

Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation

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A. Introduction

On 23 July 2008, the President of the French Republic promulgated – two days after the final vote of the two chambers of Parliament sitting jointly in *Congrès* (Congress) – the constitutional revision bill “*de modernisation des institutions de la Vème République*” (of modernization of the institutions of the Fifth Republic) n° 2008-724.² The bill was mainly based on the research work done by a *comité des sages* (expert committee) “*de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République*” (for the reflection and the proposition on the modernization and rebalancing of the institutions of the Fifth Republic).³ It had been presented by the Government to Parliament on 23 April

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² The full text of the revision bill is published on the Official Journal of the French Republic n. 171 of 24 July 2008 and available in French in the web site of the Government at: [http://www.legifrance.gouv.fr/affichTexte.do?cidTexte= JORFTEXT000019237256](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256) as well as is in the web sites of the National Assembly at: http://www.assemblee-nationale.fr/13/dossiers/reforme_5eme.asp and of the Senate at: <http://www.senat.fr/dossierleg/pjl07-365.html>, last accessed 25 September 2008. These websites also contain in French the bill presented by the Government and all the documents of the parliamentary revision procedure, including the report of the Law Commissions, the amendments proposed and the text of the bill as approved in both Chambers. For an overview of the political context in which the revision took place see: Stefano Ceccanti, *Le istituzioni ed il sistema politico dopo il primo quinquennato*, in LA FRANCIA DI SARCOZY, 27 (Gianfranco Baldini & Marc Lazar eds., 2007); Paolo Passaglia, *Le elezioni legislative in Francia: più conferme che novità*, 4 QUADERNI COSTITUZIONALI (QUAD. COST.) 860 (2007)

³ The full text of the research work is available in French in the web site of the *Comité* at: <http://www.comite-constitutionnel.fr>, last accessed 25 September 2008. The website also provides in

2008 and twice voted for by the *Assemblée Nationale* (National Assembly) and the *Sénat* (Senate).

According to Article 89 of the 1958 French Constitution,⁴ which sets out the amendment procedures,⁵ “(1) The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Prime Minister and to the members of Parliament. (2) A Government or private member's bill for amendment must be passed by the two Assemblies in identical terms. The amendment shall become definitive after approval by referendum. (3) Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly”.

The constitutional bill n° 2008-724 “is a coherent *ensemble*, that proposes a global and ambitious institutional change”⁶ and since roughly 33 articles over 89 of the French Constitution of 1958 have been changed, the bill has been called “the most important revision to which the Fundamental Law has been submitted”.⁷ All branches of Government are affected by the reform, which operates in three directions. A first series of provisions is aimed at renovating the exercise of the executive power by solving the ambiguous diarchy between the President of the

French the Presidential decree establishing the *Comité* as well as the name of its 12 members and all the documents thereof among which the final report entitled *UNE VÈME RÉPUBLIQUE PLUS DÉMOCRATIQUE* (2007). For an overview of the work of the *Comité* and an early comment on its proposals see: Federico Fabbrini, *Francia: è arrivata l'ora dell'exception d'inconstitutionnalité?* 1 *QUAD. COST.* 150 (2008); Federico Fabbrini, *Breaking from Tradition: Reshaping the French System of Constitutional Review*, 2 *WASHINGTON UNDERGRADUATE LAW REVIEW* (WULR) No.1 1 (2008)

⁴ The full text of the French Constitution is available in English in the International Constitutional Law web site at http://www.servat.unibe.ch/law/icl/fr00000_.html, last accessed 25 September 2008.

⁵ BERTRAND MATHIEU & MICHEL VERPEAUX, *DROIT CONSTITUTIONNEL* 220 (2004). Since the constitutional revision of 1962, however, another way of amending the Constitution has been found in Article 11 that affirms: “The President of the Republic may, on the proposal of the Government during sessions, or on a joint motion of the two Assemblies published in the Official Journal, submit to a referendum any bill dealing with the organization of the governmental authorities [...]”. See, Dominique Rousseau, *L'invenzione continua della V Repubblica*, in *L'ORDINAMENTO COSTITUZIONALE DELLA V REPUBBLICA FRANCESE*, 34, 75 (Dominique Rousseau ed., 2000)

⁶ *UNE VÈME RÉPUBLIQUE PLUS DÉMOCRATIQUE*, 7 (2007)

⁷ Patrick Roger, *La dernière mue?*, in *LE MONDE*, 21 May 2008

Republic and the Prime Minister,⁸ recognizing the supremacy of the first and at the same time limiting his prerogatives. A second set of measures is devoted to the legislative power with the goal to rehabilitate the role of Parliament by eliminating some of the harsher instruments of rationalized parliamentarianism introduced in 1958.⁹

A third field of intervention then, concerns judicial power and *droits du citoyen* (rights of the citizen) and certainly the most noteworthy provision here is the introduction of a new form of *a posteriori* constitutional review of legislation (*contrôle de constitutionnalité*). Indeed, even though all the changes are of great relevance, this one constitutes a “true revolution”¹⁰, since France was one of the few democracies that didn’t allow its courts to review whether acts of Parliament infringed over the fundamental rights of citizens. As such, I will devote the paper to this specific topic, with the purpose of highlighting the magnitude of the reform and its rupture with the French constitutional tradition. As I will argue, the major effect of the constitutional revision is to import into the French legal system the ideas of constitutional adjudication elaborated by Hans Kelsen.

Kelsen, a Czech jurist and the author of the *Reine Rechtslehre* (Pure Theory of Law),¹¹ is the architect of the centralized model of constitutional review.¹² Drawing inspiration from the American constitutional system, Kelsen believed that the Constitution ought to be the supreme law of the land and that no statute could violate it. However he did not support the idea that ordinary courts should have the duty to verify the compliance of acts of Parliament with the *Grundnorm* (Fundamental law), on the understanding that the function of constitutional review was in a sense a legislative function, even if purely negative.¹³ He supported, therefore, the institution of *ad hoc* (special) Constitutional Tribunals, charged with

⁸ CARLO FUSARO, LE RADICI DEL SEMIPRESIDENZIALISMO, 75 (1998)

⁹ STEFANO CECCANTI, LA FORMA DI GOVERNO PARLAMENTARE IN TRASFORMAZIONE, 107 (1997)

¹⁰ Gerome Courtois, *Le Parlement à qui perd gagne*, in LE MONDE, 21 May 2008

¹¹ HANS KELSEN, REINE RECHTSLEHRE (1960). English translation by Max Knight: PURE THEORY OF LAW (1989)

¹² MAURO CAPPELLETTI, IL CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPARATO 52 (1972)

¹³ Michel Rosenfeld, *Constitutional Adjudication in Comparative Perspective: The European Model as Against the American in Terms of Politics, Law and Interpretation* (Association of American Law Schools, Conference on Constitutional Law, Washington, 5-8 June 2002) available at: <http://www.aals.org/profdev/constitutional/rosenfeld.html>, last accessed 25 September 2008.

the specific duty to review the constitutionality of legislation and whose judges should be nominated *intuitu personae* (with special criteria).¹⁴

To assess the impact of a transformation that, metaphorically, brings Kelsen in Paris, I will structure my paper as follows. In part B, I will give an overview of the main characteristics and of the evolution of French constitutional review, analyzing the historical French distrust toward an institution that was considered to be the instrument of the *gouvernement de juges* (government of judges). In part C, I will illustrate the main features of the new form of *a posteriori* constitutional review introduced by the revision bill by describing its technicalities as well as certain caveats that need to be taken into account while considering the reform. Finally, in part D, I will underline how much this constitutional reform is inspired by the theoretical elaboration of Kelsen, and what are the effects of this Kelsenian legacy on the system of human rights protection in France.

B. Rousseau in Paris

Traditionally France has been averse to judicial review of legislation¹⁵. Since the Revolution of 1789, a strict separation of powers rule prevailed and the judiciary was not given the right to interfere with the activities of the legislature. While during the *Ancient Règime* judges could contest the legitimacy of a bill passed by the legislative power, “no court since the Revolution has ever invalidated or otherwise refused to apply a statute on the grounds that it was unconstitutional”¹⁶. Thus, contrary to what happened in the United States (where the Supreme Court¹⁷, “with a stroke of genius”, acknowledged its power to review legislation,¹⁸ making true Madison’s motto that “ambition must be made to counteract ambition”¹⁹), supremacy of Parliament and the lack of judicial review have been the defining

¹⁴ Jörg Luther, *La composizione dei tribunali costituzionali e le autonomie territoriali*, in LA COMPOSIZIONE DELLA CORTE COSTITUZIONALE: SITUAZIONE ITALIANA ED ESPERIENZE STRANIERE, 67, 76 (Adele Anzon & Gaetano Azzariti eds., 2004)

¹⁵ Michel Troper, *Judicial Power and Democracy*, in 1 EUROPEAN JOURNAL OF LEGAL STUDIES (EJLS) No.2 1 (2007)

¹⁶ ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE, 8 (1992)

¹⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

¹⁸ Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and in Europe*, in 5 GERMAN LAW JOURNAL No.6, 685, 687 (2004)

¹⁹ FEDERALIST PAPERS, number LI (J. Madison)

features of French “‘Jacobinian’ constitutionalism” since the time of the Revolution.²⁰

The theorization of Jean Jacques Rousseau was of particular relevance in shaping the traits of French Republicanism. According to the Swiss philosopher, “only *la volonté générale* (the general will) can direct the State according to the object for which it was instituted, *i.e.*, the common good”²¹. Since the general will “considers only the common interest”²² - diverging from the will of all, which “takes private interest into account, and is no more than a sum of particular wills”²³ - it ought be embodied in an organ representing the social compact, *i.e.* the legislator, and expressed through general and abstract laws. The Declaration of the Rights of Men and Citizen of 1789 codified this vision, stating in its Article 6, “*la loi est l’expression de la volonté générale* (the act of Parliament is the expression of the general will)”.

