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The 2021 International Review of Constitutional Reform

France

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I. Introduction

Although the year 2021 did not bring any fully fledged constitutional reform, a few new developments should be emphasized. Indeed, 2021 saw the *de facto* failure of the 2019 reform and of a smaller reform introduced in 2021. The first was not discussed by Parliament. The second was discussed and modified back and forth by the two chambers of Parliament, being dropped in the end. 2022 being a presidential election and a legislative elections year, the political will to fight for a constitutional reform was quite low. The oppositions would also have used the reforms and the discussions as platforms for the upcoming elections. It is however likely that a new reform, made of both old and new propositions, will be introduced after the legislative elections, depending on the elected majority. If Emmanuel Macron gets a majority, he will most likely go forth with what he laid down in his presidential program, but this will not happen before the end of 2022.

This does not mean, however, that no constitutional change took place entirely. Quite unexpectedly indeed, the Constitutional Council made a jurisprudential change by finally fleshing out the “rules or principles inherent to the constitutional identity of France”. Although not a constitutional reform in the formal meaning, it is a change at the constitutional level worth mentioning.

II. Proposed, Failed, and Successful Constitutional Reforms

First of all, it should be noted that in continuity to what was written last year in this report¹, the constitutional reform introduced in 2019², which aimed at modifying the French institutions, seems to have definitively been dropped. It has not been discussed in Parliament in 2020, nor in

1 Eleonora Botinni, “France” [2020] IRCR 112.

2 Projet de loi constitutionnelle pour un renouveau de la vie démocratique, n° 2203, presented on August 29th 2019 <https://www.assemblee-nationale.fr/dyn/15/dossiers/renouveau_vie_democratique> accessed 19th May 2022.

2021. The COVID-19 crisis has outshone it entirely, and then the presidential election made it politically impossible to discuss it. This does not mean that the reform is dropped for good. Parliament could decide to discuss it, or the Government could decide to put it on the order of the day of either one of the assemblies. It is, however, very unlikely, in the same way that it would be unlikely in the US for the unratified amendments to be eventually ratified by the States. It has not technically failed as much as it has been *de facto* dropped. The content of the various amendments will probably be kept for the next constitutional reform, though it has not even been formally announced.

The 2021 planned constitutional reform³, also mentioned in last year report⁴, aimed only at amending the first article of the Constitution, adding a new sentence related to climate change and environment. The amendment was adopted by the National Assembly, modified by the Senate, modified again by the national Assembly, and finally modified yet again by the Senate. None of the four versions are entirely identical and the differences could appear as purely semantics, but the two chambers of Parliament had very different ideas of what the new provision should entail, specifically when the Constitutional Council would use it against the legislator, that is Parliament itself. Considering the procedure of constitutional reform in France, it has not been rejected as such, and the discussion between the two chambers of Parliament could actually go on. However, the Government decided to drop the reform, so that it can be considered as having failed. Considering that the idea to include a similar provision already existed in the 2019 project, it is likely that the next revision will include, or try to include at least, a similar amendment.

It should also be noted that legal doctrine suggested some constitutional reform regarding the place of Corsica in the French Constitution⁵. Indeed, Corsica always had a specific place politically wise, but not so much constitutionally. In 1982, a process of decentralization was started. The idea was to give more powers to the various local administrations (cities, departments and regions) with no political control from the central administration. Although similar in some ways to devolution, this process is wholly different because it is only on a secondary legislation level, not on a primary legislation level. That is to say that decentralization aims at giving a power to enact regulations only, and not statutes. As of today, Corsica has a specific legislative statute, but not a constitutional one.

The proposed constitutional reform aims at giving Corsica a proper constitutional place, as well as a political and juridical recognition. The first point would be to give a constitutional recognition to the “Corsican people”⁶. The second point, that would not only benefit more than just Corsica but is mainly a demand from the Corsican people, is the possibility to teach the Corsican language by immersion education, even in public schools. The last point really focuses on the juridical statute of the island, and three possibilities are put forth. The first one would

3 Projet de loi constitutionnelle complétant l'article 1^{er} de la Constitution et relatif à la préservation de l'environnement, n° 3787, presented on January 20th 2021 <https://www.assemblee-nationale.fr/dyn/15/dossiers/pjlc_environnement> accessed 19th May 2022.

4 Eleonora Botinni, “France” [2020] IRCR 113.

5 Wanda Mastor, *Rapport sur l'évolution institutionnelle de la Corse* (11th October 2021) <<https://www.isula.corsica/attachment/2229377/>> accessed 19th May 2022.

6 See Constitutional Council, 9th May 1991, Decision n° 91-290 DC, *Act on the statute of the territorial unit of Corsica*, in which the Council struck down a statute recognizing the existence of the “Corsican people” because the Constitution only recognizes the existence of the “French people”.

follow the 2019 proposition and only add in the Constitution that Corsica is a specific collectivity, following the reform project of 2019. The second one would put in place a true devolution system, in which Corsica would have similar powers to the Parliament at least in some matters states by the Constitution and then detailed in an organic law. The third one would be giving Corsica a specific title in the Constitution, as it is the case for New Caledonia, with a possibility for a referendum of independence in years to come. This would give Corsica the to become a new, independent State. Except the part that was in the 2019 reform project, these constitute only propositions made by one scholar.

One last constitutional change, if not a constitutional reform per se, is worth mentioning here: the Constitutional Council's decision of the 15th October 2021 (2021-940 QPC, *Société Air France*). Rendered through the QPC procedure (Question Prioritaire de Constitutionnalité, an ex-post constitutional review of a legislative act), that decision is both a landmark case and a bit of a disappointment since it finally gives some content to the very broad category of "rules or principles inherent to the constitutional identity of France" created by the same Council in a decision rendered on the 27th July 2006⁷. The general (and historic) prohibition of any kind of delegation of general administrative power inherent to the exercise of public force now forms part of that category, in conditions we will investigate further on.

III. The Scope of Reforms and Constitutional Control

The content of the 2019 constitutional reform was explained in detail in last year's report, so there is no need to go back to it. However, the 2021 reform (1), the proposed reform on Corsica (2) and the first "principle that is inherent in France's constitutional identity" recognized by the Constitutional Council (3) must be explained further. None of these constitutional reforms raised any tension with unamendable rules in the Constitution⁸. They all constitute mainly amendments and not dismemberments, although a point could be made that some of the proposed reforms about Corsica are dismemberments. The Constitutional Council was only involved in the last point of interest, since the constitutional reform came from its own case law. Although its role and its place have not changed since last year, we will explain its specific position in this case.

1. Environment

The 2021 reform project is interesting in several ways. Some have been mentioned last year, and we will focus here on the scope of the reform and why it failed, which are both entangled. The general idea behind this revision was to specifically add a reference to climate change in the Constitution. In 2005, a specific Charter for the Environnement was added to the preamble of the Constitution, to be used as reference by the Constitutional Council. It is mainly based on sustainable development rather than on climate change, and it was deemed necessary to add a specific provision about climate change.

However that project failed because both chambers of Parliament did not agree on the specific wording of the provision, which has its importance since after the reform, the Constitutional Council could have used it against said Parliament. The National Assembly wanted, following

7 Constitutional Council, 27th July 2006, decision n° 2006-540 DC, *Copyright and related rights in the information Society*.

8 On the unamendable rules in France, see last year report, Eleonora Botinni, "France" [2020] IRCLR 115.

the Government, the provision to use the verb “guarantee”, to indicate that the Republic “guarantees environmental preservation and biological diversities”. The Senate, however, proposed “preserves” or “acts”, and wanted to also specifically limit the scope of the revision to what the 2005 Charter provided. The argument was that the wording suggested by the Government and the National Assembly was too restrictive on the Parliament. The Senate did not want to bind itself that much in law making, considering that its action would be too limited by the provision.

