# THE CONSTITUTIONAL IMPLICATIONS IN FRANCE OF THE MAASTRICHT TREATY

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## I. INTRODUCTION

On 12 October 1993 the German Constitutional Court in Karlsruhe[1] held that the Treaty on European Union (TEU) was not in breach of the German Constitution and could be ratified by President von Weizsäcker. This decision felled the last legal obstacle to the implementation of the Maastricht accords. Ten months later than planned, and almost two years after the original accords were signed, the Maastricht Treaty entered into force on 1 November 1993.

The Treaty has been described as a "qualitative leap from the economic to the political"[2] but, whilst signifying a deepening of European integration which may make expansion more difficult, it has not created a federal Europe based on democratic parliamentary control. The Treaty has established a political union with Union citizenship, and looks forward to the establishment of an Economic and Monetary Union (EMU). These are founded on the existing Communities, as well as on new forms of inter-governmental cooperation in the areas of foreign and security policy, and justice and home affairs.[3] The overall effect is that the impact of Europe creeps further and further down into the institutional

1. Judgment of 12 Oct. 1993 (Cases 2 BvR 2134/92 & 2159/92, Brunner v. The European Union Treaty), BVerfG 2 Sen. [Federal Constitutional Court, 2nd Chamber], [1994] 1 C.M.L.R. 57. *See* Hugo J. Hahn, *La cour constitutionnelle fédérale d'Allemagne et le traité de Maastricht*, 98 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [REV. GEN. DR. INT'L PUB.] 107 (1994), and Nigel G. Foster, *The German Constitution and E.C. Membership*, 1994 PUBLIC LAW [P.L.] 392.

2. Henri Oberdorff, *Les incidences de l'Union européenne sur les institutions françaises*, 69 POUVOIRS: REVUE FRANÇAISE D'ÉTUDES CONSTITUTIONNELLES ET POLITIQUES [POUVOIRS] 95 (1994).

3. *See generally* Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213 (1993).

framework of the Member States by what Oberdorff calls "interpenetration."[4]

When the court in Karlsruhe considered the "democratic deficit" at the European level, which had not been solved by Maastricht, despite the reinforcement of the limited powers of the European Parliament, the British Government must have been reminded of its own precarious position earlier that year. In the United Kingdom, the people were never consulted about this latest step towards further European integration. Members of Parliament, bamboozled by a motion of confidence provoked by the Government, declared how impotent they felt in spite of their opportunity to debate the treaty in the House. Constitutional experts called upon by the media could not agree on how far the Crown was free to ratify the treaty without having anyone's approval but its own, and the courts felt obliged to bow to the allegedly democratic strength of parliamentary legislative supremacy, which is in fact driven by party politics.[5]

The distinct lack of involvement of the constitutional authorities of the United Kingdom is in sharp contrast with the complex politico-legal process unleashed in France by the negotiation and signing of the Maastricht accords. This process provides a fascinating example of a written Constitution in action. The classic conception of the Fifth Republic refers to the dominant Executive and the politically appointed Conseil constitutionnel, which limit the scope for democratic expression through the "rationalised" Parliament in spite of an allegedly "sovereign" people. Before the Treaty on European Union could be ratified by France, however, the full panoply of constitutional authorities were called upon to participate, according to a set of written, though ambiguous, constitutional provisions. Three references were made to the Conseil constitutionnel, the Constitution had to be amended, and the ratification of the Treaty was made conditional upon popular approval through referendum. The result is that the French people can be certain that a set of constitutional obstacles had to be successfully negotiated before President Mitterrand could ratify the treaty he favoured. This article

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4. Oberdorff, *supra* note 2, at 99.

5. Regina v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Rees-Mogg, [1994] 9 Q.B. 552 (1993). *See* Richard Rawlings, *Legal Politics: The United Kingdom and Ratification of the Treaty on European Union (Part One)*, 1994 P.L. 254, and *(Part Two)*, 1994 P.L. 367.

seeks to explain the nature of the pre-ratification hurdles and their significance for democracy and the balance of powers within the French Fifth Republic.[6]

## II. OBSTACLE NO. 1: THE FIRST REFERENCE TO THE CONSEIL CONSTITUTIONNEL (DECISION 92-308 DC OF 9 APRIL 1992)[7]

During the negotiation of the Maastricht accords, President Mitterrand had understood[8] that ratification would probably need to be preceded by constitutional revision. As a result, the President referred the Treaty on European Union (the Treaty) to the Conseil constitutionnel (the Conseil) on 11 March 1992, for review under Article 54 of the French Constitution.

### *A. Rarity of a Decision Under Article 54*

In France, as in other Western democracies, it is the Executive which negotiates and ultimately ratifies treaties.[9] The Constitution of the French Fifth Republic makes it clear in Article 54,[10] however, that if called upon to do so, the Conseil constitutionnel must judge whether an international agreement is in conformity with the Constitution.[11] If the text is declared to include provisions which are unconstitutional, it may not be ratified until the Constitution itself has been amended. This

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6. For the implications for the reception of Community law in France see Peter Oliver, *The French Constitution and the Treaty of Maastricht*, 43 INT'L & COMP. L.Q. 1 (1994).

7. 1992 Recueil des décisions du Conseil constitutionnel [Rec. Con. const.] 55, [1993] 3 C.M.L.R. 345.z

8. Alain Rollat, *M. Mitterrand engage sa "responsabilité politique" sur la question européenne*, LE MONDE, 14 Jan. 1992, at 12.

9. "The President of the Republic shall negotiate and ratify treaties. He shall be informed of all negotiations leading to the conclusion of an international agreement not subject to ratification." LA CONSTITUTION DU 4 OCTOBRE 1958 [CONST.] art. 52, *reprinted and translated in* 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 38 (Albert P. Blaustein & Gisbert H. Flanz eds., 1988) [hereinafter "CONSTITUTIONS"].

10. "If the [Conseil constitutionnel], the matter having been referred to it by the President of the Republic, by the [Prime Minister], or by the President of one or the other assembly, [has declared] that an international [agreement] contains a clause contrary to the Constitution, the authorisation to ratify or approve [the particular international agreement] may be given only after amendment of the Constitution." CONST. art. 54, *id*. at 39, *amended by loi constitutionnelle* No. 92-554 of 25 June 1992, J.O., 26 June 1992, at 8406. *See infra* note 147 and accompanying text.

11. On the case-law of the Conseil, see generally LOUIS FAVOREU & LOÏC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL (6th ed. 1991). The complete text of all the decisions of the Conseil is available on LEXIS, PUBLIC Library, CONSTI File.

checking procedure is essential as a result of the monist view[12] expressed in Article 55: "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of [ordinary national] laws, subject, for each agreement or treaty, to its application by the other party."[13] It follows from this that, in a case of conflict between a national law and an international treaty/agreement, the French courts are obliged to apply the theory of the hierarchy of norms and to ensure the supremacy of the treaty, so long as the three conditions of ratification, publication and reciprocal application have been met.[14]

In the light of Article 55 and France's monist approach to international law, it is surprising to note that the use of Article 54 is exceptional. Since the creation of the Conseil in 1958, there had only been three references of international agreements before the case of Maastricht in 1992:[15] Decision 70-39 DC of 19 June 1970[16] on the EC budget; Decision 76-71 DC of 30 December 1976[17] on direct elections to the European Assembly; and Decision 85-188 DC of 22 May 1985[18] on Protocol No. 6 to the European Convention on Human Rights (on the abolition of the death penalty). Before 1992, none of the clauses of these international agreements had been judged unconstitutional. Their number

12. Monism and dualism are the two principal theories as to the relation between international law and state/national law. The monist view is that international law and state law are but two aspects of one system of binding legal rules. This, the older of the two theories, is justified by reference to natural law and law as a science. The dualist view (or pluralistic theory) is that international law and state law represent two distinct systems with intrinsically different characters. This latter theory was developed in part by reference to the sovereignty of nation-states. *See generally* IVAN A. SHEARER, STARKE'S INTERNATIONAL LAW ch. 4 (11th ed. 1994).

13. CONST. art. 55, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 39.

14. Although the Cour de cassation applied this principle in private law disputes, Judgment of 24 May 1975 (*Société Cafés J. Vabre*), Cass. ch. mix., 1975 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 497, within months of the obligation being made clear by the Conseil constitutionnel in 1975, Decision 74-54 DC of 15 Jan. 1975 (on abortion), 1975 Rec. Con. const. 19, the Conseil d'Etat managed to suppress its nationalist tendencies only in 1989, Judgment of 20 Oct. 1989 (*Nicolo*), Conseil d'Etat, 1990 D.S. Jur. 135, after a direct invitation from the Conseil in 1986, Decision 86-216 DC of 3 Sept. 1986, 1986 Rec. Con. const. 135. See François Chevallier, *L'exception d'inconstitutionnalité. L'État de droit et la construction de la Communauté européenne*, 1989 Recueil Dalloz-Sirey, *Chronique* 255, on the triangular relationship between domestic law, the Constitution and EC law.

15. And only four under Article 61. *See infra* discussion of Obstacle No. 5, p. 84.

16. 1970 Rec. Con. const. 15.

17. 1976 Rec. Con. const. 15.

18. 1985 Rec. Con. const. 15.

should be compared with the 192 references made during the same period about the constitutionality of ordinary laws.[19]

The reasons for the rarity of an Article 54 reference were essentially threefold. Firstly, whilst the Conseil *must* be seised under Article 61(1)[20] of all "organic" laws[21] and Parliamentary standing orders, apparently because of their potential impact on the balance of power between the organs of State, there is a mere option as to references of international agreements (and "ordinary" laws, Article 61(2)[22]). Secondly, only the four "highest authorities"[23] (President of the Republic, Prime Minister, President of the Senate, President of the National Assembly) enjoyed the power of reference under Article 54: parliamentarians could only seise the Conseil of an ordinary law under Article 61,[24] ordinary citizens have no access to the Conseil at all,[25] and the Conseil has no power to make a pronouncement without a reference. Thirdly, the control of the constitutionality of treaties is only a priori: if the opportunity is missed under both Article 54 (before ratification) and

19. Bruno Genevois, *Le Traité sur l'Union européenne et la Constitution*, 8 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [REV. FRANÇ. DR. ADMIN.] 373, 374 (1992).

20. "Organic laws, before their promulgation, and [standing orders] of the Parliamentary assemblies, before they come into application, must be submitted to the [Conseil constitutionnel], which shall rule on their constitutionality." CONST. art. 61, para. 1, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 40.

21. Under the 1958 Constitution certain constitutionally important matters (e.g., the rules of procedure of the Conseil under Article 63) must be regulated by what the Constitution calls "organic" laws. These significant laws are designed to complete the Constitution and are passed by Parliament according to the special procedure of Article 46 and not the ordinary legislative procedure. They are deemed to occupy a special place in the hierarchy of norms, namely below the Constitution itself but above the ordinary parliamentary laws of Article 34.

22. "To the same end, [ordinary] laws may be submitted to the [Conseil constitutionnel], before their promulgation, by the President of the Republic, the [Prime Minister], the President of the National Assembly, the President of the Senate or by 60 Deputies or 60 Senators." CONST. art. 61, para. 2, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 40.

23. Until the constitutional revision of 25 June 1992. *See infra* discussion of Obstacle No. 2, pp. 64-65.

24. Constitutional revision of 29 October 1974, relied upon for the reference of the law of ratification. *See infra* discussion of Obstacle No. 5, pp. 84-85.

25. In spite of proposals from, amongst others, Robert Badinter, President of the Conseil from 1986, *see* Chevallier, *supra* note 14, and President Mitterrand, *infra* note 102. Now see the proposed Article 61-1 of the Constitution in the Vedel Report of the consultative committee for the revision of the Constitution, J.O., 16 Feb. 1993, which was excluded from *loi constitutionnelle* No. 93-952 of 27 July 1993, J.O., 28 July 1993, at 10600; *see infra* note 97.

Article 61 (before the promulgation of a law authorising ratification),[26] the ratified treaty becomes unassailable.[27]

If the effectiveness of the Conseil as the arbiter of constitutional supremacy is somewhat circumscribed by the text of the Constitution, it is also at the mercy of political circumstances, not to say conspiracies. The Single European Act,[28] despite representing a significant step towards European integration, was never considered by the Conseil because there was a consensus between the main political parties.[29] The Treaty on European Union, on the other hand, was used by President Mitterrand as a means of preparation for the legislative elections of March 1993. The Socialists had suffered a serious defeat in the regional elections of 1992, and the President was delighted to exacerbate the internal divisions of the Right by taking up the cause of European Union.[30]

### *B. Constitutional Norms of Reference Applied to the Treaty on European Union*

Although it might be argued that the restrictions of Article 54 correspond to the desire *not* to curb the treaty-making power of the State too much, there are certain fundamental principles which were deemed by the constituent power to be important enough to limit the Executive. These are the norms of constitutional reference employed by the Conseil,

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26. *See infra* discussion of Obstacle No. 5, pp. 84-85.

27. In spite of the Conseil's developing attitude to the questioning of promulgated laws since Decision 85-187 DC of 25 Jan. 1985 (on the state of emergency in New Caledonia), 1985 Rec. Con. const. 43, its firm stance on the sanctity of ratified treaties is further clarified in the Maastricht decisions.

28. Implemented by *loi* No. 86-1275 of 16 Dec. 1986, J.O., 17 Dec. 1986, at 15107, and *décret* No. 87-990 of 4 Dec. 1987, J.O. 10 Dec. 1987, at 14361.

29. Jean-Paul Jacqué, *Commentaire de la décision du Conseil constitutionnel no. 92-308 DC du 9 avril 1992 (Traité sur l'Union européenne)*, 28 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 251 (1992). Bruno Genevois, *Le droit international et le droit communautaire*, *in* CONSEIL CONSTITUTIONNEL ET CONSEIL D'ETAT: COLLOQUE DES 21 ET 22 JANVIER 1988 AU SÉNAT 191, 204-05 (Montchrestien 1988) (citing proposals for a reference from two well-known commentators: François Goguel, *L'Acte unique européen et la Constitution*, LE MONDE, 11 Oct. 1986, at 2, and François Luchaire, LE MATIN, 20 Nov. 1986.)

30. Jean Pétot, *L'Europe, la France et son Président*, [1993] 2 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER [REV. DR. PUB.] 325, 373-74.

certain of which were judged to be infringed by the Maastricht Treaty in the decision of 9 April 1992.[31]

As was to be expected, the Conseil's principal task was to strike a balance between the concept of national sovereignty, the essence of the State, and the reality of international cooperation, necessary for the survival of the State. On the national side of the equation, the Conseil referred firstly to the Preamble of the 1958 Constitution[32] to show that human rights and national sovereignty are at the heart of the Constitution's concerns.[33] Then, in order to be quite clear that it is the people to whom sovereignty belongs, the Conseil cited Article 3 of the Declaration of 1789[34] and Article 3 of the 1958 Constitution itself.[35] On the international side of the balance, the Conseil found within the constitutional provisions three expressions of principle, somewhat tempered by conditions: France abides by the rules of public international law (Paragraph 14 of the Preamble to the 1946 Constitution); France agrees to limitations of sovereignty which are necessary for the organisation and defence of peace, subject to the condition of reciprocity (Paragraph 15 of the Preamble to the 1946 Constitution);[36] France can sign treaties relating to international organisations, subject to their ratification being authorised by law (Article 53 of the 1958 Constitution).[37] On the basis of these constitutional provisions, the Conseil concluded that

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31. Much of the Conseil's approach was predicted by Nguyen van Tuong. Nguyen van Tuong, *Pourra-t-on faire ratifier les Accords de Maastricht des 9 et 10 décembre 1991 par référendum?* 66 Juris-Classeur Périodique [J.C.P.] I, No. 3569, at 139 (1992).

32. "The French people hereby solemnly proclaims its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble of the Constitution of 1946." CONST. pmbl., *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 21.

33. 1992 Rec. Con. const. at 58, [1993] 3 C.M.L.R. at 350.

34. "The principle of all sovereignty lies essentially in the Nation. No body or individual may exercise any authority that is not expressly derived from it." [All translations from the French, unless otherwise attributed to an English source, are the author's.]

35. 1992 Rec. Con. const. at 58, [1993] 3 C.M.L.R. at 350. "National sovereignty belongs to the people, which shall exercise this sovereignty through its representatives and by means of referendums." CONST. art. 3, para. 1, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 22.

36. This is not reciprocity of application, as under Article 55, but reciprocity in the limitation of national sovereignty, i.e., unilateral renunciations of the exercise of power would be subject to constitutional revision.

37. 1992 Rec. Con. const. at 58, [1993] 3 C.M.L.R. at 350.

> respect for national sovereignty does not prevent France, on the basis of the abovementioned provisions of the Preamble to the 1946 Constitution, from entering into international undertakings, subject to reciprocity, with a view to participating in the formation or development of a permanent international organisation possessing legal personality and decision-making powers by the effect of transfers of powers consented to by the member-States.[38]

It thus became clear that the demands of national sovereignty and international cooperation could be reconciled under the Constitution, and that the treaty submitted for examination could be ratified without constitutional revision if four conditions were met, namely[39]

(1) reciprocity in the limitation of national sovereignty: France should not be unequally weakened on the international stage;
(2) authorisation by law: the President is subordinate to the legislature in the taking of such an important step;
(3) no clause was contrary to the Constitution: the treaty and the President must ensure the protection of human rights;
(4) no clause must infringe the "essential conditions for the exercise of national sovereignty:" the vital element in the balance.

Having accepted jurisdiction to examine the totality of the "international agreement" referred to it (including 16 protocols and 33 declarations),[40] and not only the "treaty," and having decided on the task to be accomplished, the Conseil proceeded to determine whether the preconditions for ratification were met. The first three merited very little discussion. The condition of reciprocity was judged to be satisfied by Article R of the TEU, because the whole agreement could not take effect until it had been ratified by all the Member States.[41] The satisfaction of the requirement of authorisation by law was judged to be self-evident (Constitution, Article 53). The protection of rights and freedoms was

38. 1992 Rec. Con. const. at 59, [1993] 3 C.M.L.R. at 351.
39. 1992 Rec. Con. const. at 58-59, [1993] 3 C.M.L.R. at 350-51.
40. 1992 Rec. Con. const. at 57, [1993] 3 C.M.L.R. at 349.
41. 1992 Rec. Con. const. at 59, [1993] 3 C.M.L.R. at 351.

judged to be assured by the European Court of Justice under Article F(2) TEU and also by the national courts within their sphere of competence.[42] The fourth precondition concerning national sovereignty provoked greatest concern and indeed resulted in the declaration of unconstitutionality in three areas: citizenship of the Union, the single monetary and exchange rate policy, and the entry and free movement of persons.

According to Article 3 of the Constitution,[43] national sovereignty is exercised by the people, through its representatives or by referendum, and these representatives are elected by French nationals. The representatives sit in the National Assembly and the Senate, the latter chamber having the role of representing the local communities (*collectivités locales*, Article 24) and being elected by the representatives of these communities, including the communes (Article 72). In their turn the municipal councillors (of the communes) are elected. The logical progression of these provisions shows that the election of municipal councillors within the commune has an effect on the composition of the Senate. Since the Senate takes part in the exercise of national sovereignty (which may only be exercised by the elected representatives of French nationals), the Constitution permits only French nationals to vote and stand in municipal elections.[44] As a result, the new Article 8B(1) of the EC Treaty (added by Article G TEU)[45] was judged unconstitutional:[46] as a citizen of the European Union, any Member State national living in France would have the right to vote and stand in French municipal elections.[47]

In spite of the negative verdict on Article 8B(1), the new Article 8B(2) of the EC Treaty (also added by Article G TEU) was deemed

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42. 1992 Rec. Con. const. at 59, [1993] 3 C.M.L.R. at 351.

43. *Supra* note 35.

44. Luchaire points out that it is only an ordinary law, and not the Constitution, which requires the municipal councillors to choose the electors of the Senate. The Conseil should have relied upon Article 72 alone. François Luchaire, *L'Union européenne et la Constitution. Première partie: La décision du Conseil constitutionnel*, [1992] 3 REV. DR. PUB. 589, 598.

45. Article G of the Treaty on European Union, 7 Feb. 1992, 31 I.L.M. 247 (1992), [1992] 1 C.M.L.R. 719, contains numerous provisions amending the EEC Treaty.

46. 1992 Rec. Con. const. at 61, [1993] 3 C.M.L.R. at 353.

47. The Conseil decided it could judge the constitutionality of the principle of this provision even though the details of organisation are to be decided by a *unanimous* vote of the EC Council by 31 December 1994. *See infra* text accompanying notes 59 and 60.

constitutionally acceptable,[48] although it provides for non-French nationals living in France to stand and vote in France in European elections.[49] This apparent inconsistency results from the Conseil's particular interpretation of the role of the European Parliament, which was not judged a sovereign assembly with general powers that could compete for the exercise of the national sovereignty of France. The European Parliament is founded on international agreements and belongs to a distinct legal system which, although integrated into the legal systems of the Member States, does not belong to the institutional order of the French Republic. For this reason, Article 3 of the Constitution, which limits the franchise to French nationals, is applicable only "within the conditions laid down by the Constitution," and is not infringed by the grant of a right to vote in European elections. Such a legalistic analysis does not appeal to those who appreciate the Treaty's extension of the European Parliament's powers and the specificity of the Community legal order,[50] but Luchaire rightly points out[51] that the Conseil is concerned with the transfer of power from France to the European Community, and not that between the various organs of the Community.

In their totality, the provisions of the Treaty which relate to the establishment of a single monetary and exchange rate policy are very complex. In constitutional terms, however, they are simple, and it was obvious that they would require a revision of the French Constitution. In particular, the final establishment of the policy in the third stage for achieving Economic and Monetary Union[52] compromises "the essential

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48. 1992 Rec. Con. const. at 62, [1993] 3 C.M.L.R. at 354.

49. Now see *loi* No. 94-104 of 5 Feb. 1994, J.O., 8 Feb. 1994, at 2154, 68 J.C.P. III, No. 66670 (1994); *décret* No. 94-206 of 10 Mar. 1994, J.O., 12 Mar. 1994, at 3906, 68 J.C.P. III, No. 66736 (1994).

50. *E.g.*, Genevois, *supra* note 19, at 393; Sophie Boyron, *The Conseil Constitutionnel and the European Union*, 1993 P.L. 30, 35.

51. Luchaire, *supra* note 44, at 600.

52. The establishment of economic and monetary union is one objective of the European Union under Article B TEU. Provision for realisation of the objective is made in the modified articles of the EC Treaty, particularly Title VI on Economic and Monetary Policy. Initially the Member States must closely coordinate their economic policies "in accordance with the principle of an open market economy with free competition" (Article 102A EC Treaty). During the second stage, to begin on 1 January 1994, (Article 109E(1) EC Treaty) all restrictions on the movement of capital and on payments (even to third countries) are prohibited (Article 73B EC Treaty), the Member States must endeavour to avoid excessive government deficits (Article 109E(4) EC Treaty), each Member State must start the process leading to the independence of its central bank (Article 109E(5) EC Treaty), and exchange rate policy is to be treated as "a matter of common interest" (Article 109M(1) EC Treaty). The third and final stage begins on 1 January 1999 at the

conditions for the exercise of national sovereignty."[53] These conditions are not defined, but, by reference to the articles of the Treaty judged unconstitutional, it is possible to determine which deprivations of national power were regarded as unacceptable. France would lose control over its national policy in vital areas: monetary policy would be determined by the independent European Central Bank (ECB); the issue of bank-notes and coins within the Community would be subject to the authorisation of the ECB; Member States would no longer have a national currency (the ECU being the only currency within Member States party to the system); and exchange rate policy vis-à-vis non-Community currencies would be decided at Community level (although by unanimous vote).[54]

The third area of the Maastricht negotiations which had caused consternation in France concerned immigration. The decision on the Schengen Convention[55] had already shown the Conseil's sensitivity in this area to the preservation of powers which form part of the "essential conditions for the exercise of national sovereignty,"[56] and this time the Treaty went too far. A common EC policy on the visas required by non-EC nationals wishing to enter the EC was acceptable if decided unanimously by the Council, but not if adopted by a qualified majority,[57] as planned from 1 January 1996.[58] It is argued by Jacqué[59] and Luchaire[60] that this distinction betrays a misunderstanding of France's loss of power, which occurs even when a requirement of unanimity within the EC Council allows the French Government to block a proposal (as with the exchange rate policy in the third stage). Even if France

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latest (Article 109J(4) EC Treaty). For those Member States fulfilling the necessary conditions, it brings about the adoption of a single currency, a single monetary policy and a single exchange rate policy. The UK and Denmark opted out of the third stage.

53. 1992 Rec. Con. const. at 64, [1993] 3 C.M.L.R. at 356.

54. New EC Articles 3A(2), 105(2), 105A, 107, 109, 109G(2), 109L(4), all added by Article G of the TEU. Genevois points out that the modified organisation of the IMF had been judged constitutional in Decision 78-93 DC of 29 Apr. 1978, 1978 Rec. Con. const. 23, because respect for the sovereignty of the member States of the IMF was assured by the freedom each had to choose its own exchange system. Genevois, *supra* note 19, at 396.

55. Decision 91-294 DC of 25 July 1991, 1991 Rec. Con. const. 91.

56. Jacqué, *supra* note 29.

57. 1992 Rec. Con. const. at 65, [1993] 3 C.M.L.R. at 358.

58. New EC Article 100C(3) added by Article G of the TEU. Luchaire points out that the State's power to maintain public order is expressly preserved under Article 100C(5) and he judges that a Member State could thus expel any undesirable who had benefited from a liberal visa policy. Luchaire, *supra* note 44, at 602.

59. Jacqué, *supra* note 29.

60. Luchaire, *supra* note 44, at 603-04.

maintains a veto, it has lost the power to act unilaterally, and once a unanimous decision is taken, France is again powerless to change it. It would seem that the Conseil needs to develop a transparent stance on this question.

Decision 92-308 DC makes clear which provisions of the Maastricht Treaty were unconstitutional. It does not, however, give any indication as to how all the other provisions escaped censure.[61] It can also be argued that the Conseil, unlike the German Constitutional Court, does not appear to grasp the reality of the democratic deficit within the EC. Genevois[62] reminds us of the Conseil's role: to judge when a treaty oversteps the mark and compromises the conditions which are *essential* to the exercise of national sovereignty.

### *C. Development of the Conseil's Case Law*

In order to assess the contribution of the first Maastricht decision to the Conseil's jurisprudence, it is necessary to plot the points of similarity and difference with earlier decisions. English commentaries have already been written on the implications for the construction of Europe.[63] This section will consider from a more national standpoint the Conseil's view of national sovereignty and the place of international law in the hierarchy of norms.

Whilst Article 54 of the Constitution accepts the possibility of a constitutional obstacle to the ratification of an international agreement, it provides no criteria for the constitutional interpretation of treaties. This has led to an opaque jurisprudence, which has developed in stages.

The notion of "essential conditions for the exercise of national sovereignty" appeared as early as 1970,[64] but it was then eclipsed in 1976 by the introduction of a strict and notorious distinction between "transfers" of sovereignty and "limitations" of sovereignty. Under paragraph 15 of the 1946 Preamble, limitations are possible, but "no provisions of a constitutional nature authorise transfers of all, or part of

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61. Jacqué, *supra* note 29, simply notes his disappointment, whilst Luchaire provides a useful check-list, *supra* note 44, at 606.

62. Genevois, *supra* note 19, at 393.

63. Boyron, *supra* note 50; Oliver, *supra* note 6.

64. Decision 70-39 DC of 19 June 1970, 1970 Rec. Con. const. 15; *see supra* text accompanying note 15.

national sovereignty to any international organisation."[65] This theory was widely criticised as unworkable:[66] inherent in the notion of an international agreement is a limitation of the powers of the organs of State and, in the EC, the limitations are based on transfers, since the impossibility of a Member State exercising a power results from the fact that the power has been transferred.[67] Perhaps in response to doctrinal criticism, the Conseil resumed in 1985[68] its interest in the allegedly more liberal theory of the "essential conditions," referring to the duty of the State to ensure respect for three things: "the institutions of the Republic, the continuity of the life of the Nation and the guarantee of the rights and liberties of citizens."[69] According to Genevois,[70] this refinement of the theory showed that the Conseil was more attached to fundamental rights than to an abstract concept of national sovereignty. However, the Conseil gave no specific constitutional foundation for its requirements[71] despite a continuing attachment to them[72] and a spectacularly missed opportunity to clarify which theory was applicable in the decision on Schengen.[73]

When the Conseil was seised of the Maastricht Treaty, commentators waited to discover which of its theories would be favoured. In the event we are not quite sure. It would appear that the unloved distinction of 1976 has disappeared,[74] because there is now a

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65. Decision 76-71 DC of 30 Dec. 1976, 1976 Rec. Con. const. 15; *see supra* text accompanying note 15.

66. François Luchaire, *Le Conseil constitutionnel et la souveraineté nationale,* [1991] 6 REV. DR. PUB. 1499, 1504; Dominique Carreau, *L'augmentation de la quote-part de la France au Fonds monétaire internationale: La décision du Conseil constitutional du 29 avril 1978*, 83 REV. GEN. DR. INT'L PUB. 209 (1979), and Charles Vallée, *A propos de la décision du Conseil constitutionnel du 17 juillet 1980*, 85 REV. GEN. DR. INT'L PUB. 202 (1981), *cited in* Genevois, *supra* note 29.

67. Jacqué, *supra* note 29, referring to Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425.

68. Decision 85-188 DC of 22 May 1985, 1985 Rec. Con. const. 15; *see supra* text accompanying note 15.

69. 1985 Rec. Con. const. at 15.

70. Genevois, *supra* note 29.

71. Leaving Jacqué to speculate helpfully as to their meaning, *supra* note 29.

72. Decision 91-293 DC of 23 July 1991, 1991 Rec. Con. const. 77.

73. Decision 91-294 DC of 25 July 1991, 1991 Rec. Con. const. 91. *See* Patrick Gaïa, 8 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [REV. FRANÇ. DR. CONST.] 703 (1991); François Luchaire, *Le Conseil constitutionnel et la souveraineté nationale*, [1991] 6 REV. DR. PUB. 1499.

74. A "*revirement de jurisprudence*" for Jacqué, *supra* note 29, at 255, and for Dominique Rousseau, *Chronique de jurisprudence constitutionnelle 1991-1992*, [1993] 1 REV. DR. PUB. 5, 43; but a return to the path of 1970, 1985 and 1991 for Luchaire, for whom the 1976 decision seems "*erratique, pour ne pas dire hérétique*," *supra* note 44, at 607.

concentration on determining which transfers are acceptable. This is said to take fuller account of the EC phenomenon, but it must be stressed that not all transfers of power will be constitutional because of the need for reciprocity and the need to preserve the "essential conditions." The relatively helpful list of requirements specified in 1985 has disappeared, but no criteria are devised to replace it. It is also to be noted that the Conseil still refuses to approve transfers of "*souveraineté nationale*," referring only to transfers of "*compétence*" (power).[75] Jacqué rather desperately concludes that "*Ainsi, est substitué à la distinction peu opérationnelle et scientifiquement contestable entre limitation et transfert, le recours à une notion encore largement imprécise et que le Conseil s'est bien gardé de préciser.*"[76] Van Tuong[77] seems also to disapprove of the Conseil's apparent need to construct an untouchable hard core of national sovereignty, protected from incursions by the international legislator. As might be expected, it is Luchaire who best understands the Conseil's position: sovereignty is no longer treated as an untouchable dogma but rather as a collection of powers, some of which may be transferred to international organisations. It is, thus, still within the discretion of the Conseil to judge in each case what the essential conditions for the exercise of national sovereignty are, and whether they have been infringed by the text in question; and most important, it is then for the constituent power to judge whether it wishes to go ahead and infringe those very conditions, by the process of constitutional revision.[78]

On the question of the place of international law in the hierarchy of norms, the Conseil responded to the two questions implicitly posed by President Mitterrand in his reference to the Conseil: may existing international agreements be used as norms of reference for constitutional control? and may they be questioned by the Conseil? On the first point, the Conseil referred specifically to several texts in order to conclude that, as an organ of a true monist system, it would judge the scope of the

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75. 1992 Rec. Con. const. at 59, [1993] 3 C.M.L.R. at 351.

76. "The hardly workable and scientifically doubtful distinction between limitation and transfer is exchanged for recourse to a notion which is still broadly imprecise and which the Conseil was careful not to clarify." Jacqué, *supra* note 29, at 259.

77. Nguyen van Tuong, Note to Decision 92-308 DC of 9 Apr. 1992, 66 J.C.P. II, No. 21853, at 167 (1992).

78. Luchaire, *supra* note 44, at 606. It is instructive to recall the list of functions which are seen as vital to the State by Dubouis: currency, maintenance of public order, justice, diplomacy and defence. Louis Dubouis, *Le juge français et le conflit entre norme constitutionnelle et norme européenne*, *in* MÉLANGES BOULOUIS 210, 217, *cited by* Genevois, *supra* note 19, at 396.

Maastricht Treaty by reference to the treaties it modified.[79] Once treaties are incorporated into the domestic legal order,[80] they are binding and are to be executed in good faith[81] and, subject to the usual conditions under Article 55, will have a status superior to that of laws.[82] This means that they are indeed used under Article 54 as norms of reference in the case of treaties, where consistency between agreements is desirable.[83] However, treaties are not elevated to the level of norms of reference for the control of laws by the Conseil, because under Article 61 the Conseil concerns itself only with the direct compatibility of a law with a constitutional provision and cannot inquire into the reciprocal application of treaties.[84]

On the second point, the Conseil indicated that there can be no further debate about the constitutionality of duly ratified treaties.[85] There was some suggestion that the Conseil might transpose its jurisprudence on the acceptability of questioning promulgated laws during the examination of a new and amending law,[86] but its refusal to do so is compatible with the case-law[87] and stresses the contractual nature of treaties. Whilst the Conseil can adopt a unilateral approach when controlling domestic laws under Article 61, this is not appropriate for

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79. 1992 Rec. Con. const. at 58, [1993] 3 C.M.L.R. at 350. Particularly the founding treaties and the Single European Act.

80. By laws authorising ratification and publication in the Official Journal (of either the French Republic or the EC), as required by article 3 of *décret* No. 53-192 of 14 Mar. 1953, J.O., 15 Mar. 1953, at 2436.

81. Taken from Article 26 of the Vienna Convention on the law of treaties 1969, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), since *pacta sunt servanda* is one of the rules of public international law understood in paragraph 14 of the 1946 Preamble.

82. A superiority ensured by the ordinary and administrative courts. *See supra* note 14.

83. Hartley reminds us that, in international law under Article 30(3) of the Vienna Convention, it is the second of two inconsistent treaties signed by the same parties which prevails, but that in EC law, the Community treaties may be amended only as prescribed by Article 236, *see* Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 455, [1976] 2 C.M.L.R. 98. Hartley, *supra* note 3, at 235 n.86.

84. Clear jurisprudence since Decision 74-54 DC of 15 Jan. 1975, 1975 Rec. Con. const. 19, *see supra* note 14, repeated in Decision 91-298 DC of 24 July 1991, 1991 Rec. Con. const. 82. Now see the incontrovertible statement by the Conseil in Decision 93-325 DC of 13 Aug. 1993 (on immigration law), 1993 Rec. Con. const. 224: "the judgment of the constitutionality of provisions which the legislator decides it must take could not be drawn from the conformity of the law to the requirements of international agreements, but results from the confrontation of the law and demands of a constitutional nature only." *Id*. at 226.

85. 1992 Rec. Con. const. at 58, [1993] 3 C.M.L.R. at 350.

86. Genevois, *supra* note 19, at 379-80. *See supra* note 27.

87. Decisions 70-39 DC of 19 June 1970, 1970 Rec. Con. const. 15; 77-90 DC of 30 Dec. 1977, 1977 Rec. Con. const. 44; and 78-93 DC of 29 April 1978, 1978 Rec. Con. const. 23.

treaties,[88] particularly when the Community treaties are subject only to the interpretation of the ECJ.[89]

### *D. Significance for the Balance of Constitutional Power*

Decision 92-308 DC represents the brake of the "constituent" power on one part of the "constituted" power. The simple existence of the decision, which is binding on all public authorities of the French Republic (according to Article 62), indicates that the President, even with legislative support, is not free to take any pro-European political action of his choice. The Conseil constitutionnel acts as the mouthpiece of the constituent assembly and the guardian of the Constitution. It serves to remind those who exercise authority that they should reflect before casually surrendering powers which may be vital to the State. Certain principles are so fundamental that they have been given special protection within the document on which the State is founded. The provisions of this constitutional document, the supreme norm in the hierarchy, are to be interpreted by the Conseil, which decides when there has been a breach of fundamental principle in the interest of a transient and possibly self-serving organ of the State. Such a breach will only be accommodated by a constitutional amendment.

This enthusiasm for the authority of the Constitution should not, however, be allowed to obscure the fact that the "sovereign" people must rely upon the goodwill of their political leaders to apply the brake of the Conseil constitutionnel to ensure that the constitutionality of Executive action is discussed. If the Conseil is not seised at this early stage, it is possible for duly ratified treaties to be presented to the Conseil as *faits accomplis*: the supremacy of the Constitution is not necessarily guaranteed.

## III. OBSTACLE NO. 2: THE AMENDMENT OF THE CONSTITUTION

### *A. Significance of any Constitutional Revision*

The decision of the Conseil as to the conflict between certain provisions of the Maastricht Treaty and the Constitution meant that the Treaty could not be ratified by the President without a constitutional

88. Rousseau, *supra* note 74, at 31-33.
89. Luchaire, *supra* note 44, at 593.

amendment.[90] This was a first in France's history as a member of the European Communities. It was the moment to decide which was more precious: full participation in the "ever closer Union" or preservation of the "national sovereignty" vested in the people by Article 3 of the Constitution.

If constitutional amendments are too frequent, they call into question the authority of the Constitution itself, but all legal norms must adapt to political change. Between 1958 and 1992 only five constitutional amendments had been passed, the latest in 1976, and none of them had had a direct effect on national sovereignty. If we take the purpose of a Constitution to be "the location, conferment, distribution, exercise and limitation of authority and power among the organs of a State,"[91] then only two of the amendments are of any lasting substantive significance. Firstly in 1962,[92] Articles 6 and 7 were revised so that the President of the Republic would be directly elected by the people, rather than indirectly by an electoral college. Above all, this increased the political legitimacy of the President, thereby further eclipsing the other democratically elected organ of government, Parliament, and transforming the original parliamentary regime into a semi-presidential one. Secondly in 1974,[93] Article 61 was revised to make it possible for the Conseil constitutionnel to judge the constitutionality of ordinary legislation on a reference from sixty deputies or senators. Hitherto such a reference had only been open to the four highest authorities.[94] This change served to allow challenges by parliamentary minorities to politically unacceptable legislation, increasing the power of the Opposition.[95]

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90. Amendment was also necessary in Germany, Belgium, Ireland, Italy, Spain and Luxembourg.

91. STANLEY A. DE SMITH & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 6-7 (6th ed. 1989).

92. *Loi constitutionnelle* No. 62-1292 of 6 Nov. 1962, J.O., 7 Nov. 1962, at 10762.

93. *Loi constitutionnelle* No. 74-904 of 29 Oct. 1974, J.O., 30 Oct. 1974, at 11035.

94. *See supra* text accompanying note 23.

95. The other three amendments related to i) the provisions on the now defunct "Community" consisting of France and its former overseas territories, *loi constitutionnelle* No. 60-525 of 4 June 1960, J.O. 8 June 1960, at 5103, ii) the dates of parliamentary sessions, *loi constitutionnelle* No. 63-1327 of 30 Dec. 1963, J.O., 31 Dec. 1963, at 11892, and iii) the death or incapacity of a presidential candidate, *loi constitutionnelle* No. 76-527 of 18 June 1976, J.O., 19 June 1976, at 3675.

Despite the passage of sixteen years since 1976, President Mitterrand had already made it clear that, in principle, constitutional amendment held no fears for him. He had twice presented projects to Parliament,[96] and at the end of 1991 he had announced his intention to formulate firm proposals for far-reaching reform in order to redress the perceived imbalance between the constitutional authorities.[97] The need for a constitutional amendment could thus not deflect the President from his determination to have the Treaty ratified. The only remaining questions concerned the procedure to be followed and the likelihood of success.

### *B. Thirty-Year Controversy over Procedure*

The Constitution of the French Fifth Republic, like most written constitutions, is, in the Diceyan sense, rigid: in order to ensure the stability of the regime, there is a special procedure for constitutional amendment which differs from that used for ordinary legislation. This procedure determines the identity of the body which may be called the "derived" or "instituted" constituent power.[98] The nature of this body, and the ease with which the procedure may be followed, determine to what extent the fundamental norm of the hierarchy can keep abreast of political reality.

One title of the French Constitution is devoted to "Revision:" Title XVI[99] with one article. Article 89 provides:

> 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.
>
> The [presidential project] or Parliamentary [proposal] for amendment must be passed by the two

96. *See infra* note 102.

97. Jean-Marie Colombani, *Les déclarations du chef de l'État à la télévision: Une réforme des institutions sera soumise aux Français*, LE MONDE, 12 Nov. 1991, at 1, reporting an interview on *chaîne 5* of 10 November 1991. Now see the Vedel Report, *supra* note 25, and its one concrete result thus far: *loi constitutionnelle* No. 93-952 of 27 July 1993, J.O. 28 July 1993, at 10600, revising Articles 65 and 68 of the Constitution on the independence of the judiciary and the criminal liability of members of the Government.

98. To be contrasted with the "original" constituent power, responsible for the very creation of the Constitution. *See* GEORGES BURDEAU ET AL., DROIT CONSTITUTIONNEL 76-77 (21st ed. 1988).

99. XIV until the amendment of June 1992, and XV until the amendment of July 1993.

> [parliamentary] assemblies in identical terms. The amendment shall become definitive after approval by a referendum.
>
> Nevertheless, the [presidential project for] amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress [the two assemblies sitting together at Versailles]; in this case, the [project for] amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Secretariat of the Congress shall be that of the National Assembly.
>
> No amendment procedure may be undertaken or followed when the integrity of the [country's] territory is in jeopardy.
>
> The republican form of government shall not be subject to amendment.[100]

Before 1992, the revision procedure had been used successfully in only three cases,[101] always on the President's initiative, and always with the approval of Congress. This statistic belies the existence, however, of three further presidential projects[102] and over 160 wholly unsuccessful proposals from parliamentarians.[103] This large number of failed attempts to revise the Constitution shows, in certain cases, the weakness of the proposals, but it also points up the disadvantages of the

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100. CONST. art. 89, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 49.

101. Dates of parliamentary sessions, 1963; parliamentary references to the Conseil, 1974; incapacity of presidential candidate, 1976. The revision of 1960 had followed the special procedure of Article 85 since it concerned the "Community." *See supra* notes 93 and 95.

102. Pompidou project of 6 September 1973 to reduce the presidential mandate to five years, abandoned on his death in 1974; Mitterrand project of 24 July 1984 to extend the scope of the referendum to the guarantee of fundamental freedoms, rejected by the Senate; Mitterrand project of 2 April 1990 to introduce *l'exception d'inconstitutionnalité* (i.e., judicial references to the Conseil of ordinary legislation deemed by litigants to be unconstitutional), rejected by the Senate. Also to be noted within the Giscard d'Estaing project of 1974 was the plan to allow former members of the Government automatically to resume their parliamentary seats, never put before Congress. *See generally* BERNARD BRANCHET, LA RÉVISION DE LA CONSTITUTION SOUS LA VE RÉPUBLIQUE (1994).

103. See, in particular, the proposal of Senator Etienne Dailly of 15 October 1991 "*tendant à combler les lacunes, à remédier aux défaillances et à prévenir les interprétations abusives de la Constitution de 1958, afin de préserver et de maintenir les institutions de la Ve République*" ["to fill the gaps, to remedy the failings and to prevent abusive interpretations of the Constitution of 1958, in order to preserve and maintain the institutions of the Fifth Republic"], discussed by BRANCHET, *id.* at 75-85 and 93-95.

procedure.[104] It should be particularly noted that Article 89 vests a power of veto in the Senate, since any text must be adopted "in identical terms." As a result, the National Assembly, which is directly and democratically elected, is placed on an equal footing with an assembly which, by virtue of its anachronistic form of recruitment,[105] ensures the over-representation of the rural, and probably conservative, population. This is to be contrasted with the procedure for ordinary legislation under Article 45, by which the National Assembly is assured the last word.

The cumbersome nature of the Article 89 procedure can be seen as a valuable defence for the constituent assembly's carefully planned regime, but can also be diagnosed as "*une menace virtuelle de blocage des institutions, qui devrait mettre en cause l'article 89.*"[106] In practice, it requires a coincidence of view between the proposing Prime Minister, the President and the two assemblies. Rather than seek to modify Article 89, which could be said to constitute or require the abolition of the Fifth Republic,[107] and in order to bypass the often resistant Senate, a second means of revision was discovered within the text of the Constitution.

Article 11 is one of the fifteen articles in Title II devoted to "The President of the Republic." It makes no explicit reference to constitutional amendment, but merely provides for the President, on a proposal from the Government or Parliament, to submit to a referendum "any [B]ill [*projet de loi*] dealing with the organisation of the [public] authorities, entailing approval of a Community[108] agreement, or providing for authorisation to ratify a treaty that, without being contrary to the Constitution, [would] affect the functioning of [existing] institutions."[109] The first part of this phrase was generously interpreted by President de Gaulle: "*loi*" was to include "*loi constitutionnelle,*" and "organisation of the [public] authorities," though not as comprehensive as

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104. *See generally* Nguyen van Tuong, *La procédure de révision de la Constitution de 1958*, 66 J.C.P. I, No. 3582, at 215 (1992).

105. *See supra* text accompanying note 44.

106. "A virtual threat of blockage for the institutions which should cast doubt on Article 89." Van Tuong, *supra* note 104, at 220.

107. The power to revise the procedure for revision belongs only to the *original* constituent power which, by definition, can exist only in the absence of a Constitution. BURDEAU ET AL., *supra* note 98, at 449. *Cf.* BENOIT JEANNEAU, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 82 (6th ed. 1981): this fundamental revision can be effected by the sovereign people who, for him, indeed constitute the original constituent power.

108. Now defunct. *See supra* note 95.

109. CONST. art. 11, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 25.

Article 89, could certainly cover the selection of any of the constitutional authorities.[110] So in the face of Senate opposition, he relied upon Article 11 in 1962[111] to introduce direct presidential elections. The use of the somewhat ambiguous Article 11 for this purpose provoked controversy.[112]

The constitutional purists understood the limitations of Article 89, but appreciated that the procedure of constitutional amendment is designed not to be lightly undertaken. If the President can modify the fundamental charter of the Republic by a simple alliance with the people, he is subverting the Constitution and denying participation to the other organs of government. In particular, whilst Article 89 so carefully requires the full cooperation of both houses of Parliament, the use of Article 11 need not depend upon Parliament at all. Title XVI would thus cease to have any meaning if procedures for revision could be found elsewhere within the Constitution.

The argument that a direct call to the people is subversive seems perverse in a Republic where national sovereignty is said to reside in the people who exercise it, either through their representatives or by way of a referendum (Article 3).[113] Indeed, President de Gaulle appears to have been fully conscious of the fact that his interpretation of the Constitution could be said to be in line with its spirit: the constitutional committee of 1958 had been driven by the desire to reestablish governmental continuity and to bring an end to parliamentary omnipotence. If Articles 11 and 89 are taken together, they reestablish the balance of powers, allowing for revision by the Legislature with the people (89), the Legislature with the Executive (89), or the Executive with the people(11).[114] The Executive was supposed to be able to have recourse to the people in order to overcome parliamentary resistance.[115]

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110. *Cf.* Mitterrand project of 1984, *supra* note 102.

111. *See supra* note 92.

112. *See generally* van Tuong, *supra* note 104, at 218. The matter was also referred to the Conseil. *See infra* discussion of Obstacle No. 5, pp. 85-88.

113. When the Conseil was seised in 1962 it did not take the opportunity to declare unconstitutional the use of Article 11.

114. *Cf.* Vedel Report, *supra* note 25, on the revised Article 89: revision would be possible by the Executive with *one* assembly and the people.

115. Indeed when de Gaulle's project of 2 April 1969 to create regions and to reform the Senate was rejected at a referendum, he treated it as a plebiscite and retired.

Although President Mitterrand did not resort to Article 11 in either 1984 or 1990 when his constitutional projects were opposed by the Senate, he had made it clear in 1988 that he believed he had a choice between Articles 11 and 89, although the former should be used sparingly.[116] Thus when the Conseil, in its decision of 9 April 1992, gave no indication as to the route to be followed for constitutional revision, the President announced on television[117] that he intended to use Article 89 and the parliamentary route, but would turn to a referendum in the case of any blockage. As Luchaire points out,[118] this could have referred to any of three possible uses of the referendum: under Article 11, after constitutional revision, for the passage of the law authorising ratification;[119] under Article 89, for the first time in history, if the constitutional amendment were voted by weak majorities in the two assemblies and a three-fifths majority in Congress (i.e., the two assemblies sitting together at Versailles) looked unlikely; or, in the spirit of de Gaulle, under Article 11, for the constitutional amendment if the two assemblies could not agree on a text.[120]

In the event, controversial recourse to Article 11 proved unnecessary. According to the letter of Article 89, the Socialist Prime Minister did propose the *projet de loi* to the President, the text was then voted in identical terms by the two assemblies, and the President then submitted the text to Congress where three-fifths of the votes cast were in favour. This apparent ease of passage for the Bill does not demonstrate, however, that it was without controversy.

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116. François Mitterrand, *Sur les institutions* (interview by Olivier Duhamel), 45 POUVOIRS 131, 138 (1988), and François Luchaire, *L'Union européenne et la Constitution. Deuxième partie: La révision constitutionnelle*, [1992] 4 REV. DR. PUB. 933, 934. This echoes the view of Georges Vedel, *Le droit par la coutume*, LE MONDE, 22 Dec. 1968, at 7, but was firmly rejected by Maurice Duverger, *La carte forcée*, LE MONDE, 22 Dec. 1968, at 7: "*une fois n'est pas coutume.*"

117. 12 April 1992.

118. Luchaire, *supra* note 116, at 934.

119. *See infra* discussion of Obstacle No. 4, pp. 77-84.

120. Deemed by Jacques Larché (president of the Senate's permanent commission on legislation and rapporteur on the Bill) to be impossible. It would have been even more outrageous than in 1962: President Mitterrand would have had to describe the text as relating to "the organisation of the public authorities" in the face of a clause forbidding the authorisation by referendum of the ratification of an unconstitutional treaty.

### *C. Content and Problems* of loi constitutionnelle *No. 92-554*[121]

In its decision of 9 April, the Conseil had given no advice as to how, in a textual sense, the Constitution could or should be revised to enable the ratification of the Treaty. True to its mission, the Conseil had not pointed out the articles of the Constitution that needed to be revised, but had confined itself to listing the articles of the Treaty that were unconstitutional. There was no obvious parallelism between the articles of the Treaty and the articles of the Constitution,[122] and thus the Government was left to make a difficult decision of drafting. It has been argued that the Government forestalled accusations that it was not making clear which constitutional provisions were being affected, by rejecting Luchaire's suggestion[123] that the constitutional law could be used simply to permit the ratification of the Treaty. However, the Government's preferred solution not only fails to specify the articles of the Constitution to which there now exist exceptions,[124] it also serves to give constitutional value to the European Union, a result not favoured by everyone. *Loi constitutionnelle* No. 92-554 of 25 June 1992 (article 5) has, precisely in line with President Mitterrand's wishes, ensured the pursuit of the objectives of the Treaty on European Union by economically adding to the Constitution a new Title XIV,[125] "On the European Communities and the European Union:"

> *Article 88-1.*
>
> The Republic participates in the European Communities and the European Union, constituted by States that have freely chosen, by means of [the treaties which created] them, to exercise in common certain of their competences.
>
> *Article 88-2.*

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121. *Loi constitutionnelle* No. 92-554 of 25 June 1992, J.O., 26 June 1992, at 8406.

122. *See* van Tuong, *supra* note 77, at 167.

123. Luchaire, *supra* note 116, at 935-36, and Georges Vedel, *Schengen et Maastricht*, 8 REV. FRANÇ. DR. ADMIN. 173 (1992).

124. Their modification was not judged necessary by Luchaire, *supra* note 116, at 939, and *L'Union européenne et la Constitution. Troisième partie: Commentaire de la loi constitutionnelle du 25 juin 1992*, [1992] 4 REV. DR. PUB. 956, 959, with regard to*, e.g.,* Article 34 on currency. *Cf.* the arguments of the senators in the second reference to the Conseil, *infra* text accompanying note 179.

125. Now Title XV as a result of the introduction of the new Title X in July 1993.

> Under the reservation of reciprocity, and according to [the terms] specified by the Treaty on European Union signed on February 7, 1992, France consents to the transfer of competences necessary for the establishment of the European economic and monetary union as well as [for] the determination of [rules] relative to the crossing of the exterior frontiers of the member states of the European Community.
>
> *Article 88-3.*
>
> Under the reservation of reciprocity and according to the [terms] specified by the Treaty on European Union signed on February 7, 1992, the right to vote and of eligibility in municipal elections can be accorded [only] to citizens of the Union residing in France. These citizens cannot exercise the functions of mayor or [deputy mayor] nor participate in the designation of senatorial electors [or] the election of senators. An organic law, passed under the same terms by the two assemblies, determines the conditions of the application of this article.
>
> *Article 88-4.*
>
> The Government submits to the National Assembly and to the Senate proposals [of Community acts which include provisions of a] legislative nature[, as soon as they are transmitted to the Council of the Communities].
>
> During [parliamentary] sessions [or] outside them, resolutions can be voted within the framework of [this] article [i.e., 88-4], according to the [terms] determined by [the standing orders] of each assembly [*le règlement de chaque assemblée*].[126]

Title XIV (as it was) modifies the Constitution as little as possible whilst responding to the three constitutional objections raised by the Conseil. It is logically slipped in to the international part of the Constitution following Titles on the (defunct) Community and on agreements with associated states; and as a free-standing Title it

126. CONST. art. 88, *reprinted and translated in* CONSTITUTIONS (Supp. 1994), *supra* note 9, at 11.

underlines France's commitment to Europe, as well as the distinction between the supranational European Communities/Union and other international organisations.

Article 88-1, introduced as an Opposition amendment in the National Assembly, was not necessitated by the Conseil's decision. It simply provides a definition of the Communities and the Union, and could seem to add nothing to the pre-existing state of affairs. This is particularly so in the light of the fact that it is the European Court of Justice which is solely responsible for the interpretation of the founding treaties. The article does, however, have three distinct effects. Firstly, the language of "freely" choosing to pool "certain" powers is designed to placate the anti-federalists. Secondly, like any other part of a written Constitution, it has an educative effect on the public. Thirdly, the "constitutionalisation" of France's membership of Europe has rendered unconstitutional any future withdrawal.

Article 88-2 is a direct response to the second and third of the Conseil's objections on the grounds of national sovereignty.[127] The text invites two main observations. Firstly, the double reference to the Treaty *and* to the condition of reciprocity[128] seems like overkill, since the Conseil had already made it clear that the Treaty satisfied several preconditions for ratification, including that of reciprocity. It appears, however, that the reference to the Treaty was added to the text of the *projet de loi* by the Conseil d'Etat[129] to ensure that the new transfer of powers from France to Europe would be strictly as a function of what was required under the Treaty. Any further transfer would require further consideration, perhaps a reference to the Conseil, and even a constitutional amendment.[130] Secondly, it should be noted that the article makes no reference to any transfer of "*souveraineté*" but only "*compétences.*" This is an echo of the distinction drawn by the Conseil.[131] It appears to show that sovereignty, whatever that might be, has not been surrendered by France, and there has only been a loss of a limited number of specified national powers. The constituent power has understood the danger of compromising "the essential conditions for the

127. *See supra* text accompanying notes 52-62.
128. As in Article 88-3.
129. Consulted by the Government under Article 39.
130. Luchaire, *supra* note 116, at 936-37.
131. *Supra,* text accompanying note 76.

exercise of national sovereignty" and has thus agreed to give up only those powers which must be pooled if the European Union is to succeed.

Article 88-3 is another direct response to the Conseil, this time to its first constitutional objection.[132] The Conseil had been particularly concerned about the impact of municipal elections on the Senate. The Senate, with a right-wing majority opposed to President Mitterrand, proved equally hostile[133] to local representation for foreign residents, and it managed to secure a number of concessions. From the outset, the Government had foreseen a generalised adverse reaction, and had included in the original proposal a version of the penultimate line of Article 88-3. It is worth noting that the Government was not being particularly adventurous or imaginative in this, but merely following the lead of the EC Commission. A Directive proposed to the Council of Ministers on 23 October 1989 had stated that "municipal elections" were to be defined by each Member State, and that non-nationals could be excluded from the functions of mayor or deputy, and also from participating in the election of parliamentary assemblies.[134] It is, thus, highly likely that the detailed provision adopted by the Council of Ministers will accord with Article 88-3.

A second victory for the Senate is to be found in the last line of Article 88-3: the details of French electoral law concerning citizens of the EU are to be decided by an "organic law, passed under the same terms" by the two assemblies. Organic laws, being laws of constitutional importance envisaged in a limited number of cases, cannot be adopted according to the ordinary legislative procedure of Article 45, in which the National Assembly has the final word. Their special procedure is detailed in Article 46, which provides that organic laws relating to the Senate must be passed in the same terms by both assemblies. Thus, whereas prior to the passage of Article 88-3 electoral law was dependent upon ordinary laws and escaped Senate censure, the law which pertains (for example) to the composition of the Senate and the designation of senatorial electors, will now require Senate approval, thanks to an Opposition amendment in the National Assembly. More important, by

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132. *See supra* text accompanying notes 44-50.

133. Senator Charles Pasqua, later Minister of the Interior, led a move to have the entire article suppressed: he and the RPR (*Rassemblement pour la République*) were only defeated by 186 votes to 107. *See* Luchaire, *supra* note 116, at 952.

134. 1989 O.J. (C 290) 4; Luchaire, *supra* note 116, at 941.

virtue of a Senate amendment which was forced upon the National Assembly, the Senate's power of co-decision is further increased because the organic laws must be voted in the same terms. This means that the Senate will be able to veto not only the laws relating to itself (as under Article 46), but also *any* of the electoral laws concerning EU citizens, such as the law concerning the administrative organisation of local authorities. This was not required by the Treaty; it caused the abstention of 125 RPR members in the final National Assembly vote, but it was the price that had, reluctantly, to be paid by a Union-hungry Government.

By according the right to vote and stand in French municipal elections to non-nationals, Article 88-3 has uncoupled the notions of nationality and citizenship. The membership of the "body politic" which votes is no longer identical to that of the Nation.[135] This represents a revolution in constitutional theory, which has linked democracy to the nation-State. As Rousseau pertinently asks "if the national link is no longer to be the sole criterion of the citizen-elector, what other link exists to establish this quality?"[136] In his words, it is a "constitutional identity" made up of "a collection of democratic rights and universal principles," which bring together a body of people in "a shared political culture."[137] This is a major legacy of the Treaty on European Union.[138]

Article 88-4 was in no way essential for the ratification of the Treaty, but it is absolutely in line with the sentiments of Declaration 13, which accompanies the Treaty: national parliaments should be encouraged to participate in the activities of the EU, and Governments of Member States must ensure that their parliaments have access to the Commission's legislative proposals. Article 88-4 was introduced as an amendment in the report of the National Assembly's permanent

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135. See the reaction of the Conseil, discussed *infra* under Obstacle No. 3, pp. 71-72.

136. Rousseau, *supra* note 74, at 47, referring to Jürgen Habermas, *Citoyenneté et identité nationale*, *in* L'EUROPE AU SOIR DU SIÈCLE: IDENTITÉ ET DEMOCRATIE 29 (Jacques Lenoble & Nicole Dewre eds., 1992).

137. *Id*.

138. *Cf.* the inverse case of *French* nationals voting in elections to the *European* Parliament. After Decision 76-71 DC of 30 Dec. 1976 (on direct elections to the European Assembly), 1976 Rec. Con. const. 15, Vedel had already argued that the Constitution does not reveal "the prohibition to extend beyond the Nation the democratic principle and universal suffrage which accompanies it." Georges Vedel, *Les racines de la querelle constitutionnelle sur l'élection du Parlement européen*, 2 POUVOIRS 23 (1977). I.e., the *people* must be sovereign for the power of the authorities to have a legitimate, democratic basis, but those people only happen to be organised in nations by historical accident.

commission on legislation, precisely to ensure that the French Parliament takes part in the elaboration of EC law. In a Republic where Parliament is described as rationalised, it represents significant progress. Firstly, it is now an obligation of a constitutional nature for the Government to "submit" the legislative proposals of the Commission to the parliamentary assemblies themselves; formerly a simple law[139] provided that the "parliamentary delegations for the European Communities" should receive from the Government all proposals of Community acts so that reports could be prepared for the parliamentary commissions. Secondly, the assemblies[140] also now have an additional opportunity for self-expression by means of a "resolution." This is purely consultative but sounds, according to the Senate, more authoritative than an "opinion" (*avis*). The Government was clearly unwilling to countenance any restriction on the freedom of manoeuvre of its members attending the Council of Ministers, but Parliament was determined that its views should carry as much weight as possible. The result is a nod in the direction of Parliament, but no real concession at all.[141]

In addition to adding the new Title on the European Communities and the European Union, the constitutional law of June 1992[142] also modified three other articles of the Constitution: 2, 54 and 74. In the case of two of them, the link with the Treaty is extremely tenuous. The change to Article 74 (introduced by article 3 of the law) is unimportant for the purposes of this article, since it concerns the organisation of the overseas territories.[143]

The second amendment (introduced by article 1) affects Article 2, which forms part of the first Title, "On Sovereignty," including references to the republican nature of France, the *tricolore* and the *Marseillaise*. Introduced as an Opposition amendment in the National

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139. *Loi* No. 90-385 of 10 May 1990, J.O. 11 May 1990, at 5619.

140. Or indeed one of the permanent commissions of either assembly outside parliamentary sessions, although the revised standing orders are silent on this point. See the "interpretation" by the Conseil in its decisions under Article 61(1): 92-314 DC of 17 Dec. 1992, 1992 Rec. Con. const. 126, for the National Assembly, and 92-315 DC of 12 Jan. 1993, 1993 Rec. Con. const. 9, for the Senate.

141. This is confirmed by the Conseil, *id.* *See* François Luchaire, *L'Union européenne et la Constitution. Cinquième partie: Les règlements des Assemblées parlementaires*, [1993] 2 REV. DR. PUB. 301.

142. *Supra* note 121.

143. It is discussed by Luchaire, *supra* note 124, at 971-75.

Assembly, it adds one paragraph to Article 2: "The language of the Republic is French."[144]

This constitutional reassurance that the French language is an expression of French identity can be seen in many lights.[145] In the face of an "ever closer Union," bringing local representation for foreigners, the planned disappearance of the French franc and loss of autonomous control over external borders, a certain resistance must be put up to further European integration. French must be defended on the European stage, most particularly against the hegemony of English.[146]

The amendment to Article 54[147] (introduced by article 2), indirectly prompted by the Treaty, is parallel to the 1974 revision of Article 61(2), which allowed the constitutionality of legislation to be referred to the Conseil by sixty parliamentarians. That amendment heralded a new age of politically motivated references by parliamentary minorities defeated in legislative debate. At the same time it created an anomaly, allowing parliamentarians to refer laws authorising the ratification of treaties but not the treaties themselves. As of 1992, parliamentarians may now act and refer a treaty before a law has been drafted and even where no legislative authority is required for ratification. The amendment was introduced by the Senate after the negative vote in the Danish referendum, and following attempts by the Right to have the entire Bill thrown out.[148]

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144. CONST. art. 2, para. 2, *reprinted and translated in* CONSTITUTIONS (Supp. 1994), *supra* note 9, at 3. The order of this sentence was diplomatically reversed in the Senate, which represents the overseas departments, so that French is not seen as the exclusive property of France!

145. *See generally* Roland Debbasch, *La reconnaissance constitutionnelle de la langue française*, 11 REV. FRANÇ. DR. CONST. 457 (1992).

146. Now see *loi* No. 94-665 of 4 Aug. 1994 (*Relative à l'emploi de la langue française*), J.O., 5 Aug. 1994, at 11392, severely pruned by the Conseil in Decision 94-345 DC of 29 July 1994, J.O., 2 Aug. 1994, at 11242.

147. It now reads: "If the [Conseil constitutionnel], the matter having been referred to it by the President of the Republic, by the Prime Minister, [or] by the President of one or the other assembly or by sixty deputies or sixty senators, has declared that an international [agreement] contains a clause contrary to the Constitution, the authorisation to ratify or approve the particular international commitment [may be given only] after an amendment of the Constitution." CONST. art. 54, *reprinted and translated in* CONSTITUTIONS (Supp. 1994), *supra* note 9, at 5. *See supra* note 10 for the previous version.

148. An interesting sub-amendment would have allowed an Article 54 reference to the Conseil of "a proposal of a Community act," requiring the Conseil to judge whether the approval of such a proposal required constitutional revision. The Government secured its removal.

*D. Significance for the Balance of Constitutional Power*

In substantive terms, the constitutional amendment of 1992 can be seen as an Executive victory, since a second obstacle to ratification of the Treaty had been successfully negotiated. Major transfers of power to Europe had been agreed in areas which affect the essential conditions for the exercise of national sovereignty. At the same time, however, certain shifts had been affected in the balance of the institutions within the Republic.

From Parliament's point of view, Article 54 now offers an additional opportunity to control Executive decisions. Article 88-4 also represents at least a symbolic move towards greater influence. The assemblies have, henceforth, a constitutional right to intervene in the procedure of creating international organisations, by receiving EC legislative proposals and adopting resolutions on them. The symbol, however, may be hollow, because of the Conseil's obligatory check on the constitutionality of parliamentary standing orders.[149] By this route, it has successfully prevented Parliament from clawing back the prerogatives which were removed in 1958 by the Constitution. In particular, the Conseil made it clear at the beginning of the regime that any parliamentary resolution which attempted to control governmental action would be unconstitutional, because Article 20 empowers the Government to determine and conduct the policy of the Nation, and provides for no question of confidence against the Government outside the strict procedures of Articles 49 and 50.[150] It is thus clear that any breach of Article 88-4 by the Government, or use of Article 88-4 by Parliament, would have purely political consequences. The most optimistic interpretation is that a resolution could act as a warning that a dissatisfied Parliament might later adopt a motion of no confidence, if its suggestions for the Council of Ministers were not heeded. This does not plug the democratic deficit.

From the Senate's standpoint, Article 88-3 has significantly modified the constitutional balance established in favour of the National Assembly, by broadening the domain of the organic law. However, the wording of the first sentence conceals a disappointing constraint for the

149. Article 61(1).

150. Decision 59-2 DC of 17, 18 and 24 June 1959, 1959 Rec. Con. const. 58. The Conseil decisions on the standing orders modified as the result of the 1992 amendment, *supra* note 140, refer also to the Government's control over the parliamentary agenda under Article 48.

Senate. It is stated that the right to vote "can be accorded," which appears to leave open to the organic legislator the option of denying certain rights of Union citizenship. In truth, any such parliamentary refusal could attract a penalty under Article 171 of the EC Treaty, which provides for the enforcement of a Member State's obligations under the Treaty. The Senate's victory is not so great as imagined, and the French Parliament finds itself embarrassingly constrained.

For the Conseil, Article 54 and Article 88-3 have increased the opportunity for intervention in the name of constitutionality. Unfortunately, Article 88-3 may also have increased the likelihood of embarrassment for the Conseil which may be forced to accept an exception to its established case-law.[151] Since 1975, the Conseil has consistently refused to check the conformity of a law to a constitutionally superior treaty.[152] What is to occur when the Conseil is seised of an organic law (made under Article 88-3), which is supposed to respect the EU Council measures on citizenship taken to implement the Treaty? To effect this control the Conseil would arguably have to interpret the Treaty and secondary legislation, thus opening the way for contradictory views to be expressed by the Conseil and the ECJ.[153]

In terms of the contribution of the constitutional authorities to the pre-ratification process, the passage of *loi constitutionnelle* No. 92-554[154] shows that the brake of the *original* constituent power is not a block. The Conseil had pointed out the desire expressed in the Constitution for the protection of human rights and those conditions essential for the exercise of national sovereignty, but the will of the constituent power has given way, as was intended, to a reinforced majority of the people's representatives within the *instituted* constituent power. The Executive has not been allowed to forge ahead with the approval of neither the people[155] nor their representatives.[156] But neither has the Conseil been able to apply an irremovable brake: although there is no appeal against the Conseil's decisions,[157] it is not the Conseil which is sovereign in deciding which constitutional principles must be preserved. The Conseil

151. Luchaire, *supra* note 124, at 970.
152. *See supra* note 14.
153. *See infra* discussion of Obstacle No. 3, pp. 68-76.
154. *Supra* note 121.
155. CONST. art. 11.
156. CONST. art. 89.
157. CONST. art. 62.

is only the keeper of the constitutional key, pointing out the dangers of compromising enduring national principles in the interest of international progress. It is the authority which can effect constitutional revision which takes responsibility for sacrificing these principles. In the present case, that authority approved the result of Executive negotiation. It then remained to secure authorisation for ratification.

## IV. OBSTACLE NO. 3: THE SECOND REFERENCE TO THE CONSEIL CONSTITUTIONNEL (DECISION 92-312 DC OF 2 SEPTEMBER 1992)[158]

The President had already made the *décret*[159] which fixed the date of the referendum on Maastricht when the Conseil was seised of the Treaty for a second time. By its decision of 2 September, the Conseil could have made ratification impossible without a further constitutional revision. In the event of a judgment that the Treaty was contrary to the Constitution, the Treaty could not have been put to a referendum (Article 11).

### *A. Procedural Novelty*

During the referendum campaign, more than sixty senators[160] seised the Conseil of the Treaty on European Union. The timing of this first reference to the Conseil under the extended Article 54 was significant. It also raised two interesting procedural questions.

Since the law of constitutional amendment had been promulgated on 25 June, it is worth wondering why the parliamentarians waited until 14 August before making their reference. It is to their constitutional credit that they were intent on preparing a set of reasoned arguments to support their objection, as has been urged by Genevois.[161] It was thus necessary for them to study the lengthy text of the Treaty itself, the first Maastricht decision of the Conseil, and the *travaux préparatoires* of the constitutional amendment. However, this delay gave them time also to digest the learned commentaries of Genevois and Luchaire. The status of

158. 1992 Rec. Con. const. 76.

159. 1 July 1992. *See infra* discussion of Obstacle No. 4, pp. 77-84.

160. Led by the tenacious Pasqua who was campaigning vigorously against the Treaty.

161. Bruno Genevois, *Le Traité sur l'Union européenne et la Constitution révisée*, REV. FRANÇ. DR. ADMIN. 937, 950 (1992).

these writers, as Secretary General of the Conseil[162] and current adviser to the President of the Conseil,[163] respectively, has endowed their exhaustive articles with a certain authority,[164] and it was not surprising that the parliamentarians made direct references to their work in order to depoliticise the reference.

The first procedural difficulty arose out of the rejection by the Danish people of the Treaty in their referendum of 2 June. The senators argued that the Treaty could now not be ratified by France, without a breach of Paragraph 14 of the 1946 Preamble, relating to respect for the rules of public international law.[165] The Treaty could not enter into force until it was ratified by all signatories (Article R TEU), and the revision of the Treaty of Rome was not possible without the unanimous agreement of all Member States (Article 236 EC). Although these arguments hold good in European and international law, they were of no interest to the Conseil, because it held that the exercise of constitutional control under Article 54 is of effect solely within the domestic legal order and cannot contravene the rules of public international law.[166] The *existence* of the Treaty was in no doubt, and so under Article 54 the Conseil needed only to verify that it had been signed in the name of the Republic, and that the text which would authorise ratification had not yet been adopted. Once a law allowing ratification had been passed, any reference to the Conseil would have to come within the terms of Article 61(2).[167]

The second procedural question arose from the text of Article 62: "A provision declared unconstitutional may not be promulgated or implemented. The decisions of the [Conseil constitutionnel] may not be appealed to any jurisdiction whatsoever. They [are binding on] the [public] authorities and [on] all administrative and [judicial] authorities."[168] While it is true that there is no body to which one may appeal against a decision of the Conseil, and that such a decision is

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162. And author of LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL: PRINCIPES DIRECTEURS (1988).

163. And former member, 1965-1974.

164. Since the decisions of the Conseil are delivered in the name of the institution (like all judicial decisions in France), constitutional theory is assisted by "authoritative" explanation as it would be by published dissent. *See* Rousseau, *supra* note 74, at 9-11.

165. 1992 Rec. Con. const. at 77-78.

166. 1992 Rec. Con. const. at 78.

167. The argument was again unsuccessful in the third reference to the Conseil. *See infra* discussion of Obstacle No. 5, pp. 85-89.

168. CONST. art. 62, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 41.

"binding" on the public authorities, they do not have to accept it. The adoption of the law of constitutional amendment is a clear example of the circumnavigation of a Conseil decision, with the implicit approval of Article 54, a demonstration of the power of the constituent assembly.[169]

The final procedural difficulty arose out of the doctrine of *l'autorité de la chose jugée* (res judicata): was the reference of 14 August unacceptable on the single ground that the constitutionality of the Treaty had already been considered by the Conseil in its decision of 9 April? In that decision, three types of provisions of the Maastricht Treaty had been judged unconstitutional, but "none of the other provisions," according to the Conseil, could be faulted.[170] Was this novel double reference to be rejected?

The senators' clear intention was to discover whether or not the constitutional amendment had done enough to invalidate the objections raised by the Conseil on 9 April. The Conseil was being asked to judge the constitutionality of the ratification of the same Treaty, certainly, but against different constitutional constraints. In a predictable response, the Conseil in no way denied the absolute authority which attached to the earlier decision, confirming its well-established jurisprudence[171] that the constitutionality of a single text cannot be questioned twice. However, the doctrine of res judicata cannot be invoked in two cases: i) if the revision was insufficient and leaves a contradiction between the modified Constitution and certain provisions of the treaty; and ii) if the revision was overdone and introduced new provisions which create an incompatibility with the treaty.[172] This logical approach enabled the Conseil to pass judgment on the steps taken by the constituent power and

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169. This is not quite the same as the controversial adoption in 1993 of a *loi* which, enabled by a constitutional amendment, was designed to contradict a Conseil decision under Article 61: *loi* No. 93-1027 of 24 Aug. 1993, J.O., 29 Aug. 1993, at 12196; *loi constitutionnelle* No. 93-1256 of 25 Nov. 1993, J.O., 26 Nov. 1993, at 16296; Decision 93-325 DC of 13 Aug. 1993, 1993 Rec. Con. const. 224. Note the outrage of Rousseau, who seems to lose sight of the intervention of the constitutional amendment between the decision and the parliamentary vote. *Chronique de jurisprudence constitutionnelle 1992-1993*, [1994] 1 REV. DR. PUB. 103, 104-05.

170. 1992 Rec. Con. const. at 65, [1993] 3 C.M.L.R. at 358.

171. Since Decision 62-18 L of 16 Jan. 1962 (under Article 37(2)), 1962 Rec. Con. const. 31, a decision, including the reasoning, has been binding.

172. 1992 Rec. Con. const. at 77.

is, in Genevois' opinion, in line with the French style of constitutional review: "abstract" and "a priori."[173]

### *B. Substantive Content of the Decision*

Once the senators' reference had been declared admissible, the substantive arguments could be examined. In deciding that the ratification of the Treaty did *not* need to be preceded by another constitutional amendment, the Conseil shed light on two matters of enduring interest: the extent of the freedom of the constituent power and of the organic legislator.

Although it is clear to some that there is no untouchable hard core of principles that are beyond the constituent power,[174] the senators were keen for the Conseil "to fix a ceiling above which constitutional revision would still be possible but ought to have as its object the complete reform of the State and the change of its nature." This points to the difference between remaining within the Fifth Republic and creating a Sixth, in which the balance of powers could be revolutionised. Since the French Constitution is constructed around the central idea of national sovereignty, how far could there be "successive attacks on the essential conditions for the exercise of sovereignty"[175] by a merely instituted constituent power?[176] Unsurprisingly, the Conseil refused to answer such an open-ended question on the ground that it had nothing to do with the question under Article 54 of the compatibility of the Treaty with the Constitution. However, the notion of supra-constitutionality (i.e., that parts of the Constitution are beyond amendment) was firmly rejected: "*le pouvoir constituant est souverain.*"[177] The senators had argued that there was a need for express amendments to the articles of the Constitution

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173. Genevois, *supra* note 161, at 943. *Cf.* the less strict approach of the ECJ in its consideration of the external agreements of the Community. Under Article 228(6) of the EC Treaty, "The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty." An adverse opinion would prevent the entry into force of the agreement without an amendment of the EC Treaty. However any opinion under Article 228 does not preclude the ECJ's jurisdiction to rule on the validity of the same agreement at a later stage, e.g., on a preliminary reference from a national court under Article 177 EC.

174. Vedel, *supra* note 123, at 179. *Cf.* Louis Favoreu, *Souveraineté et supraconstitutionnalité*, 67 POUVOIRS 71 (1993).

175. 1992 Rec. Con. const. at 84.

176. *See supra* note 98.

177. "The constituent power is sovereign." 1992 Rec. Con. const. at 80.

which were obstructing ratification of the Treaty, namely, Articles 3 and 24 (on national sovereignty and the Senate), Article 34 (on the power of Parliament to fix by *loi* such things as the rules on currency), and Articles 20 and 21 (on the power of the Government, led by the Prime Minister, to determine the policy of the French nation). The Conseil was unconvinced: if the constituent power chooses instead to add a special title, so be it, because "nothing prevents it from introducing into the text of the Constitution new provisions which . . . derogate [either expressly or impliedly] from a rule or a principle of constitutional value."[178] These words suggest that Article 88-3 had indeed introduced an exception to Article 3, and the homogeneity of the electorate, just as Article 88-2 partially contradicts Articles 20 and 21.[179]

If even the instituted constituent power is supreme, it is reasonable to wonder whether there are any articles of the Constitution which are protected from modification,[180] whether any constitutional amendment is more important than any other and so deserving of a special adoption procedure, and whether constitutional laws are subject to any control at all. Rousseau claims that the decision of 2 September is an acknowledgment by the Conseil of its jurisdiction over constitutional laws,[181] because the sovereignty of the constituent power is said to be subject to certain limitations imposed by the Constitution. These prevent any change to the republican form of government,[182] and prevent constitutional revision during the interim period between Presidents,[183] when the integrity of the territory is infringed,[184] or when Article 16 is in use. This last reference is the vaguest, since Article 16[185] makes no

178. 1992 Rec. Con. const. at 80.

179. In Decision 93-324 DC of 3 Aug. 1993 (on the Bank of France), 1993 Rec. Con. const. 208, the Conseil judged unconstitutional that part of *loi* No. 93-980 of 4 Aug. 1993, J.O., 6 Aug. 1993, at 11047, which provided for the Bank to determine French monetary policy. Since Article 88-2 of the Constitution could not apply until after the entry into force of the Treaty, there was a breach of Articles 20 and 21. *See* Note by Nguyen van Tuong, 68 J.C.P. II, No. 22193, at 20 (1994).

180. *Cf.* the immutability of certain articles in the German Constitution under Article 79(3).

181. Rousseau, *supra* note 74, at 19-20, and *supra* note 169, at 129. On the Conseil's attitude to laws adopted by referendum, see *infra* discussion of Obstacle No. 5, pp. 85-89.

182. Article 89(5), quoted by the Conseil. Is republican merely the opposite of monarchical, or does it imply certain values?

183. Article 7(11), added by *loi constitutionnelle* No. 62-1292 of 6 Nov. 1962, J.O., 7 Nov. 1962, at 10762, which refers to the use of Article 89. What of the use of Article 11?

184. Article 89(4), which refers to "amendment procedure."

185. The full text of Article 16 reads:

mention of constitutional revision in the context of the emergency presidential regime envisaged in times of national crisis. Rousseau[186] argues that the Conseil must have combined its reading of Articles 16 and 89, since one ground for the implementation of Article 16 is a threat to the integrity of the territory. Genevois[187] and Luchaire[188] provide an alternative explanation: the emergency measures taken by the President must be designed to ensure that the "*constitutional* [public] authorities" can resume their missions as soon as possible, i.e. Article 16 confers on the President legislative power (as in *loi*) and regulatory power (as in *règlement*), but not constituent power. As Luchaire carefully points out, this would not prevent the proper application of Article 89 during a period of emergency rule even if the President himself could not effect a revision.

It does not follow from the fact that certain limits exist on the power of the constituent assembly, that it is the Conseil that has jurisdiction to exercise control over constitutional laws. Genevois firmly rejects the notion that the Conseil claims any such power, since Article 61 provides for the reference of ordinary and organic laws only.[189] Luchaire accepts this view but wonders, pragmatically, why the Conseil should

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> When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional [public] authorities is interrupted, the President of the Republic shall take the measures commanded by these circumstances, after official consultation with the [Prime Minister], the Presidents of the assemblies and the [Conseil constitutionnel].
>
> He shall inform the nation of these [matters] in a message.
>
> These measures must be prompted by the desire to ensure the constitutional [public] authorities, in the shortest possible time, the means of fulfilling their assigned functions. The [Conseil constitutionnel] shall be consulted with regard to such measures.
>
> Parliament shall meet by right.
>
> The National Assembly may not be dissolved during the exercise of [exceptional] powers [by the President].

CONST. art. 16, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 27.

186. Rousseau, *supra* note 74, at 19-20.

187. Genevois, *supra* note 161, at 945.

188. François Luchaire, *L'Union européenne et la Constitution. Quatrième partie: Le référendum,* [1992] 6 REV. DR. PUB. 1587, 1592, relying on the authority of the Conseil d'Etat in the Judgment of 2 Mar. 1962 (*Rubin de Servens*), which is discussed in Jean-François Henry, *Le contrôle du recours à l'article 16 et de son application,* [1962] 2 REV. DR. PUB. 294.

189. Genevois, *supra* note 161, at 945, referring to Decision 92-313 DC, discussed *infra* under Obstacle No. 5, pp. 85-89.

bother to list the limitations on the constituent power if there was to be no sanction.[190] His limited response is that the Conseil should probably reject a coup d'etat but, in the absence of a specified procedure, does not claim for itself the power to control constitutional laws. The Conseil has never claimed to have an inherent power (*pouvoir général d'appréciation*) to uphold the Constitution, but only the power conferred by particular articles of the Constitution prescribing particular procedures. This perhaps reveals the true nature of the "sovereignty" of the constituent power, which could indeed repeal any of the articles of the Constitution which limit the power of revision, including Article 89 itself.[191] The unpalatable inference from these analyses is that there is no formal control over constitutional laws, even in respect of procedural irregularities. A preferable, though more radical, conclusion is comparable to that drawn by the Cour de cassation in 1975:[192] any act which is authorised by a constitutional law, but contrary to the Constitution, will be declared void by the ordinary or administrative courts. The alleged constitutional law remains in the hierarchy of norms below the level of the unassailable Constitution unless it is correctly adopted.

The limits to the Conseil's jurisdiction are equally well illustrated by the problem of organic laws on voting rights made under Article 88-3. According to the decision of 2 September, "the organic law will have to [*devra*] respect the requirements issued at the level of the European Community for the implementation of the right recognised by Article 8B(1)."[193] Since every organic law must be submitted to the Conseil, Rousseau argues that the Conseil will be required to test the conformity of the law to Community measures as well as to the Constitution.[194] This would be in direct contradiction of the Conseil's stance established since 1975.[195] For Rousseau, this "*revirement de jurisprudence*"[196] is only limited, since it does not relate to ordinary laws or the majority of organic laws, but it does show that it is technically possible for the Conseil to test

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190. Luchaire, *supra* note 188, at 1592.

191. Luchaire, *supra* note 188, at 1591. Luchaire accepts this possibility in the case of the republican form of government, describing Article 89(5) as "a paper barrier."

192. *See supra* note 14.

193. 1992 Rec. Con. const. at 81. *See supra* note 47.

194. Rousseau, *supra* note 74, at 15-16.

195. *See supra* note 14.

196. Rousseau, *supra* note 74, at 43.

the compatibility of a law and a treaty. Such a contradiction of precedent is said to make "a breach, the enlargement of which will be difficult to prevent."[197]

Rousseau's pro-European fervour seems to induce a profound misunderstanding. Although the Conseil is fully aware of the constitutional status of Article 55, its decision of 1975 shows that it does not believe itself to be an unfettered agent in the upholding of the Constitution or a general guardian of the Constitution.[198] The superiority of treaties over laws is now accepted as being for the ordinary and administrative courts to ensure, because the jurisdiction of the Conseil, defined by the articles of the Constitution, provides for no system or procedure for this check. The Conseil has thus simply announced the need for a job to be done by someone else.[199]

### *C. Significance for the Balance of Constitutional Power*

In a desperate, seemingly last-ditch party political move to scupper the ratification, the minority had appealed to the will of the constituent power for protection of the French Republic in the face of political defeat by the Executive and a strong Parliament. The senators had hoped to use the Conseil as a weapon against the law of constitutional amendment, but the Conseil makes it clear that there is no "government of judges." The Conseil is not supreme and must give way to the expression of the apparently supreme constituent power vested in the sovereign people. In an act of self-denial, the Conseil has respected the bounds of its role and submitted to the power of constitutional amendment, producing a pro-Maastricht decision.

The decision of 2 September is confirmation that the "brake" had been released by a force stronger than the Conseil. By changing the point

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197. Rousseau, *supra* note 74, at 16.

198. A role in fact entrusted to the President of the Republic under Article 5.

199. This view is shared by Nguyen van Tuong who wonders if the administrative courts, with jurisdiction over municipal elections, will move faster than they did in recognising the primacy of Community law over ordinary domestic law. Nguyen van Tuong, 66 J.C.P. II, No. 21943, at 382 (1992). *Cf.* Luchaire, who points out that i) the Conseil is prepared to check the conformity of laws to treaties when seised of an appeal in an electoral matter (Decision 88-1082/1117 of 21 Oct. 1988, 1988 Rec. Con. const. 183), and ii) whilst other jurisdictions are left to ensure the observance of Article 55, we are here concerned with Article 88-3 which imposes on the organic law a specific constitutional obligation. As a result the Conseil will find it difficult to shy away. Luchaire, *supra* note 188, at 1594.

of reference, the constituent power has managed to rob the Conseil of its objections.

## V. OBSTACLE NO. 4: THE REFERENDUM

### *A. Constitutional Basis for Ratification*

Once it had been decided that the Treaty was not contrary to the revised French Constitution, it was necessary to proceed to ratification. At the Community level, Article 236 EC requires ratification to be effected according to the constitutional requirements within each Member State. At the national level, Article 55 requires that treaties be "ratified or approved" if they are to be introduced into the domestic order. Certain treaties, however, may not be ratified or approved at the discretion of the Executive: Article 53(1) prescribes that

> Peace treaties, commercial treaties, treaties or agreements relative to international organisation, those that imply a commitment for finances of the State, those that modify provisions of a legislative nature, those relative to the status of persons, [and] those that call for the cession, exchange or addition of territory, may be ratified or approved only by a law [*loi*].[200]

This technique for controlling presidential action is applied to some thirty or forty treaties out of three or four hundred signed each year.[201] It had already been used in respect of the founding treaties, the Merger Treaty, the enlargement of the Community, direct elections to the European Parliament, and the Single European Act.[202] In the area of "international organisation" there is, therefore, an interesting convergence between the "monism" of France and the "dualism" of the United Kingdom, where *no* treaty has any legal affect in the British legal order unless it has been approved by the legislatively supreme Parliament as well as ratified by the Crown. In European matters, more exceptionally,

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200. CONST. art. 53, para. 1, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 38.

201. *See* Genevois, *supra* note 29. In other cases ratification will take place without legislative authorisation, or there may be only publication, perhaps by an international instrument in, e.g., the Official Journal.

202. All of these *lois* are cited as *visas* in the Conseil's first Maastricht decision. *Cf.* in the UK the European Communities Act 1972, the European Parliament Elections Acts 1978 and 1981, and the European Communities (Amendment) Act 1986.

section 6 of the U.K. European Parliament Elections Act 1978 prescribes that no treaty, which provides for any increase in the powers of the European Parliament, can even be ratified by the United Kingdom without parliamentary approval. The necessary authorisation for ratification of the Maastricht Treaty was given by section 1(2) of the European Communities (Amendment) Act 1993.[203] In the case of France, any doubt as to the need for legislative intervention in the case of the Treaty on European Union had been removed by the Conseil in its decisions of 9 April ("*en vertu d'une loi*")[204] and 2 September ("*sur le fondement d'une loi*").[205]

### *B. Legislation by Referendum*

The normal procedure for the adoption of *lois* is prescribed by Articles 39 and 42-45, and depends on a proposal from the Prime Minister or parliamentarians, which should then be adopted by the two parliamentary assemblies before promulgation by the President. This route was not chosen for the authorisation to ratify the Treaty. Having avoided constitutional revision by referendum and having already witnessed the support of the parliamentary majority, President Mitterrand would have been entitled to see the last pre-ratification stage as a pure formality. However, the negative Danish vote had turned Article R TEU into another uncomfortable obstacle:[206]

> This Treaty shall enter into force on 1 January 1993, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.[207]

It is clear that each Member State was to enjoy the power of veto in accordance with Article 236 EC. The twelve Foreign Ministers had

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203. Geoffrey Marshall argues that these "domestic constitutional requirements" were not observed. The House of Commons did not come to a "resolution" on the question of adopting the Protocol on Social Policy, as required for the entry into force of the 1993 Act by its s.7: only the motion of confidence in the Government's policy on adoption was carried. *See* Geoffrey Marshall, *The Maastricht proceedings*, 1993 P.L. 402.

204. 1992 Rec. Con. const. at 65.

205. 1992 Rec. Con. const. at 84.

206. Relied upon unsuccessfully in the second and third references to the Conseil. *See supra* and *infra* discussions of Obstacles No. 3 and 5, pp. 68-76 and 85-89 respectively.

207. Treaty on European Union, 7 Feb. 1992, 31 I.L.M. 247 (1992), [1992] 1 C.M.L.R. 719.

agreed not to renegotiate the Treaty,[208] and still expected the Treaty to have been fully ratified by the end of the year, but the Danes had been accused of being anti-European and there was talk of a future without Denmark. Against this backdrop, President Mitterrand announced on 3 June, whilst the Senate was still discussing the constitutional amendment, that there would be a referendum.[209]

In political terms, the President's decision to chance legislation by referendum was a calculated risk.[210] Even a "yes" vote by the French people could not cancel out the Danish vote, and if he indicated the need to allow "democracy to express itself" on this important European question, we can recall that he had shown no such scruples about the Single European Act. In a gloomy economic climate of rising unemployment, the President was throwing down the Elysée gauntlet and opening the door to three and a half months of debate. On the positive side, however, the polls were predicting a 60% "yes" vote, and the prestige of popular support expressed through a referendum would be tremendous, effectively upsetting the opposition in their preparation for the legislative elections of March 1993.

In constitutional terms, the President was exercising a right under Article 11.[211] "[A]ny [B]ill [*projet de loi*] . . . providing for authorisation to ratify a treaty that, without being contrary to the Constitution, [would] affect the functioning of [existing] institutions"[212] may be submitted to a referendum by the President, on a proposal from the Government or Parliament. Referenda are not common in France. Before the referendum of 1992, there had been only six during the life of the Fifth Republic (and only three since the departure of General de Gaulle in 1969). Five of these had related to Bills concerning "the organisation of the public authorities": the future status of Algeria in 1961 and 1962,[213] direct presidential elections in 1962,[214] the Senate and the regions in 1969,[215] and finally, after a significant lapse, the future status of New

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208. Oslo, 4 June 1992.

209. As in the Republic of Ireland on 18 June: 68.7% "yes" vote. Ratification was made by parliamentary authority in the remaining Member States.

210. On the political dimension, see generally Pétot, *supra* note 30, at 380 et seq.

211. *See generally* van Tuong, *supra* note 31 (written before the passage of the constitutional amendment).

212. *Supra* note 109. *See supra* text accompanying note 110.

213. After which Algeria became independent.

214. *Supra* note 92.

215. *Supra* note 115.

Caledonia in 1988. Only one referendum had ever been organised on the subject of a treaty: on the enlargement of the European Community in 1972.[216] It can thus be seen that the people had not been directly consulted about every major step towards European integration. Only the public authorities had been involved when France became a member of the European Communities, when the European Parliament was directly elected for the first time, and when the Single European Act was signed, even though this last instrument effected a massive transfer of power by ensuring the realisation of the single European market. The greatest virtue of the referendum on Maastricht was that it at least gave the people a chance to express their view on an important treaty and, more significantly, on the construction of Europe.

In the year before the reintroduction of a "cohabiting" right-wing Government, it was easy for the President to count on the proposal in a letter from the Prime Minister (required under Article 11), which led to the presidential *décret* of 1 July,[217] fixing the date of the referendum for 20 September. The Conseil had been consulted[218] and the text of the *loi* had also been seen by the Conseil d'Etat.[219] However, other less straightforward procedures had to be followed before the people could be consulted. Firstly, it was not enough to decree that the referendum would take place on a certain date; it was also necessary for further *décrets* on the detailed organisation of the referendum to be made on 8 August. Under articles 46 and 47 of the *ordonnance* of 7 November 1958,[220] these *décrets* are subject to prior consultation with the Conseil. The opinion of the Conseil is not binding, and thus it cannot quash the *décrets.*[221] However, like any other administrative act, they can be challenged by way of a *recours pour excès de pouvoir* before the Conseil

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216. When the original six were joined by Denmark, Ireland and the United Kingdom.

217. J.O., 2 July 1992, at 8682.

218. According to article 46 of the *ordonnance* No. 58-1067 of 7 Nov. 1958, J.O., 9 Nov. 1958, at 10129, which complements the articles of the Constitution on the Conseil.

219. Under Article 39.

220. *Ordonnance* No. 58-1067, J.O., 9 Nov. 1958, at 10129.

221. Per Decision of 25 Oct. 1988 (on the New Caledonia referendum), 1988 Rec. