

## External Dimensions of the French Constitution

JOHN BELL\*

*France lives with a tension between its internationalist and Universalist aspirations and the national preoccupations of its domestic politics. On the one hand, international treaties prevail over ordinary domestic legislation. On the other hand, constitutional control over treaties ensures that essential elements of "national sovereignty" are preserved. This concept is unclear and gives considerable scope for judicial interpretation. The treatment of foreigners by French law starts from the requirement to afford them basic minimum rights and freedoms, including the right to asylum. Constitutional rights are limited, but they are enlarged by the ordinary law, which the legislator is free to change. Basic civil liberties are well protected, but the legislator has a greater margin of appreciation in relation to social advantages and assistance justified by the constitutional principle of solidarity. Basic medical, income, and legal protection are assured, but beyond that the legislator is free to allocate benefits according to criteria related to the degree to which the foreigner is integrated into French society.*

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\* Professor of Law (1973), University of Cambridge, U.K.

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## I. INTRODUCTION

The French constitution is predominantly concerned with domestic constitutional organs and domestic rights of citizens. But there are two features that take French constitutional law beyond this comfort zone. The first is that the Constitution restricts the acts of organs of the French state in international affairs. The Conseil constitutionnel (Constitutional Court) has emphasized that the Constitution does not permit treaties and international agreements which compromise “essential conditions for the exercise of national sovereignty” or fundamental rights. Secondly, the Constitution extends its protection and its obligations not only to citizens, but also to foreigners residing on its territory. The question is what kinds of rights are provided. The “Declaration of the Rights of Man and of the Citizen” of 1789 already recognizes the distinction between protections afforded to all and those restricted to citizens. Most centrally, there is a distinction between rights of protection (typically in the 1789 Declaration) and rights to solidarity (typically in the Preamble to the 1946 Constitution). Current debates on integration of long-term residents challenge the boundaries of these distinctions.

This article deals with both issues. It argues that France lives with a tension between its internationalist and Universalist aspirations and the national preoccupations of its domestic politics. For the most part, the status quo is on the nationalist side, where the Gaullist ambitions of the founders of the Constitution remained. The latter position is the default position for France and the Conseil constitutionnel.<sup>1</sup> That means that treaties of an expansionist international character often require amendments to the Constitution before they can be enacted. In relation to solidarity rights, foreigners are only marginally on the same footing as citizens. European Union law is in a special position, but the national constitution ultimately prevails. The result is that the French Constitution restricts what can be done in the name of international law and restricts the internal impact of international law.

## II. TREATIES AND NATIONAL LAW

The French Constitution of 1958 contained a tension between two traditions. The internationalist tradition, set out in article 55, provides that “duly ratified or approved treaties or agreements have a higher authority than *lois*<sup>2</sup> (legislation enacted by the Parliament), subject, for each treaty or agreement, to its implementation by the other party.” This monist idea was

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1 F. LUCHAIRE & G. CONAC, LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1059 (Economica, 2d ed. 1979).

2 This term is contrasted with legislation enacted by the Executive (*règlements*).

carried over from the French Constitution of 1946 and has enabled France to adhere to a series of international treaties creating organizations such as the UN, the European Coal and Steel Community (“ECSC”), and the European Economic Community (“EEC”) (as they then were called), as well as on topics relating to fundamental rights and refugees. This follows as a consequence of the central role of Parliament in the ratification of many treaties. Article 53 requires Parliament to ratify major treaties, especially those involving international organizations.<sup>3</sup> The Gaullist tradition objected to the way the Treaty of Rome was enacted, because it considered that the Treaty infringed upon French sovereignty. Accordingly, article 54 of the Constitution permits the President, the Prime Minister, or sixty members of either chamber of Parliament to refer treaties to the Conseil constitutionnel before they are ratified, in order to assess whether they are compatible with the Constitution.<sup>4</sup> Where “the Conseil constitutionnel declares that an international agreement includes a clause contrary to the Constitution, authorization to ratify or to approve it may only be given after a revision of the Constitution.”<sup>5</sup> In such a situation, the government is faced with the choice of abandoning the treaty or securing a constitutional amendment. This section looks at both the procedural constraints, which the role of the Conseil constitutionnel involves, and asks how far the Constitution (as interpreted by the Conseil) imposes substantive constraints on what politicians can achieve through treaties.

In the Gaullist model, the Conseil constitutionnel is the guardian of the national Constitution, fundamentally national sovereignty. It does not act of its own initiative. The Presidents of the Republic, the National Assembly, or the Senate, or the Prime Minister and (since 1992) sixty senators or deputies may refer a treaty for consideration by the Conseil constitutionnel to determine whether it is contrary to the Constitution. If it is contrary to the Constitution, then it can only be ratified after a constitutional amendment has been passed (article 54). This procedure is merely an extension of the competence of the *Comité constitutionnel* under the Fourth Republic, about

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3 1958 CONST. art. 54 (“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, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured.”) (All translations from the Constitution are taken from the website of the Conseil constitutionnel: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleVI>, last visited 11 January 2017). This provision has been fairly constant in content since 1875. See LUCHAIRE & CONAC, *supra* note 1, at 1007.

4 For the relationship between this article and the Gaullist position on entry into the EEC, see LUCHAIRE & CONAC, *supra* note 1, at 1059.

5 John Bell, *French Constitutional Council and European Law*, 54 INT’L & COMP. L. Q. 735, 736 (2005).

which there was controversy when the EEC Treaty was ratified in 1957. The Gaullists claimed that it was a breach of national sovereignty as guaranteed by the Constitution and so the legislature was not constitutionally competent to ratify it. As Conac and Luchaire explained, article 54 is a continuation of article 53 in that it circumscribes the power of the legislature to ratify a treaty.

So, the 1958 Constitution provided a mechanism to stop the politicians both in government (the President) and in the legislature from exceeding their constitutional mandates.<sup>6</sup> The function of the provision is to identify situations where the existing constitutional provisions require a revision of the Constitution to permit ratification to happen.

The Conseil does not systematically check whether an ordinary *loi* is compatible with a treaty obligation.<sup>7</sup> That task is left to the ordinary courts, since the Conseil only judges the compatibility of laws and treaties with the Constitution.

This does mean that international relations are subordinated to domestic constitutional law and domestic politics. Technically, the Conseil is reviewing potential legislation by reviewing the treaty. But the reference made is of the whole treaty and not just specific provisions that trouble the President or members of Parliament. Once seized of the treaty, the Conseil can call into question the constitutionality of any provision it likes to consider. There is no issue of acting *ultra petita*. The consequence has been that the Conseil has often required that a constitutional amendment be enacted before a treaty is ratified. Good examples have been in relation to the treaties deepening the European Union.

Non-treaty aspects of international relations fall within the province of the executive. Article 5 of the Constitution makes the President of the Republic the guarantor of the nation's independence and the individual charged with the state's treaty-making power.<sup>8</sup> Under article 52, he negotiates and ratifies treaties (subject to the role of Parliament in the subsequent articles). Under article 15, he is the head of the army and is responsible for national defense. These foreign affairs activities of the state are governed by administrative law in that the legality of the decision of the President might be challenged before the administrative courts. Administrative law is adjudicated by separate courts according to distinct

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<sup>6</sup> In the early period, the President of the Republic was the only one to make use of this procedure in relation to EEC taxation (1970), European elections (1976) and the additional Protocol to the European Declaration on Human Rights on the death penalty (1985).

<sup>7</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54 DC, Jan. 15, 1975, Abortion Law, Rec. 19, para. 7; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-605DC, May 12, 2010, Online Betting and Gambling, para. 11.

<sup>8</sup> See CONST., *supra* note 3, art. 5 (“The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties.”).

principles of law.<sup>9</sup> However, there is the theory of “*acte de gouvernement*” under which the acts of the French government in international affairs are deemed not to be justiciable in the French courts. An example would be the decision of President Chirac to recommence nuclear testing before the entry into force of a treaty banning such testing. That decision could not be challenged.<sup>10</sup> Likewise, many administrative decisions<sup>11</sup> connected with the signing of treaties cannot be challenged in the administrative courts.<sup>12</sup> So, there are significant decisions in the international sphere that escape the control of any of the different French judiciaries.

In the case of the armed forces, the *Code de la justice militaire*, as it results from *loi* n° 2013-1168 of 18 December 2013, provides for the hearing of criminal proceedings for the actions of French forces overseas to be handled by the Tribunal de Grande Instance of Paris, allowing specialized judges to deal with military matters.<sup>13</sup> The Tribunal deals not only with the criminal prosecution, but also with the civil claims brought by the victims (including foreign victims).<sup>14</sup> Such actions depend on the express authorization of the *Procureur* (the state prosecutor) under article 689-2 of the *Code de procédure pénale*. This protects the military against inappropriate prosecutions. The military also has greater protection than ordinary citizens in these cases because they are only liable to prosecution for lack of ordinary care that were not beyond their capabilities or powers, given the means at their disposal and the knowledge available to them.<sup>15</sup> This is a more protective standard than would apply in ordinary civilian cases.

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9 See LIONEL NEVILLE BROWN & JOHN BELL, FRENCH ADMINISTRATIVE LAW 20–21, 24–25, 138–39 (5th ed. 1998).

10 See CE Ass., Sept. 29, 1995, Association Greenpeace France, L'Actualité Juridique – Droit Administratif 684. See also, CE Ass. July 5, 2000, Mégret et Mekhantar, L'Actualité Juridique – Droit Administratif 95 (the deployment of French forces in former Yugoslavia and Kosovo); CE Ass. Dec. 30, 2003, Comité contre la guerre en Irak, Rec. Lebon 707 (the decision to grant rights to British and American forces to fly over French territory on route to Iraq).

11 In French law, this is a technical term. The administrative decision to authorize a minister to sign is the act in internal French law which can be challenged in court. The Signature in an international forum is governed by international law and so has effect irrespective of domestic law.

12 See CE Ass., Section du contentieux, June 1, 1951, Société des étains et wolfram du Tonkin, Rec. Lebon 312; CE Ass. Nov. 23, 1984, Association “Les Verts”, Rec. Lebon 446 (vote of a minister in the Council of Ministers of the European Economic Community).

13 See CODE DE LA JUSTICE MILITAIRE [Code of Military Justice] art. 2011-8 et seq.

14 See further, P. Bricard, *La mise en oeuvre de la responsabilité pénale des militaires français en mission à l'étranger* (on file with the author).

15 CODE DE LA DEFENSE [Code of Defense] art. 4123-11 (“Sous réserve des dispositions du quatrième alinéa de l'article 121-3 du code pénal, les militaires ne peuvent être condamnés sur le fondement du troisième alinéa de ce même article pour des faits non intentionnels commis dans l'exercice de leurs fonctions que s'il est établi qu'ils n'ont pas accompli les diligences normales compte tenu de leurs compétences, du pouvoir et des moyens dont ils disposaient ainsi que des difficultés propres aux missions que la loi leur confie. Ces diligences normales sont appréciées en particulier au regard de l'urgence dans laquelle ils ont exercé leurs missions, des informations dont ils ont disposé au moment de leur intervention et des circonstances liées à l'action de combat.”).

### A. Constitutional Control Over Treaties

The typical case when the Conseil constitutionnel refuses to approve the ratification of a treaty and requires a constitutional amendment is when the treaty interferes with attributes of national sovereignty. Such attributes are not clearly identified in the Constitution, and so the Conseil creatively interprets such concepts.

The Maastricht Treaty offers a good illustration of those issues that require constitutional amendment.<sup>16</sup> The treaty to reform the European Communities was submitted to the Conseil constitutionnel by the President in March 1992 to ensure its conformity with the Constitution. The Conseil found that a number of provisions were not compatible with the existing Constitution.<sup>17</sup> In particular, the provisions permitting EU citizens to vote in local elections would indirectly affect the appointment of members of the Senate. Members of the Senate are elected by representatives of local government. So, indirectly, non-nationals would be able to affect the membership of the national parliament. Furthermore, the power to control the national currency was considered to be an aspect of national sovereignty that the creation of a single European currency controlled by a single European central bank would take away. As a result, it was necessary to amend the Constitution through the Congress in June 1992 to insert articles 88-1 to 88-4, which made the ratification of the Treaty possible. In response, a number of members of the opposition again used art. 55 to challenge the compatibility with the Constitution as revised. This time, the Treaty was found to be compatible, since it fell within the range of possible decisions that the Constitution allowed to the constituent power.<sup>18</sup> This political process allowed debate on the principles to be settled by politicians. But the actual *loi* authorizing the President to ratify the Treaty was put to a referendum on 20 September 1992, which was narrowly won, and which the Conseil constitutionnel claimed to have no competence to review.<sup>19</sup> Although some technical expertise was required to produce appropriate formulations of the constitutional amendments, the principal problem was obtaining the requisite majority first for the constitutional amendment and then for its

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16 See Sophie Boyron, *The Conseil Constitutionnel and the European Union*, PUBLIC LAW 30 (1993); see also the ratification of the Amsterdam Treaty: Anne Bonnie, *The Constitutionality of Transfers of Sovereignty: the French Approach*, 4(4) EUROPEAN PUBLIC LAW 517 (1998).

17 Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-308DC, April 9, 1992, Maastricht I, Rec. 55.

18 Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sept. 2, 1992, Maastricht II, Rec. 76.

19 Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-313DC, Sept. 23, 1992, Maastricht III, Rec. 94. The Conseil constitutionnel does not have jurisdiction to review laws and constitutional amendments passed through art. 11 of the Constitution. See BROWN & BELL, *supra* note 9, at 133-37.

application in the law on ratification of the Treaty. The first review of the Maastricht Treaty by the Conseil constitutionnel created problems of a constitutional nature for the Government, because it was not clear which provisions would be identified as affecting “national sovereignty.”

There are, thus, two possible scenarios in terms of the outcomes of the constitutional review of treaties. In the first, a treaty is compatible with the Constitution and the President can sign the ratification statute. Where it is not compatible, then a very different process of constitutional revision must take place, and this will usually require some support from the opposition in order to establish the requisite majority in the Congress.<sup>20</sup> So the effect of a decision of the Conseil constitutionnel is more to change the internal political dynamics rather than to lead to a specific foreign policy outcome.

In some cases, however, it is not politically possible to build up the support for a constitutional change. For example, the European Charter for Regional and Minority Languages was held incompatible with the Constitution’s requirement that French was the language of the Republic, but it was not possible to obtain a constitutional amendment to permit the ratification of this treaty.<sup>21</sup> The Council of Ministers proposed a constitutional law to permit the ratification of the treaty on July 31, 2015, despite an unfavorable legal opinion from the Conseil d’Etat.<sup>22</sup> But, as yet, this proposal still has not been adopted. In this specific instance, the need to amend the constitution before the ratification of a treaty has produced a roadblock in international relations, which the national government has not been able to undo.

Contemporary foreign policy often involves building transnational or supranational legal orders or institutions. The Gaullist position would retain the priority of national state sovereignty, expressed in the form of the sovereignty of the national Constitution over any international treaty. In

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<sup>20</sup> The Congress requires a two-thirds majority of a joint meeting of both chambers of the legislature. The alternative way of changing the Constitution is a statute approved by referendum.

<sup>21</sup> See Conseil constitutionnel [CC] [Constitutional Court] decision No. 99-412DC, June 15, 1999, Rec. 71. This was in line with its decisions of Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-345DC, July 29, 1994, loi Toubon, Rec. 106 and Conseil constitutionnel [CC] [Constitutional Court] decision No. 91-290 DC, May 9, 1991, Corsica, Rec. 50. The protection of minority languages was seen as contrary to equality before the law and the unity of the French people (paragraph 10). The Charter also breached the Constitution by permitting the use of languages other than French not only in private life, but in public life, especially in the courts and in public services (such as education) (paragraph 11).

<sup>22</sup> See CE Ass., July 31, 2015, 390.268, Ratification de la Charte europeenne des langues regionalis ou minoritaires, <http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Ratification-de-la-Charte-europeenne-des-langues-regionales-ou-minoritaires>.

In paragraphs 5 and 6, the Conseil notes that there is an incoherence between the text of the Charter (which requires respect by states for minority languages) and the declaration of the French Government in 1999 that the Charter does not confer collective rights to the use of languages other than French in public services. *Id.*



relation to European Union law, there has been a softening of this line. The European Union claims priority over national law, but national constitutional courts, like the Conseil constitutionnel, continue to assert the priority of the national constitution. The way of avoiding a direct conflict is to assert the importance of interpretation. National legislation is interpreted as to conform both to the Constitution and to the European Union law. In a decision on 10 June 2004, the Conseil constitutionnel decided to set out a general principle on the relationship of EU law and French Constitutional law for the first time. Under this principle,

the transposition of a directive into internal law results from a constitutional requirement which can only be impeded because of a provision expressly contrary to the Constitution; as, in the absence of such a provision, it is only for the Community court, seized by means of a preliminary reference, to ensure that the Community directive respects both the competence set out in the treaties and the fundamental rights guaranteed by article 6 of the Treaty on European Union.<sup>23</sup>

The “constitutional requirement” here is article 88-1 of the Constitution, introduced in 1992. This article is broader than article 55 and gives a legal status to all European legislation.<sup>24</sup> Whereas the Conseil had said in its decision n° 98-405 DC of 29 December 1998 that it was not its role to examine whether a *loi* was compatible with a directive, the 10 June 2004 decision suggests that the duty to implement a directive is a constitutional requirement, so this has left French lawyers perplexed as to whether the Conseil intends to examine whether legislation is correctly implementing a directive.<sup>25</sup> After all, where the implementation of a directive falls within the legislative competence of the executive under article 37 of the Constitution, the review exercised by the Conseil d’Etat, the top administrative court,<sup>26</sup> would certainly cover this issue of whether the directive had been properly transposed. The suggestion from one of its then members, Dutheillet de Lamothe, that there would be no direct reversal of the *Abortion Law* case-law suggests that the 1998 decision still

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<sup>23</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-496DC, June 10, 2004, para. 8.

<sup>24</sup> A rather extreme interpretation would be to suggest that the logic of this change of constitutional basis for the status of EU legislation would be to give the whole of Community law constitutional status and to permit any national law to be reviewed by the Conseil constitutionnel for its compatibility with EU law. See Jérôme Roux, *Le Conseil Constitutionnel, le droit communautaire dérivé et la Constitution*, REVUE DE DROIT PUBLIC 912, 923–24 (2004).

<sup>25</sup> See Bruno Genevois, *Le Conseil constitutionnel et le droit communautaire dérivé*, 20 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 651 (2004).

<sup>26</sup> France has several supreme courts. The Conseil d’Etat is the supreme court on administrative law matters, i.e. the validity of acts of the Government, local authority and public agencies. See BROWN & BELL, *supra* note 9, at 126.

stands, but it is heavily criticized.<sup>27</sup> In a 2010 decision, the Conseil constitutionnel clarified the position. It declared, on the one hand, that the compatibility of national law with EU law was a matter for the ordinary civil and administrative courts. EU law is a higher form of national law and so the conflict between different levels of national law is a matter for the ordinary courts.<sup>28</sup> However, it did accept that the duty to transpose an EU directive into French law is a constitutional requirement arising under article 88-1 of the Constitution. But the Conseil constitutionnel has two formal restrictions on its jurisdiction in such matters: it cannot require the transposition of anything which is contrary to fundamental rights and principles protected by the French Constitution (whatever European Union law requires) and the time limits laid down by the Constitution prevent it from referring cases to the Court of Justice of the European Union. So, it declared that:

[I]t can rule unconstitutional under Article 88-1 of the Constitution solely a statutory provision which is patently incompatible with the Directive its purports to transpose. In all events, it is incumbent upon Courts of law and Administrative Courts to review the compatibility of a statute with European commitments entered into by France and, if need be, to make a reference for a preliminary ruling to the European Court of Justice.<sup>29</sup>

The result is really a matter of procedure. The Conseil constitutionnel will not strike down legislation before it is enacted, but the ordinary courts can do so after it is enacted, they can suspend the operation of the French implementing law and can make a reference to Court of Justice of the European Union.

In relation to the European Convention on Human Rights, the Cour de cassation (the supreme private and criminal law court) and the Conseil d'Etat (the supreme administrative law court) have held that the Constitution retains its priority.<sup>30</sup> But only the Conseil d'Etat has held that the same applies to EU legislation.<sup>31</sup> Certainly, the Conseil constitutionnel

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27 Oliver Dutheillet de Lamothe, *Le Conseil Constitutionnel Et Le Droit Europeen* 57 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 23, 25; see also, *Actualité du Droit Communautaire*, L'ACTUALITE JURIDIQUE: DROIT ADMINISTRATIF 2261, 2265 (2004).

28 Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-605DC, May 12, 2010, Online Betting and Gambling, paras. 12–16.

29 *Id.* para. 18. Note that the name of the European Court of Justice was changed after this decision by the Treaty of Lisbon.

30 Cour de cassation [Cass.] [supreme court for judicial matters], Ass. plén., June 2, 2000, Mlle Fraisse, D 2000 J 865 (note Mathieu et Verpaux); CE Ass., Oct. 30, 1998, Sarran, REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1091 (1998).

31 CE Ass. Dec. 3, 2001, *Syndicat national de l'industrie pharmaceutique*, L'ACTUALITE JURIDIQUE: DROIT ADMINISTRATIF 1219 (2002) (note Valenbois). This is in line with the broader thrust of the *Cohn-Bendit* decision of 1978, CE Ass., Dec. 22, 1978, Rec. Lebon 524, for which Genevois was commissaire du gouvernement, and Dutheillet de la Mothe was an approving commentator.

does not want to become a judge of community law. As a result, there are effectively two forms of constitutional review of legislation. The first, exercised by the Conseil constitutionnel, examines how far a statute is compatible with the Constitution. The second, exercised by the civil, criminal, and administrative courts, examines how far a statute is compatible with a ratified treaty or with EU law. Dutheillet de Lamothe described this position as creating a form of constitutional review operated by the ordinary courts:

In not ensuring itself the primacy of a treaty over a *loi*, but leaving it to the ordinary courts to ensure this supremacy, the Conseil constitutionnel has opened for these courts *a new form of constitutional review*.

Of course, from the strictly legal perspective, it is not constitutional review but review of compatibility with a treaty, and it does not have the same consequences. It cannot lead to the censure of a *loi* preventing it being promulgated. It results simply in the fact that the judge, in specific litigation, sets aside the national provision from *loi* or *règlement* which it considers contrary to European law.<sup>32</sup>

So, on the one hand, the Conseil asserts the primacy of the national constitution. On the other hand, it recognizes the significant ways in which treaty obligations restrict the freedom of the legislator. This is done through *ex post* examination by the ordinary courts of the compatibility of the implementing legislation with the treaty (and not with the Constitution). Conform interpretation is a way of ensuring that these apparently contradictory positions can be held together.

We see in European law the most significant attempts to create a supranational legal order that potentially undermines the national constitutional order. In its decision n° 2004-505 DC of November 19, 2004, the Conseil ruled that the label “Constitution” given to the “European Constitution” did not affect its status as a treaty, since “this label has no effect on the existence of the French Constitution and its place at the summit of the internal legal order.”<sup>33</sup> At the same time, the Conseil relied on article 88-1 of the Constitution to establish that the constituent power had already accepted the existence of a (European) Community legal order, integrated into the internal legal order while still distinct from the international legal order. Interpreting the provisions of the Treaty in light of the declaration annexed to it, the Conseil held that article I-6 of the European Constitution “does not confer on the principal

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<sup>32</sup> See Dutheillet de Lamothe, *supra* note 26, at 27.

<sup>33</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-505DC, Nov. 19, 2004, para. 10.

of the supremacy a meaning other than that which it had previously.”<sup>34</sup> In this light, given that there was no change to the character of the Union, there was no need to amend the French Constitution to deal with this aspect of the new treaty.

In the same decision, the interpretative approach can be seen in relation to the EU Charter of Fundamental Rights as it appears in Part II of the European Constitution. The Conseil relied on paragraph 4 of article II-112, which provided that the Charter is to be interpreted consistently with the constitutional traditions of the Member States. It therefore concluded that the fundamental purposes of the Republic as articulated in articles 1 through 3 of the French Constitution were respected to the extent that they preclude the recognition of collective rights to groups defined by ethnic origin, culture, language, or belief. While this is consistent with the Conseil’s view on minorities’ “rights,” especially linguistic and cultural minorities, it depended on a particular view of the social unity of France, which might not be shared in Belgium or even the UK. This focus on interpretation is based on a detailed focus on secularism (“*laïcité*”) in the decision on the European Constitution and especially the Charter, a pre-occupation which few other countries will share.

Naturally, the approach of interpreting the transnational European instrument in conformity with specific national constitutions can lead to a significant diversity in the way that instrument is interpreted.<sup>35</sup>

The Conseil cited in the recitals of its decision on the European Constitution the judgment of the European Court of Human Rights in the case of *Leyla Sabin v Turkey*,<sup>36</sup> which was a then-recent decision on secularism and human rights. The Praesidium of the Convention had declared that the Charter would be interpreted in the light of national constitutional traditions. Article II-70 of the Constitution protects religious freedom and should be interpreted in that way to respect the French constitutional tradition.<sup>37</sup> This had been the approach the European Court of Justice applied to article 9 of the European Convention in *Leyla Sabin*, which had concerned the Turkish secular

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<sup>34</sup> *Id.* para. 12.

<sup>35</sup> See J. SCHWARZE, BIRTH OF A EUROPEAN CONSTITUTIONAL ORDER, 511–16 (2001), who argues that national sovereignty remains a value in each national constitution but is now interpreted in the light of the European project.

<sup>36</sup> App. No. 44774/98, available at [https://hudoc.echr.coe.int/eng#{"appno":\["44774/98"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-70956"\]}](https://hudoc.echr.coe.int/eng#{).

<sup>37</sup> “Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.” Draft Treaty Establishing a Constitution for Europe, 24 O.J. C 310/1, Art. II-70 (never ratified) [hereinafter Constitutional Treaty].

tradition and whether a female student could complain that wearing a Muslim veil was not permitted in the university. Interpreting the Charter in this light, the Conseil concluded that the French view of secularism would be permitted and the view “prohibits anyone from relying on religious beliefs to exempt themselves from general rules governing the relationships between public authorities and individuals.”<sup>38</sup>

As a result, the Charter was declared compatible. But, of course, this relied on the Court of Justice adopting the interpretations presented by the *Præsidium* or adopted by the Conseil constitutionnel, should the Constitution ever come into force. It also illustrates a careful examination of the treaty’s text to show, at least to the French government, the ways in which the Constitution constrains the development of foreign policy.

The limits of the scope for achieving compatibility through interpretation were shown in relation to the provisions on institutional changes that gave greater powers to EU institutions. New areas of competence for the European Union were identified by the Conseil constitutionnel as effecting a transfer of powers from national sovereignty, thereby requiring a French constitutional amendment to permit ratification of the treaty since treaties that are considered to abridge or threaten attributes of national sovereignty require the approval of the constituent body and not just the legislature, a significant hurdle. These areas included border controls (article III-265), judicial cooperation in civil and criminal matters (articles III-269, -270 and -271), as well as the creation of the European Prosecutor (article III-274). Equally, the Treaty permitted changes in the voting regime within the Council of Ministers for other areas, increasing the scope for qualified majority voting rather than unanimity (which thus reduced the French scope to object to measures affecting its interests). Such changes in voting might include judicial cooperation in criminal matters, the activities of Eurojust and Europol or proposals from the European Foreign Minister.<sup>39</sup> Giving decision-making powers to the European Parliament through the “reinforced cooperation” procedure in the use of the Euro (article III-191) and in the European area of liberty, security, and justice (article III-419) would also reduce the scope of French initiative and thus reduced national sovereignty. The reduction of national initiative was also found in the provisions requiring only a joint initiative of a quarter of Member States, rather than just of individual states in the area of liberty, security, and justice, Eurojust or Europol.<sup>40</sup> Here, the Conseil betrays a suspicion about how the new powers might be

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38 This approach of using interpretation to avoid conflict with the Constitution was used in relation to arts. II-107 (fair trial including a public trial), II-110 (no prosecution after acquittal within the union), and II-112 (proportionality in restrictions on rights).

39 Constitutional Treaty, Arts. III-270, 271, 273, 276, and 300 § 2(b).

40 Constitutional Treaty, Arts. III-264, 273, 275, 276, and 277.

used and, in the absence of the kinds of specific reassurance found in the declarations of the Praesidium or in existing case-law of the European Court of Justice (“ECJ”), the Conseil required the revision of the French Constitution to permit explicitly the transfers and limitations on sovereignty identified in the European Constitution. But there was also a desire by the Conseil that any change in the institutional structures of the French Constitution be authorized explicitly in the French Constitution. Thus, the new powers accorded to the French Parliament to object to the simplified revision of the Treaty or to refer matters to the European Court of Justice, given in article IV-444 of the Constitutional Treaty, also required amendment to the Constitution.

### *B. What Does National Sovereignty Involve?*

Some aspects of national sovereignty seem relatively straightforward. For example, protection of the currency and reducing the powers of the national legislature clearly belong to the idea of national sovereignty. However, the idea is much wider. For instance, a constitutional revision was required to ratify the treaty establishing the International Criminal Court. The procedural protection for the head of state and members of the Government under article 68-1 of the French Constitution and of members of parliament under article 26 of that Constitution were considered sufficiently fundamental to require constitutional change to permit those politicians to be prosecuted before the International Criminal Court.<sup>41</sup> The precise scope of this concept of national sovereignty is unclear. National sovereignty and the independence of France were core ideas in the program put forward by General de Gaulle when he came to power in 1958 and the Constitution was a major part of this. That is why there were seven references to it in the original text (the Preamble, Title 1 and then articles 3, 4, 5, 16 and 89). Stéphane Pierre-Caps argues that the concept is essentially political, focused around the concept of the nation state that provides social and political unity.<sup>42</sup> Essentially, the Constitution is far more concerned with the procedure for exercising national sovereignty and the limits on power than with its substance. So, we are left with a concept which is more like a slogan and which the Conseil constitutionnel must use to determine the role of treaties within national law.

The French Constitution has a significant influence on the conduct of

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41 See Conseil constitutionnel [CC] [Constitutional Court] decision No. 98-408DC, Jan. 22, 1999, Rec. 29.

42 S. Pierre-Caps, *La Souveraineté, Expression de la Singularité de la République*, in 1958-2008: CINQUANTIÈME ANNIVERSAIRE DE LA CONSTITUTION FRANÇAISE 161, 163 (B. Mathieu ed., 2008).

French foreign policy outside France. While more general acts in the international sphere, such as military and diplomatic activities conducted within the constitutional competence of the Executive, escape all forms of judicial control, treaties may confer powers on international bodies only with the consent of the Parliament and within the constraints of proper respect for the fundamentals of national sovereignty, as policed by the Conseil constitutionnel. For the most part, this has not caused problems within the EU, any more than the German Constitutional Court's *Solange* decisions.<sup>43</sup> But it has changed the dynamics within France of complying with EU law and ensures a substantial political consensus around EU membership. In other areas, it has taken time for the French to comply with international obligations, as with the International Criminal Court.

### III. FOREIGNERS' RIGHTS IN FRANCE

The situation of foreigners living in France is mainly governed by French statutes and by treaties to which France is a party, notably its membership of the European Union. There are few provisions of the Constitution that directly address the situation of foreigners. The constitutional position of foreigners is thus a matter of bringing together scattered provisions. To begin with, the Declaration of the Rights of Man and of the Citizen of 1789 contains both rights of all people (the "Rights of Man") and rights restricted to citizens. The French have struggled over the years to find that happy balance between these different categories of rights. This section will deal with two issues: how far are foreigners in France entitled to receive the same protection as French citizens, and how far must benefits accorded to French citizens also be accorded to foreigners in France?

#### *A. Rights to Protection of Foreigners*

In principle, rights of protection belong to the category of rights of man and not just the rights of citizens. Laws covering foreigners should not be retroactive, should specify criminal offenses and taxes in advance, should not subject them to arbitrary detention, and should not deny them freedom of expression and so on. International treaties may actually justify giving more beneficial treatment to foreigners than to citizens. For

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<sup>43</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 37/271 (Ger.); See Solange II, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 73/339; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 89/155 (Maastricht); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 123/267 (Lisbon Treaty); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 132/195 (European Stability Mechanism); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 135/317 (ESM Treaty).

example, in the 1982 *Nationalisations* decision, the legislature was held to be free to decide that foreign-owned banks would be exempt from the measure that nationalized French banks.<sup>44</sup> However, there needs to be a justification for unequal treatment.

The obvious area of basic protection for foreigners is the right of asylum. In France, that right was traditionally the right of protection of those who were fleeing political persecution. Article 120 of the 1793 Constitution proclaimed: “[t]he French people shall grant asylum to foreigners banished from their homeland for the cause of freedom, but shall refuse it to tyrants.”<sup>45</sup> The fourth paragraph Preamble of the 1946 Constitution provides for the protection of those who are fleeing predominantly for political reasons; the text reads: “Any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum upon the territories of the Republic.”<sup>46</sup> The Conseil constitutionnel affirmed that this right to asylum was of constitutional value in two decisions of 1980.<sup>47</sup>

France saw itself as the territory of freedom and so campaigners for freedom were given greater protection than ordinary migrants. However, its constitutional definition of a refugee is narrower than that of the Geneva Convention:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>48</sup>

This wider definition focuses on racial and religious minorities (especially, at the time, Jews), whereas the tighter definition focuses on essentially persecution on the ground of political opinions.

French law implements the Geneva Convention as a treaty, but, as such, it does not have constitutional status. The minimum *constitutional*

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44 Conseil constitutionnel [CC] [Constitutional Court] decision No. 81-132DC, Jan. 16, 1982, Rec. 18; J. BELL, *FRENCH CONSTITUTIONAL LAW* 222, 339 (1992).

45 *Constitution due 24 juin 1793*, CONSEIL CONSTITUTIONNEL, available at <https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-24-juin-1793>.

46 *Preamble to the Constitution of 27 October 1946*, CONSEIL CONSTITUTIONNEL, § 4 (2002), available at [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/cst3.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf).

47 Conseil constitutionnel [CC] [Constitutional Court] decision No. 79-109DC, Jan. 9, 1980, Rec. 29; Conseil constitutionnel [CC] [Constitutional Court] decision No. 80-116DC July 17, 1980, Rec. 36.

48 Geneva Convention Relative to the Status of Refugees, art. 1A (2), July 28, 2951, 19 U.S.T. 6223.



protection offered to foreigners is thus much more limited than the wider *legal* protection that is offered by the rest of French law.

In the management of deportation, there is an obvious area for balance between the protection of the individual and the public interest. On the one hand, there may be good reasons for removing individuals from the country. On the other hand, basic protections need to be afforded. A good example of the protection offered even to those illegally in France is shown by the 2003 *Immigration Law* decision.<sup>49</sup> There, the challenged law included a provision for detaining suspected illegal migrants beyond the normal period and, there was a provision that the migrant would not have access to a place to talk confidentially to a lawyer in the case of *force majeure*. The Conseil examined the text and, rather than accepting that *force majeure* exempted the state from providing access to a lawyer, it merely considered that *force majeure* justified the delay in providing access to a space in which the migrant could talk to a lawyer. In other words, rights to a lawyer were sufficiently important to be available to anyone detained by the state, citizen or foreigner. Likewise, the guarantee in article 66 of the Constitution that a judge oversees detention was considered to apply even to detention pending deportation, even if this had to be prolonged.<sup>50</sup>

The extent of judicial protection for civil liberties in the face of detention and deportation is also shown in the area of extradition. The requests by the French government to a foreign government requesting extradition are not “*actes de gouvernement*,”<sup>51</sup> nor are decisions to refuse an extradition request.<sup>52</sup> The explanation is that the decision to exercise the power to control an individual is separable from the prerogative power to conduct inter-state relations. So, in many ways, rights of protection are guaranteed in similar ways to those of citizens. There may be specific rules, such as the duty of a foreigner to carry proof of identity at all times, which are justified by public order. But these are not significant interferences with basic freedoms to move and to express opinions.

### B. Solidarity

Solidarity is a principle recognized formally in the eleventh and twelfth paragraphs of the Preamble to the 1946 Constitution,<sup>53</sup> though its origins

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49 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2003-484DC, Nov. 20, 2003, paras. 49–53.

50 *Id.* para. 66.

51 CE Sect., July 21, 1972, Legros, Lebon 554.

52 See CE Ass., Oct. 15, 1993, *Royaume-Uni de Grande Bretagne et d'Irlande du Nord et Gouverneur de la Colonie Royale de Hong Kong*, Rec. Lebon 267.

53 “It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or

are much older. Many, like Philip Dann, attribute its origins to the French revolution, which saw equality between giver and recipient, rather than the vertical relationship of classical ideas of charity.<sup>54</sup> The 1946 Constitution tried to go beyond this in response to the problems of the Great Depression of the 1930s. Jean-Paul Cot remarked that

I believe solidarity is a guideline, a political concept and a useful political tool but not a legal principle in international law.... I was ill at ease with the legal principle of solidarity. It does not fit into the French legal culture and is not part of our international law tool. I think Dr. Dann was correct in originating the political concept of solidarity in the French Revolution where there was a clear break with the traditional concept of charity. But that does not transform it into a legal principle.<sup>55</sup>

He saw it as a sociological principle of description in Durkheim and there was a political movement of solidarism under Léon Bourgeois, but neither established a legal principle.

The Conseil constitutionnel has been limited in its use of solidarity under the 1946 Preamble. Loïc Philip in 1980 doubted whether the principles of 1946 were more than political slogans.<sup>56</sup> But, more recently, the Conseil has given some limited scope to their application. From our perspective, there is a question of how far national solidarity applies beyond solidarity between citizens, which is how it was envisaged in the 1790s and the 1940s. Pontier's careful study<sup>57</sup> of national solidarity points to the way it is built upon the solidarity of the family and supplements its efforts,<sup>58</sup> e.g. through education. The nation supplements this in relation to sickness or inability to work, where the individual can obtain subsistence from the community, or in the face of national calamity. He saw solidarity as part of the unity of the nation, part of the sense of belonging to the group, to the idea of "living together" (*vivre ensemble*). Poincaré's call at the beginning of the war in 1914 for a "*union sacrée*" was part of this vision.<sup>59</sup> As Pontier remarks:

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mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society." *Constitution due 24 juin 1793*, *supra* note 45, at art. 11. "The Nation proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities." *Id.* at art. 12

54 P. Dann., in SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW 56–57 (R. Wolfrum & C. Kojima eds., 2010).

55 J.-P. COT, *id.* at 81.

56 L. Philip, *La Valeur Juridique du Préambule de la Constitution du 27 Octobre 1946 Selon la Jurisprudence du Conseil Constitutionnel*, in MELANGE R. PELLOUX 265 (J.M Auby ed., 1980).

57 Jean-Marie Pontier, *De la Solidarité Nationale*, REVUE DE DROIT PUBLIC 899 (1983).

58 "The nation shall ensure to the individual and to the family the conditions necessary for their development."

59 Jean-Marie Pontier, *supra* note 57, at 913.

Solidarity realises the national interest by supporting unity, and national unity finds one of its best expressions through the solidarity of its members.<sup>60</sup>

Carré de Malberg, for example, used solidarity as a justification for the French nation repairing the destruction caused to its citizens by war damage. But this is really a political principle and rarely leads to legal results because of its lack of precision.<sup>61</sup> Once translated into the international sphere, as Cot suggests, it loses all potency. As Pontier eloquently put it, “[t]he sentiment of belonging to one world, if it exists, hardly ever produces consequences.”<sup>62</sup>

Although paragraph 11 of the 1946 Preamble talks of guaranteeing to “all” health protection and to “every human being” the means for living, in practice this is restricted in relation to foreigners.<sup>63</sup> As Gaudemet and others remark:

The difference in treatment between the different benefits [provided by the State] reveals a certain conception of the rights of foreigners in French society. Benefits of primary necessity or of primary urgency—social assistance to children, medical and hospital treatment—are the responsibility of the public authority without any special precondition or only on the minimal condition of *residence*. On the other hand, other benefits, judged to be less indispensable to the very existence of the human being, are only guaranteed by the Nation to those who have sufficiently tight links with it that they can be considered its members, whether nationals or foreigners.<sup>64</sup>

The requirement of residence was prescribed by the Conseil d’Etat in 1981 as satisfied when a person “is found in France and remains there in conditions which are more than purely occasional and which present a minimum of stability.”<sup>65</sup>

Thus, there is a limited application of benefits in relation to non-

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<sup>60</sup> *Id.* at 915.

<sup>61</sup> *Id.* at 928; *see, e.g.*, CE Ass., Dec. 10 1962, Rec. Lebon 676; C.E. Ass., Nov. 29, 1968, Rec. Lebon 607 (rejecting claims based on solidarity for harms suffered by the French withdrawal from Vietnam in the absence of a specific text providing for compensation).

<sup>62</sup> Jean-Marie Pontier, *supra* note 57, at 906. He illustrates this by the limited nature of foreign aid and the way foreigners are treated.

<sup>63</sup> “[The Nation] shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society.” *Preamble to the Constitution of 27 October 1946*, CONSEIL CONSTITUTIONNEL, § 11 (2002), available at [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/cst3.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf).

<sup>64</sup> Y. GAUDEMET, B. STIRN, T. DAL FARRA & F. ROLIN, LES GRANDS AVIS DU CONSEIL D’ETAT 184 (1997).

<sup>65</sup> Conseil d’État [CE], 8 Jan. 1981; *id.* at 179.

French nationals to be found on French territory. On the one hand, constitutionally, basic-level protection cannot be excluded. For example, a statute of 1990 proposed to introduce an additional benefit from the National Solidarity Fund for aged persons, especially those who have become unable to work, in cases where they do not have available a sum from resources of whatever origin which assures them of a minimum for living.<sup>66</sup> But, the allocation of this benefit subject to a period of residence in France was held to be contrary to the principle of equality:

Considering that the exclusion of foreigners lawfully resident in France from the enjoyment of the additional benefit when they cannot rely on international agreements or regulations made on that basis, disregards the constitutional principle of equality[.]<sup>67</sup>

This was an argument raised by the Conseil of its own motion and not just one argument raised by the applicants.

But the approach of equality and solidarity only applies where the basic minimum is in question. The Conseil constitutionnel accords to the national legislature a wide margin of appreciation both to determine how to achieve the constitutional requirements of solidarity as well as how to amend existing laws and how to balance competing constitutional objectives. So, the Conseil would not interfere where a difference in treatment was made between French citizens and foreigners in the payment of the basic income grant (the *revenue de solidarité active*) introduced by article L. 262-4 of the Code de l'action sociale et des familles. The only restriction would be that the legislation must not deprive people of statutory guarantees for constitutional requirements (meaning thereby the very basic income, as in the 1990 case.)<sup>68</sup> In this case, a minimum residence requirement of five years was acceptable, since it placed foreigners on the same footing as European Economic Area (EEA) residents who only got permanent residence after that period and could then be considered incorporated into French society. No problem of disproportionality arose. A similar approach was taken in an earlier case relating to payment for medical treatment given to foreigners residing unlawfully in France. The statute proposed to exclude from state payments for medical treatment those foreigners who had not been continuously resident for at least three months. This did not breach the right of solidarity in relation to health, outlined in the Preamble, because the statute provided that there was special consideration for treatment that involved a vital prognosis or would lead to a serious and permanent change in the health of

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<sup>66</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 89-269DC, Jan. 22, 1990.

<sup>67</sup> *Id.* para. 33. (discussion in relation to art. 24 of the *loi*).

<sup>68</sup> *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-137QPC, June 17, 2011.

the person or an unborn child.<sup>69</sup> So, if there was emergency treatment, then normal treatment would need to wait until a certain period of residence in France had been established.

At the same time, any restriction must have some connection with the purpose of the benefit. So, in *Ville de Paris v. Levy*,<sup>70</sup> the Conseil d'Etat quashed a decision of the City Council of Paris that limited a discretionary payment for parents of children in school to French nationals. Its reasoning was that the costs of schooling did not vary depending on the nationality of the parents and the concern that most of the families with many children were not French had nothing to do with the purpose of the social benefit in question. So, equal treatment is a default position, unless good reason can be given to justify discrimination.

The logic of these decisions is to allow the legislature freedom to determine when a person is sufficiently integrated into the web of solidarity among people residing in France. At the same time, there is a second web of solidarity that applies to any human being who happens to be on the French territory and who is entitled to basic medical, income and legal protection.

#### IV. CONCLUSION

This article has examined the extent of the French Constitution's impact outside of French territory and outside the relationship between the French state and its citizens. The perspective from which the Constitution is constructed is that of national sovereignty: France is a self-governing state and has a special relationship with its citizens, who form the people and thus the constituent power.

While the sphere of international relations lies outside the paradigm relationship of the French state and its citizens, the Constitution still constrains international relations within the paradigm concept of national sovereignty. No agreement in international affairs can prejudice core features of national sovereignty without the approval of the constituent power and the adoption of a revision to the Constitution. No agreement can prejudice the finances of the state, the core status rights of citizens (their nationality) or the territorial integrity of France without the approval of the citizens' representatives in Parliament. This perspective of national sovereignty is reinforced by the jurisdiction of the Conseil constitutionnel and the authority of the courts to interpret treaties. The Executive is given constitutional authority to conduct national defense and international relations between states, but these areas are not considered to prejudice the rights of individuals.

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<sup>69</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2003-488DC, Dec. 29 2003, para. 18.

<sup>70</sup> Conseil d'Etat [CE], 30 June 1989, Lebon 157.

In terms of the relationship between the French state and foreigners on its territory, there are limits to the protection and benefits that are offered. The basic protection offered is, on the whole, similar to that of citizens. Foreigners lawfully resident are accorded the same basic rights of freedom from arrest or detention, as well as the freedoms of expression, movement and property. That basic protection is extended to refugees in that they are granted rights to continue to reside. However, the constitutional category of such persons is more limited than that afforded by international treaties to which France is a party and which have a status below the Constitution. Then again, when it comes to solidarity, basic protection in the form of healthcare and the means of subsistence are guaranteed on the basis of residence. But it is constitutionally permissible for public authorities to impose more significant conditions for less essential benefits. The French constitutional conception of solidarity is primarily focused on the solidarity between citizens on whose behalf the state is the representative. Accordingly, non-essential benefits are shared only with those foreign residents who have a substantial attachment to the French Nation, typically shown by a long period of residence.

Thus, the French manage to live with a tension between internationalist and nationalist ambitions, which is coherent in the relationship of the French Nation with other states and with their citizens. This is not a coherence that is well articulated in French constitutional textbooks or writings, but it can be seen in the varied and fragmentary provisions that have been brought together here.