the evolution of the Strasbourg system (especially after the entry into force of Protocol No. 11), increasingly exposed the French system of rights protection as indefensible and inadequate. See Elisabeth Lambert Abdelgawad and Anne Weber, "The Reception Process in France and Germany," in A. Stone Sweet and H. Keller, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press), pp. 107-64; Mitchell Lasser, "The European Pasteurization of French Law," 90 *Cornell Law Review* (2005), pp. 995-1083.

supreme courts now perform the task – an inherently constitutional task – of determining how constitutional rights and Convention rights will be coordinated with one another. A steady stream of cases provides them with opportunities to modify or reinforce their positions, on a continuous basis. The Council will either reverse its 1975 jurisprudence, or be increasingly marginalized.

Finally, the 2008 constitutional revision introduces a form of concrete review (*l'exception d'inconstitutionnalité*) into France, which is likely to complicate matters further. The reform was justified, in part, as a “modernization” of the legal system, allowing France to “catch up” with its European neighbors. Here again, a comparative perspective is instructive.<sup>20</sup> In Spain and Germany, individuals can appeal directly to the constitutional judge when the ordinary courts either fail to refer matters to the constitutional court, or when they fail to apply its jurisprudence properly. In Italy, where there is no *amparo* mechanism, the *Corte Costituzionale*'s authority depends on its ability to negotiate a cooperative relationship with the *Corte di Cassazione* and the *Consiglio di Stato*. Cooperation is not guaranteed; indeed, “wars of judges,” large and small, periodically break out. The French Council now faces an Italian-style situation. In my view, the *l'exception d'inconstitutionnalité* is likely to accentuate, rather than reduce, constitutional pluralism. How the new procedure will operate will be determined more by inter-court diplomacy than through hierarchical authority.

## Conclusion

In 1958, the founders of the Fifth Republic rejected proposals to provide for fundamental rights, for a constitutional court, and for the judicial review of statutes. Today, these are core features of French constitutional law.

This article tells this saga, of “the transformation of the Fifth Republic,” in two parts. The first focuses attention on the interactions between the Council and the legislator, within legislative processes, after the 1971 decision. French politicians could have revised the Constitution in order to purge it of fundamental rights. Instead, in 1974, they extended the power of referral to the Opposition. The political parties could have refused to use the *saisine* (an illegitimate insult to the formation of *la Volonté Générale*). Instead, when in the minority, both the Left and the Right deployed the *saisine* in the service of their political agendas. They did so, routinely and without apology, thereby legitimating the authority of the Council, and of fundamental rights, within the legislative process.

The second part of the saga focuses on the relationship between the Council and the courts. During the critical 1974-88 period, the constitutional politics taking place within legislative space fatally undermined the notion that *la Loi* was “sacred” and immune to external control. Gradually, the courts began to interpret and apply constitutional rights on their own, for their own jurisprudential purposes. As important, the development of European law created new opportunities for the two supreme courts to redefine themselves as *de facto* constitutional jurisdictions. The constitutional order

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<sup>20</sup> See *Governing with Judges*, op cit., chapter 4.

now features a plurality of jurisdictions, interpreting and applying multiple of sources of higher law. Parliament is just one of these jurisdictions, and often not the most important.

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On July 21, 2008, legislative sovereignty died. French legislators killed it – an act of euthanasia.<sup>21</sup>

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<sup>21</sup> In 1990 and 1993, similar reforms were blocked by the Senate, and they were opposed by politicians on both the Left and the Right. At the time, some praised legislative sovereignty; some complained that the Council's development of the *bloc de constitutionnalité* has not been authorized by constituent power; some worried about installing a "government of judges." In 2008, no one bothered to raise any of these objections. Legislative sovereignty died without a bang, or even a whimper.