The consequence of Parliamentary sovereignty was to reduce the role of judges to that of “*la bouche qui prononce les paroles de la loi* (the mouth that pronounces the words of the law), mere passive beings, incapable of moderating either its force or rigor”,²⁴ as Charles de Secondat, Baron de Montesquieu, famously wrote. Not surprisingly, “the judge’s role in this centralized system is subservient and bureaucratic. [...He] may be required to verify the existence and applicability of a command but he may not investigate the work of the legislature any further”.²⁵ The dogma of “*la intangibilité de la loi* (the intangibility of the law)”²⁶ together with the myth of the judge as a “syllogism machine”²⁷, then, consolidated during the

²⁰ AUGUSTO BARBERA, *LE BASI FILOSOFICHE DEL COSTITUZIONALISMO*, 6 (1997)

²¹ JEAN JACQUES ROUSSEAU, *LE CONTRAT SOCIAL*, Book 2, Chapter 1 (1762) Italian Translation by Valentino Gerratana: *IL CONTRATTO SOCIALE*, 63 (1965)

²² *Id.*, Book 2, Chapter 3. Italian Translation by Valentino Gerratana: *IL CONTRATTO SOCIALE*, 68 (1965)

²³ *Id.*

²⁴ MONTESQUIEU, *L’ESPRIT DES LOIS*, Book 11, Chapter 6 (1748) Italian translation by Mauro Cotta : *IL PENSIERO POLITICO DI MONTESQUIEU* 207 (1995)

²⁵ STONE SWEET, *supra* note 16, 26

²⁶ Maria Rosaria Donnarumma, *Un mito infranto: l’intangibilità de la loi. Il controllo della ‘ragionevolezza’ delle leggi in Francia*, in 4 *DIRITTOE SOCIETÀ* (DIR. SOC.) 521, 579 (2007)

²⁷ Charles Eisenmann, *La pensée constitutionnelle de Montesquieu*, in *LA PENSÉE POLITIQUE ET CONSTITUTIONNELLE DE MONTESQUIEU: BICENTENAIRE DE L’ESPRIT DES LOIS 1748-1948*, 133 (Boris Mirkine-Guetzévitch & Henri Puget eds., 1952)

nineteenth century and survived in the Fifth Republic notwithstanding the burial of the parliamentary regime²⁸.

Indeed, when the Framers of the Constitution of 1958 instituted a *Conseil Constitutionnel* (Constitutional Council) – endowed with the function, among others, of exercising *a priori* constitutional review – their intent was not to create an organ charged with the duty to protect fundamental rights.²⁹ The Framers, in fact, intended to create an arm against the deviation of the parliamentary regime.³⁰ “The function of the Council in this system was made explicit: to facilitate the centralization of executive authority and to ensure that the system would not somehow revert to traditional parliamentary orthodoxy”³¹. The Council itself originally complied with this understanding: *e.g.* in the 1962 *Loi référendaire*³² decision, it refused to review referendum laws, thereby defining itself as a mere “organ that regulates the activity of the public powers”.³³

The peculiarities of French constitutional review indicate the continuity with the ‘Jacobinian’ tradition. According to Article 61(2) – as revised in 1974³⁴ – “acts of Parliament may, before their promulgation, be submitted to the Constitutional Council by the President of the Republic, the Prime Minister, the President of the *Assemblée Nationale*, the President of the *Sénat*, sixty deputies or sixty senators”. As such, the Council rules *a priori*, “on the constitutionality of bills which have been definitively adopted by Parliament but not yet promulgated by the executive,”³⁵ in

²⁸ Stefano Ceccanti, *La V Repubblica: un lento (e parziale) avvicinamento alle altre forme di governo europee*, in *L'ORDINAMENTO COSTITUZIONALE DELLA V REPUBBLICA FRANCESE*, 13, 14 (Dominique Rousseau ed., 2000)

²⁹ LOUIS FAVOREU & LOIC PHILIP, *LE GRANDES DECISIONS DU CONSEIL CONSTITUTIONNEL*, 177 (2005)

³⁰ TEXTES ET DOCUMENTS SUR LA PRATIQUE INSTITUTIONNELLE DE LA VEME REPUBLIQUE, 5 (Didier Maus ed., 1978)

³¹ STONE SWEET, *supra* note 16, 47

³² *Loi référendaire* Décision 62-20 DC, 6 November 1962

³³ Louis Favoreu, *Le Conseil Constitutionnel régulateur de l'activité normative des pouvoirs publics*, in *REVUE DU DROIT PUBLIC (RDP)* 7 (1967)

³⁴ Before the Constitutional Revision law n° 1974-904 only the President of the Republic, the Prime Minister and the Presidents of the two Assemblies could refer a law to the Constitutional Council. See: JEAN JACQUES CHEVALLIER, GUY CARCASSONNE & OLIVIER DUHAMEL, *LA VE REPUBLIQUE: 1958-2004* 231(2004)

³⁵ STONE SWEET, *supra* note 16, 8

the absence of a concrete case and only upon referral of five political authorities.³⁶ Therefore, once the law is enacted "it may not be challenged or made subject to any jurisdictional control other than that of the Parliament itself".³⁷

Notwithstanding its structural limits, the Constitutional Council remarkably expanded its role in the course of the years. With a juridical *coup d'Etat*,³⁸ in the 1971 decision *Liberté d'association*³⁹ the Council incorporated the Preamble of the Constitution of 1958 within the *bloc de constitutionnalité* (norms of reference for exercising constitutional review).⁴⁰ The Constitution of 1958 was entirely dedicated to the framework of government. The Preamble of 1958, on the contrary, recalled the Declaration of Rights of Men and Citizen of 1789 (the *magna charta* of individual liberties) and the Preamble of the Constitution of 1946 (a charter dedicated to social rights). The effect of the 1971 decision, then, was to invent a compound Bill of Rights and to transform the Council into an institution charged with the protection of fundamental rights.⁴¹

The "strengthening"⁴² of the Constitutional Council was also favored by the 1974 constitutional revision that extended the *droit de saisine* (right of referral) to the Council to sixty deputies or sixty senators.⁴³ In fact, "by the mid-1970s, the politics of review [became] a central features of opposition tactics"⁴⁴ with an increase in the quality and quantity of cases to be decided by the Council. However, the main features of French judicial review remained largely unchallenged, as the Council would still review legislation *a priori*, abstractly and upon request of political authorities. Only in the 1990s were several attempts made to reform the system, but

³⁶ GIUSEPPE DE VERGOTTINI, *DIRITTO COSTITUZIONALE COMPARATO*, 186 (2004)

³⁷ STONE SWEET, *supra* note 16, 8

³⁸ Alec Stone Sweet, *The Juridical Coup d'Etat and the Problem of Authority*, in 8 *GERMAN LAW JOURNAL* No.10, 915, 922 (2007)

³⁹ *Liberté d'association* Décision 71-44 DC, 16 July 1971

⁴⁰ Bertrand Mathieu & Michel Verpaux, *La garantie des droits et libertés*, in *LE CONSEIL CONSTITUTIONNEL* 91, 92 (Michel Verpaux & Maryvonne Bonnard eds., 2007)

⁴¹ FAVOREU & PHILIP, *supra* note 29, 254

⁴² DOMINIQUE ROUSSEAU, *DROIT DU CONTENTIEUX CONSTITUTIONNEL*, 63 (2004)

⁴³ See, *supra*, note 34

⁴⁴ STONE SWEET, *supra* note 16, 60

all of them failed⁴⁵. In the recent comprehensive constitutional reform, though, the effort proved successful and eventually a form of *a posteriori* judicial review has been introduced in France.

C. The *exception d'inconstitutionnalité*

Article 26 of the constitutional revision bill n° 2008-724 introduces in the French Constitution a new provision: Article 61-1, will be placed immediately after Article 61 (which, as we saw in the previous section, disciplines *a priori* constitutional review). The provision reads as follows:

“(1) When, in the course of a controversy before a judicial court, it is claimed that a statutory disposition infringes over the rights and liberties that the Constitution safeguards, the Constitutional Council may be requested to judge on the issue by referral of the *Conseil d’Etat* (Council of State)⁴⁶ or of the *Cour de Cassation* (Court of Cassation)⁴⁷, which shall decide in a timely manner. (2) An organic law sets the conditions for the application of this article”⁴⁸.

Article 61-1 grants the Constitutional Council the power to exercise *a posteriori* constitutional review. The technical mean by which this goal is achieved is the

⁴⁵ A constitutional bill amending the Constitution to introduce *a posteriori* constitutional review was submitted to Parliament by the President of the Republic Mitterrand on 30 March 1990, under the advice of the former President of the Constitutional Council Badinter. After two separate votes in the *Assemblée Nationale* and the *Sénat*, however, the two chambers of Parliaments, because of the opposition of the conservative party, didn't agree on the same text and therefore the proposal failed. A similar draft written by constitutional law professor Vedel was later presented to Parliament on 10 March 1993, but was dismissed by new conservative majority elected in spring. For a historical overview of these event see: NICOLO ZANON, *L'EXCEPTION D'INCONSTITUTIONNALITE IN FRANCIA: UNA RIFORMA DIFFICILE* 93 (1990); Didier Maus, *Nouveaux regards sur le contrôle de constitutionnalité per voie d'exception*, in *MELANGES EN L'HONNEUR DE MICHEL TROPER*, 665, 668 (Véronique Champeil-Desplats et al. eds., 2007). The main features of the two proposal are analyzed by: JEAN LUC WARSMANN, *RAPPORT FAIT AU NOM DE LA COMMISSION DES LOI CONSTITUTIONNELLES DE L'ASSEMBLEE NATIONALE N. 892-2008 439* (2008) available in French at: <http://www.assemblee-nationale.fr/13/rapports/r0892.asp>, last accessed 25 September 2008.

⁴⁶ The *Conseil d’Etat* is the French Supreme Court for administrative justice. It hears both recourses against decrees and other executive decisions as well as appellate cases from lower administrative courts. Its decisions are final.