It is hard to really foresee what the Constitutional Council would have made of both the proposed wordings, but the fear of being too limited by the Constitution is what made the reform fail. If the Constitutional Council can usually be considered an enlightened court, it can sometimes be counter-majoritarian. The fear of the Council using that reform as a counter-majoritarian tool is then what led to the that reform’s failure.

2. Corsica

Symbols are important, especially so when dealing with cultural identities on a constitutional level. The existence of a Corsican people, although a sociological and anthropological reality⁹, has always been concealed behind the whole of the French people. The idea of a complete unity of the French people, however, has already been challenged, first in 1998 with the recognition of the New Caledonian people in article 76 of the Constitution, then in 2003 in article 72-3 with the recognition of overseas populations. The 1991 justification for the unconstitutionality of a statute recognizing the Corsican people and the lack of a constitutional mention of Corsica altogether is then hard to justify. This is precisely the point of the proposed reform of article 72-3 of the Constitution: recognizing both the overseas populations *and* the Corsican people. Undoubtedly, such a change is largely cosmetic. It is, nonetheless, an important one when it comes to matter of principles. Such a change might appear as a dismemberment, if one is to follow the decision of the Constitutional Council of 1991¹⁰. Indeed, at least according to the Constitutional Council, the Constitution must be read as recognizing only the French people, this being a founding part of the French Republic.

The second part of the proposed reforms concerning Corsica is about teaching the Corsican language, and more largely other regional languages. Since the 1789 Revolution, France has been built on the unity of the language spoken by its people. People speaking regional languages do not have any specific rights to be addressed in said languages when dealing with the administration, and every legal act of both the central State and the local administrations has to be written in French as per the *ordonnance de Villers-Cotterêts* of 1539. The idea behind the proposed reform is to enable public schools to teach regional languages by immersion education. It is obviously possible for private schools to do it, but it is prohibited for public schools to teach regional languages in such a way. This reform aims directly at overturning a recent decision of the Constitutional Council, in which it ruled that it was unconstitutional to allow a city to finance schools with immersion education¹¹.

Regarding Corsica, last but not least is the place of the island altogether in the Constitution. A first project is inside the 2019 reform project, and only aims at mentioning Corsica in the

9 Liza Terrazoni, *Les autres en Corse : pour une sociologie des relations interethniques* (Albiana, 2019).

10 Constitutional Council, 9th May 1991, Decision n° 91-290 DC, *Act on the statute of the territorial unit of Corsica*.

11 Constitutional Council, 21st May 2021, Decision n° 2021-818 DC.

Constitution. However, the two other propositions, mentioned in II, would give a specific status to the island, either through a form of devolution or through a planned autonomy, not unlike New Caledonia. Such a reform could be seen as a dismemberment, since article 1 of the Constitution is centered on the unity of the State.

3. Constitutional Identity

The 2021-940 QPC decision of the Constitutional Council mentioned earlier is worth exploring a bit further here. As indicated, it is a landmark case as it constitutes the first practical application of another landmark decision rendered on the 27th July 2006¹². The 2006 decision regards the only possible situation where a constitutional review of a law ensuring the transposition into national law of European directives is possible, when the law only provides the necessary consequences of an unconditional and precise directive: the situation where the transposition law “runs counter a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto” (*i.e.*, through a constitutional reform). In any other case, supremacy of European law as well as article 88-1 of the French Constitution apply: European directives must be transposed into French law and, in the event of a difficulty with any piece of European law (for example, a conflict between the directive’s content and the national Constitution), only the European Court of Justice is competent to give rulings on their interpretation and validity, or lack thereof (art. 267 TFEU).

The 2006 decision caused quite the commotion in both French and European law at the time. At the European level, that decision happened only a year after the TCE’s failure (Treaty establishing a Constitution for Europe), in a time of great fragility of the European institutions. It started a trend amongst some of the most historical members of the EU to reaffirm their constitutional identity against European Law (followed by Spain on a European decision rendered on the 20th November 2008, and then by Germany in a decision rendered on the 30th juin 2009¹³). At a more national level, that decision triggered a series of scholarly discussions as to what that notion encompassed. Different principles were suggested, including the French concept of separation of powers or public service, the free administration of local authorities and, most notably, the French concept of *laïcité*¹⁴. Even though litigants tried to use that newfound lever against transposition law more than once, no principle was ever sanctioned as being part of those rules or principles inherent to the constitutional identity of France.

It's a done thing now with the 2021 decision, and the principle it elevated as being inherent to the constitutional identity of France is one of the reasons why it is quite a disappointment.

The decision was rendered in a very specific context, which is the obligation imposed on the company that transported a foreigner who is not a national of a member of the European Union and who has been denied entry in France to transport them back to their departure point (art. L. 231-4 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*). That obligation was incorporated into French law as per the 2001/51/CE Directive of the 28th June 2001 and article

12 See above, note 7.

13 CJCE, 20th November 2008, case T-185/05, *Italian Republic v. Commission* and Federal Constitutional Court of Germany, 30th June 2009, 2 BvE 2/08 e.a.

14 See, for example, Michel Troper, “Identité Constitutionnelle”, in Mathieu Bertrand (ed.), *1958-2008. Cinquantième anniversaire de la Constitution française* (Daloz 2008).

26 of the Convention implementing the Schengen Agreement of 14 June 1985, and it was challenged on the grounds of “running counter” the principle, inherent to the constitutional identity of France, that powers of general, administrative police cannot be delegated to private entities (such as, in that case, the private society Air France). More precisely, the society argued that, through that obligation to transport foreigners back to their departure point, they were also compelled to detain those foreigners against their will, transferring them the exercise of public force. That obligation to detain and transport unwilling passengers, as well as the costs involved and entirely supported by the company, was considered unconstitutional (as per article 12 of the *Déclaration des Droits de l’Homme et du Citoyen of 1789*) and a violation of that principle forbidding that delegation of general, administrative police powers.

That prohibition was indeed sanctioned as part of the principles inherent to the constitutional identity of France, thus making possible a constitutional review of the transposition law challenged by the company. Making it possible, however, does not mean that the law was found unconstitutional: the Constitutional Council, right after recognizing that the prohibition of delegation of general administrative police powers inherent to the use of public force does form part of the principles inherent to the constitutional identity of France, highlights that the obligation imposed on the air transportation company to transport the foreign who has not been granted entry into French territory only compels them to see to their transportation. Any sort of monitoring, restricting or use of force against those foreigners is carried out by the police authorities, not by the company, meaning. The law is, then, found constitutional and the litigants are dismissed.

That decision, as unique as it formally is, is not very original on a more substantial point of view. The prohibition of delegation of general administrative police powers was first formulated in an historic case of the Council of State of the 14th June 1937 (*Ville de Castelnaudary*) and then reiterated by the Constitutional Council¹⁵. The only novelty in this decision is the fact that that prohibition forms part of the principles inherent to the constitutional identity of France – a possibility that had never been imagined by the various authors who speculated on its content. That such a narrow prohibition was the first principle to be sanctioned as such was as much of a surprise as it was a disappointment to those who imagined a more substantial content to that notion¹⁶.

Another source of disappointment is that the prohibition pointed out by the Constitutional Council is the “narrow version” of the prohibition put in place by *Ville de Castelnaudary*: it only regards the delegation of general administrative police powers and the exercise of public force, and not the delegation of special administrative police powers (here, the special administrative police of foreigners). The window the decision opens is then a very small one: it means that a law ensuring the transposition into French law of a directive that is unconditional and clear can only be reviewed on grounds of constitutionality if it delegates to private entities powers of general administrative police, including the exercise of public force – that is, traditional police activities. Any other sort of delegation of administrative police powers will not fall into that category, and will not allow for a constitutional review if put in place by a transposition law.

15 See, for example Constitutional Council, 10th March 2011, decision n° 2011-625 DC, *Law on guidelines and programming for the performance of internal security* or 20th May 2021, decision n° 2021-625 DC.

16 See, for example, Sébastien Hourson, “L’identité par contraste, la légalité du contrat” [2022] Dr. Adm. 3.

That decision is not nearly the bombshell the 2006 decision was, mostly because of how narrow it is and because it did not, ultimately, lead to any sort of sanction on the challenged law. It does work, however, as a reminder that that category of principles inherent to the constitutional identity of France exist and might be used against European law if necessary. It also makes for another example of the tendency of the Conseil constitutionnel to toy with his jurisdictional competences and with a rather constructive approach to the Constitution to create, shape and potentially reshape his own place in the constitutional framework¹⁷. We will not here engage in a full review of the role the Constitutional Council plays in the French institutional landscape, as this has already been done in the previous edition. We can still definitely connect that occasional tendency of the Council to come up with new notions, categories and regimes as his own way of play somewhat of an enlightened role, in the small margins offered by his constitutionally, culturally and politically constrained position.

IV. Looking Ahead

2021 was not a very productive year in terms of constitutional reform for a reason, whether it is considered good or bad: 2022 is an electoral year. Politically, considering how tense the political and social climate already was at the beginning of the year and how *tenser* it grew to become through the months, it was rather hard to imagine how it could be possible to follow through with a full-fledged constitutional reform.

As we are writing these lines, President Emmanuel Macron has already been reelected against his main opponent, Marine Le Pen. As the first round of the legislative elections will be organized on the 12th June, that is to say three days before the deadline of this article, we cannot yet predict whether the newly reelected President will be able to re-engage another constitutional reform project according to his electoral manifesto. Its content, as far as he gave details about it during the campaign, is mostly similar to the one he initiated back in 2018: reinforcing of the control powers of Parliament over the executive power, injecting a dose of proportional elections into the legislative elections (for now entirely based on a majoritarian system), reducing the number of deputies and senators, barring the possibility to hold multiple mandates through time, suppressing the Cour of Justice of the Republic (the specific jurisdiction charged with investigating ministers) and including the status of Corsica into the constitutional text. The only “novelty” resides in the method he means to use, since he wishes to summon a cross-party commission to work on the new draft. That method is far from new since eight commissions have already been summoned to work on constitutional reform drafts, with only two being really cross-party and four leading to actual constitutional reforms.

Whether or not that constitutional reform will finally be put to the vote and, eventually, adopted highly depends on the results of the legislative elections. Considering the constitutional amendment procedure set up by article 89, President Emmanuel Macron will need the absolute majority in the National Assembly to be able to conduct the process as he imagined – otherwise, if he loses his majority during the next legislative election, he will have to make do with an adverse majority and an adverse Prime Minister (the political situation is called *cohabitation* and has not happened in France since 1997). He might have to make concessions or, depending on what Prime Minister he eventually names, to give up on his initial project. It could be, then, that the 2022 edition of this review might have a brand-new constitutional reform to write about.

17 See, on the matter of the role of the Constitutional Council, Eleonora Botinni, “France” [2020] IRCR 115.

With the number of unknown variables involved in the process and the complicated political atmosphere in France at the moment, we should expect 2022 to be an *interesting* year on a constitutional level – if not a peaceful year

V. Further Reading

Wanda Mastor, *Rapport sur l'évolution institutionnelle de la Corse* (11th October 2021) <<https://www.isula.corsica/attachment/2229377/>> accessed 19th May 2022.

Nicolas Pauthe, “Modifier l'article 1^{er} de la Constitution : une fausse bonne idée pour la cause environnementale ?” [2021] AJDA 2021.

Pierre-Antoine Tomasi, “L'identité constitutionnelle de la France, la force publique et le service public” [2021] RFDA 1087.

Romain Rambaud, “Observations sur le projet de réforme constitutionnelle ‘pour un renouveau de la vie publique démocratique’”, orale presentation on the 21st November 2019, <<https://hal.archives-ouvertes.fr/hal-02543985/document>> accessed 19th May 2022.