⁴⁷ The *Cour de Cassation* is the French Supreme Court for civil and criminal justice. It is the main court of last resort in France (excluding cases of administrative justice, which go before the *Conseil d’Etat*)

⁴⁸ Author's translation. For the French text consult the Official Journal of the French Republic n. 171 of July 24th 2008 available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256>, last accessed 25 September 2008.

exception d'inconstitutionnalité (plea of unconstitutionality), an instrument shared by all the juridical systems that have attributed the power of constitutional review to *ad hoc*, centralized courts, following the theorization of Hans Kelsen. In those systems, ordinary and administrative judges can not review on their own the constitutionality of legislation; however, when it is claimed in the course of a legal dispute that the statute that commands the case is contrary to the Constitution, the judge may suspend the decision of the case in front of him and recur to the Constitutional tribunal asking for a ruling on the matter.⁴⁹

If the Constitutional tribunal does not declare the statute unconstitutional, the judge may proceed in the decision of the controversy applying the statute in its ruling. If, otherwise, the Constitutional tribunal does declare the statute unconstitutional, the judge should decide the case without taking into consideration the voided statute.⁵⁰ Accordingly, Article 62 of the French Constitution, as amended by Article 30 of the constitutional revision bill, affirms that: "(2) A statutory disposition declared unconstitutional on the basis of Article 61-1 is repealed as from the day of the publication of the ruling of the Constitutional Council [...] (3) The decisions of the Constitutional Council shall not be subject to appeal to any jurisdiction. They shall be binding on the governmental authorities and on all administrative and jurisdictional authorities".⁵¹

A peculiarity of the *exception d'inconstitutionnalité* mechanism recently introduced in the French Constitution, however, is that not all judges are allowed to recur to the Constitutional Council and ask whether a statutory disposition infringes over the rights and liberties that the Constitution safeguards. Indeed, only the top ordinary and administrative tribunals, *i.e.* the *Conseil d'Etat* and the *Cour de Cassation*, may defer a matter to the Constitutional Council. When lower judges face a constitutional question, they shall, on the contrary, submit the matter to their Supreme Ordinary or Administrative Court. The high court has the duty to verify the seriousness of the matter in a timely manner; only when the seriousness test is passed the Constitutional Council may then be called upon to review the allegedly unconstitutional statute.

⁴⁹ CAPPELLETTI, *supra* note 12, 98

⁵⁰ Gustavo Zagrebelsky, *La giurisdizione costituzionale*, in MANUALE DI DIRITTO PUBBLICO, 657, 666 (Giuliano Amato & Augusto Barbera eds., 1991)

⁵¹ See, *supra*, note 48

The choice not to allow lower judges to recur directly to the Constitutional Council is known as 'double-filter mechanism' and has drawn much criticism.⁵² Indeed, even though this mechanism has several advantages since, "on one hand it shelters the Council from being over flooded by lower judges' referrals, and, on the other hand it allows the *Conseil d'Etat* and the *Cour de Cassation* to participate in the elaboration of the Council's case law",⁵³ the proposal contains various limitations. In fact, not only the beneficial effects of a direct dialogue between judges and Constitutional Council will be neutralized,⁵⁴ but also the achievement of the reform could be jeopardized. After all, "shouldn't the high courts be interested in defending their competences by deferring only an infinitesimal quantity of cases to the Council and thus making no sense of the reform?"⁵⁵

The draft constitutional bill elaborated by the *comité de sages* did not grant to the Supreme Administrative and Ordinary Courts the power to review the seriousness of the constitutional question to be submitted to the Constitutional Council. The 'double filter mechanism' materialized during the Parliamentary work under the lobbying of the *Conseil d'Etat* which, besides a judicial function, also furnishes legal advice to the Government in drafting legislation.⁵⁶ Traditionally the most important French institution, the *Conseil d'Etat* is very deferential toward the legislature but endowed of a power of moral suasion *vis à vis* the other branches of government.⁵⁷ However, as the Constitutional Council in the course of time strengthened its position, becoming the prominent institution in the protection of fundamental liberties, the *Conseil d'Etat* has seen its prerogatives diminishing.

The success of the *Conseil d'Etat* in establishing a 'double filter mechanism' that allows it (and the *Cour de Cassation*) to interfere in the dialogue between the lower judges and the Constitutional Council may, nevertheless, turn out to be a 'Pirrus victory'. Such a complicated mechanism may be a disincentive for lower ordinary

⁵² ZANON, *supra* note 45, 129

⁵³ JEAN LUC WARSMANN, *supra* note 45, 439

⁵⁴ Valerio Onida, *Giurisdizione e giudici nella giurisprudenza della Corte Costituzionale*, in CORTE COSTITUZIONALE E SVILUPPO DELLA FORMA DI GOVERNO IN ITALIA, 159 (Paolo Barile et al. eds., 1984)

⁵⁵ The question was raised by professor Mathieu during an interview with the members of the Law Commission of the *Assemblée Nationale* and is reported in WARSMANN, *supra* note 45, 438

⁵⁶ Aldo Maria Sandulli, *La giustizia*, in ISTITUZIONI DI DIRITTO AMMINISTRATIVO, 381, 392 (Sabino Cassese ed., 2004)

⁵⁷ Andrea Patroni Griffi, *Il Conseil Constitutionnel e il controllo della 'ragionevolezza'*, in 1 RIVISTA ITALIANA DIRITTO PUBBLICO COMUNITARIO (RIDPC) 39, 73 (1998)

or administrative judges, dealing with an allegedly unconstitutional statute, to raise constitutional questions. Moreover, because in the French legal order treaties have a supra-legislative status, lower judges already have the power to review on their own whether a statute complies with international treaties (*contrôle de conventionnalité*).⁵⁸ And since there are international conventions that have catalogues of rights quite comparable to a constitutional Bill of rights, this review tends to resemble heavily a form of decentralized judicial review.⁵⁹ When assessing the impact of the current constitutional reform, therefore, this caveat also needs to be taken into account.

D. Kelsen in Paris

Beyond the technical debate about the features of the *exception d'inconstitutionnalité* mechanism introduced by the recent constitutional revision, the importance of the reform itself shall be highlighted. The introduction of a form of *a posteriori* constitutional review of legislation represents a milestone in the juridical history of a country that was traditionally hostile to judicial review and the "limitation of parliamentary sovereignty".⁶⁰ Eventually, also in France, individuals will be allowed to contest, in the course of a concrete controversy, by recurring to the Constitutional Council (via the *Conseil d'Etat* and the *Cour de Cassation*), the legitimacy of a statute that unjustly abridges the rights and liberties recognized by the Constitution. As such, this novelty may be appreciated as an "important step of the development of the *Etat de droit* (Rule of Law)".⁶¹

From this point of view, the innovation brought forward by the constitutional revision bill, reconciles the French juridical system with the theoretical and practical work of Hans Kelsen, who was favourable - as anticipated in the introduction - towards the realization of "a *Verfassungsgerichtsbarkeit* (constitutional justice), that is supportive of granting the function of safeguarding the Constitution to an *independent tribunal*".⁶² Indeed, according to the Czech jurist, the legal order is

⁵⁸ MAUS, *supra* note 45, 675

⁵⁹ Olivier Dutheillet de Lamothe, *Contrôle de constitutionnalité et contrôle de conventionnalité*, in MELANGES EN L'HONNEUR DE DANIEL LABETOUILLE, 1, 13 (Ronny Abraham et al. eds., 2007)

⁶⁰ BARBERA, *supra* note 20, 13

⁶¹ UNE VEME REPUBLIQUE, *supra* note 2, 90

⁶² Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* in DIE JUSTIZ, 576-628 (1930) Translated in Italian by Carmelo Geraci: LA GIUSTIZIA COSTITUZIONALE 239 (1981); italics in the original text

a “*Stufenbau* (hierarchical structure)”⁶³ of norms, on the top of which stands the Constitution. It is therefore necessary to arrange certain technical means in order to assure the supremacy of the fundamental norm. Attributing to a specially created court the concrete function of “voiding the unconstitutional statutes secures the main and most effective warranty for the Constitution”.⁶⁴

Moreover, the *exception d'inconstitutionnalité* introduced by the constitutional reform, by establishing a ‘double filter’ to be exercised by the Supreme Ordinary and Administrative Courts, directly evokes the method set up in the Austrian Constitution written by Kelsen and embodying *par excellence* the idea of constitutional justice.⁶⁵ Indeed, in the 1920 Austrian Constitution, as modified in 1929,⁶⁶ the “unconstitutionality of an act of Parliament could be alleged only in front of the *Obster Gerichtshof* (Supreme Ordinary Court) or of the *Verwaltungsgerichtshof* (Supreme Administrative Court), as only those tribunals could suspend in that case the proceeding pending in front of them and ask the *Verfassungsgerichtshof* (Constitutional Court) to declare the statute void whenever they doubted of its constitutionality”.⁶⁷

A significant indication of the realignment of the French system of constitutional review with the Kelsenian model of constitutional adjudication is the approval by the *Sénat* of amendment n. 321, introducing in the bill a new Article 24-3 affirming: “In the Constitution, the words ‘Constitutional Council’ shall be replaced by the words ‘Constitutional Court’”. The socialist Senator (and former President of the Constitutional Council) Badinter presented the amendment on the following argument: “The name adopted in 1958 appeared already paradoxical [...] as the institution had essentially a judicial function. This role will be strengthened by the introduction of the *exception d'inconstitutionnalité*. It ought therefore be recognized

⁶³ HANS KELSEN, *REIHNE RECHTSLEHERE* (1934) Translated in Italian by Renato Treves: *LINEAMENTI DI DOTTRINA PURA DEL DIRITTO*, 105 (2000)

⁶⁴ Hans Kelsen, *La garantie juridictionnelle de la Constitution (La justice constitutionnelle)*, in XXXV RDP, 197-257 (1928) Translated in Italian by Carmelo Geraci, *LA GIUSTIZIA COSTITUZIONALE*, 170 (1981)

⁶⁵ WARSMANN, *supra* note 45, 435

⁶⁶ CAPPELLETTI, *supra* note 12, 94

⁶⁷ Hans Kelsen, *Judicial Review of Legislation. A comparative study of the Austrian and the American Constitution*, in *JOURNAL OF POLITICS (JOUR. OF POL.)*, 183-200 (1942) Translated in Italian by Carmelo Geraci, *LA GIUSTIZIA COSTITUZIONALE*, 308 (1981)

to the institution its true identity of 'court', following the example of its European homologues".⁶⁸

The amendment was later rejected in the *Assemblée Nationale* and did not appear in the final version of the revision bill. However, the proposal to change the name of the institution – "Court and Council, as if it was the difference between a judge and a consultive committee"⁶⁹ – also symbolically highlights the spreading awareness that with the approval of the reform the Council will wear 'Kelsenian clothes', becoming a true judicial institution charged with the duty to review constitutionality of legislation. Thus in the comparative perspective, the introduction of a mechanism of *a posteriori* constitutional review of legislation certainly terminates the anomaly of the French constitutional model and determines a convergence with most of the other European systems of constitutional adjudication, shaped over the Kelsenian prototype.⁷⁰

In other respects, the shift of the French judicial system toward a Kelsenian ratio, can be appreciated in the context of the transformation of the European legal space in a true *Grundrechtsgemeinschaft* (community of rights).⁷¹ Indeed, at the supranational level, both the European Court of Justice and the European Court of Human Rights have begun taking human rights seriously⁷² and claiming a constitutional status⁷³. The human rights' case law of these two European courts is becoming increasingly influential and often used as an example even by the domestic courts of states with well-built 'legal nationalism'.⁷⁴ There is, therefore, a strong incentive (if not duty) for the national jurisdictions to elevate their standard

⁶⁸ Available in French at: http://ameli.senat.fr/amendements/2007-2008/365/Amdt_321.html, last accessed 25 September 2008.

⁶⁹ BARBERA, *supra* note 20, 13

⁷⁰ ANDREA MORRONE, *IL CUSTODE DELLA RAGIONEVOLEZZA*, 506 (2000)

⁷¹ Armin Von Bogdany, *The European Union as a Human Rights Organization?*, in 37 COMMON MARKET LAW REVIEW (CML REV), 1307, 1308 (2000)

⁷² Marta Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in I DIRITTI IN AZIONE, 1, 37 (Marta Cartabia ed., 2007)

⁷³ Luzius Wildhaber, *A constitutional future for the European Court of Human Rights?*, in 23 HUMAN RIGHTS LAW JOURNAL (HRLJ) 161 (2002)

⁷⁴ Joel Andriantsimbazovina, *La prise en compte de la Convention européenne des droits de l'homme par le Conseil Constitutionnel*, in 18 CAHIERS DU CONSEIL CONSTITUTIONNEL 1 (2004); MAUS, *supra* note 45, 673; Jacques Ziller, *L'eupérisation du droit : de l'élargissement des champs du droit de l'Union européenne à une transformation des droits des Etats membres*, in EUI Law Dept. Working Papers No.19, 6 (2006)

of rights' protection to comply with the growing attention to fundamental liberties at the European level.⁷⁵

France's paradox was that while individuals had, since the eighteenth century, the right to contest the legality of an executive decree in front of the administrative judge (i.e. the *Conseil d'Etat*), they did not have any means to defend their rights at the national level from an unconstitutional statute. Individuals now have at their disposal, however, effective remedies at the supranational level and may benefit of a last resort mechanism in front of the European Court of Human Rights. From this point of view, as Prime Minister Fillon acknowledged, with the constitutional revision bill "this French idiosyncrasy ends".⁷⁶ Even though the reform does not establish an individual direct recourse to the Constitutional Council, like the German *Verfassungsbeschwerde* (Constitutional complaint), the introduction of *a posteriori* constitutional review significantly strengthens the protection of individual rights at the domestic level.⁷⁷

Moreover, by amending the 1958 Constitution with the introduction of the *exception d'inconstitutionnalité* the revision bill n° 2008-724 recognizes that democracy today finds its *raison d'être* "in pluralistic social and institutional systems, empowered by the progressive erosion of the classical concept of sovereignty as a consequence of the processes of international and supranational institutional integration".⁷⁸ Contemporary multicultural societies are characterized by a growing concern and demand for individual liberty.⁷⁹ The 'Jacobinian' belief that liberties are created and secured through the activity of a god-almighty legislature is thus gradually substituted by the consciousness that the will of the majority may violate the rights

⁷⁵ Diletta Tega, *La CEDU nella giurisprudenza della Corte Costituzionale*, in 2 QUAD. COST. 431 (2007)

⁷⁶ The speech of Prime Minister Fillon at the *Assemblée Nationale* on May 20th 2008 to present the constitutional revision bill is available at: http://www.assemblee-nationale.fr/13/cri/2007-2008/20080161.asp#INTER_0, last accessed 25 September 2008.

⁷⁷ MAURO CAPPELLETTI, *LA GIURISDIZIONE DELLE LIBERTÀ* (1955)

⁷⁸ MORRONE, *supra* note 70, 524

⁷⁹ See, among others: NORBERTO BOBBIO, *L'ETÀ DEI DIRITTI* (1992), GUSTAVO ZAGREBELSKY, *IL DIRITTO MITE* 97 (1992); PETER HÄBERLE, *DIRITTO E VERITÀ* (2000); ALESSANDRA FACCHI, *I DIRITTI NELL'EUROPA MULTICULTURALE* 21 (2001); ANTONIO CASSESE, *I DIRITTI UMANI OGGI* 3 (2005); Jürgen Habermas, *Lotta di riconoscimento nello stato democratico di diritto*, in *MULTICULTURALISMO*, 63 (Jürgen Habermas & Charles Taylor eds., 2005); ALESSANDRA FACCHI, *BREVE STORIA DEI DIRITTI UMANI* 144 (2007);

of the minority and by the 'liberal' confidence that a better deal is to empower judges of the duty to enforce individual rights.⁸⁰

In other words, the introduction in France of a form of *a posteriori* constitutional review of legislation embodies a transition from the logic of Rousseau, - of the inanimate judge *bouche de la loi*, expression of a general will that may never be wrong - to the logic of Kelsen. Here, the constitutional judge is the guardian (*Hüter*) of the fundamental values enshrined in the Constitution - a living institution that safeguards the principle of pluralism and the individual liberties whenever the exercise of the majority power degenerates into tyranny. Kelsen's vision, by recognizing that the majority may express its wishes in so far that it does not violate the rights of the individual, represents a successful attempt to balance the need of unity with the desire of pluralism.

E. Conclusion

French academics and politicians have been conscious for the last twenty years of the need to renovate the 1958 Constitution, especially of the need to introduce a new form of *a posteriori* constitutional review of legislation. Notwithstanding the fact that all such proposals failed, the reform was seen as something "that for sure [was] about to happen, soon or later".⁸¹ Therefore, even though the revision bill was approved in *Congrès* only by a one vote-majority, with the conservative and centrist members of Parliament voting in favour of it and the socialist against it (with the noteworthy exception of the socialist Deputy and vice President of the *comité des sages* Lang), there was a wider *consensus* on the suitability of the reform. Moreover, many of the innovations contained in the revision bill, such as the proposal to introduce a form of *a posteriori* constitutional review, had been for many years a battle horse of the left and strongly opposed by the conservative right.⁸²

⁸⁰ Just to recall some of the wide literature on the issue, see: Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION*, 17 (1996); BARBERA, *supra* note 20, 10; MORRONE, *supra* note 70, 508; Giorgio Bongiovanni, *Spirito protestante, libertà religiosa e Dichiarazioni americane e francese*, in *LA DICHIARAZIONE DEI DIRITTI DELL'UOMO E DEL CITTADINO DI GEORGE JELLINEK, v, xviii* (Giorgio Bongiovanni ed., 2002); MICHAEL IGNATIEFF, *UNA RAGIONEVOLE APOLOGIA DEI DIRITTI UMANI*, 34 (2003); Dieter Grimm, *Il significato della stesura di un catalogo europeo dei diritti fondamentali*, in *DIRITTI E COSTITUZIONE NELL'UNIONE EUROPEA*, 5 (Gustavo Zagrebelsky ed., 2003); Armin Von Bogdany, *Il costituzionalismo nel diritto internazionale*, in *POPOLI E CIVILTÀ*, 183 (Gustavo Gozzi & Giorgio Bongiovanni eds., 2006)

⁸¹ Louis Favoreau, *La questione pregiudiziale de constitutionnalité*, in *MELANGES EN L'HONNEUR DE PHILIPPE ARDANT*, 265 (Guy Carcassonne et al. eds., 1999)

⁸² Stefano Ceccanti, *Ora la Francia è un pò meno gollista*, in *IL RIFORMISTA*, 22 July 2008

A recent interview in French newspaper *Le Monde*⁸³ gives evidence of the bipartisan support for the introduction of the *exception d'inconstitutionnalité*. Asked to comment on the new Article 61-1 of the French Constitution, the gaullist Deputy, former Prime Minister and President of the *comité des sages*, Balladur affirmed that this innovation “is one of the most important measures that we propose”. However, the socialist Senator Badinter had also declared in the same interview, “I am obviously favourable to the *exception d'inconstitutionnalité* [...] In a democracy, it should not be given effect to an act of Parliament that is contrary to the fundamental rights of citizen. This is a primary necessity. This reform is therefore a step forward”.

Indeed, the introduction of *a posteriori* constitutional review represents a milestone innovation in French constitutional history. The design of this new legislative reality undeniably represents a change in paradigm, that was made possible by peculiar political and historical conditions.⁸⁴ On one hand, there is increasing attention towards human rights at the European level. On the other hand, contemporary societies become more pluralistic and multicultural. The concern for a stronger protection of fundamental rights and liberties, under both internal and external pressures, is at the core of this institutional change. Even though certain caveats are necessary, it is likely that *a posteriori* constitutional review will shape the life of the Fifth Republic in the years to come. Embracing the Kelsenian model of constitutional adjudication means breaking with the ‘Jacobinian’ constitutional tradition that considers the law as the expression of a general will that may never be wrong, but also putting the individual, with his bundle of rights and liberties, at the heart of the constitutional cosmos.

⁸³ Gerome Courtois, *Réforme constitutionnelle: Badinter face à Balladur*, in LE MONDE, 11 June 2008

⁸⁴ HOFFMANN-RIEM, *supra* note 18, 689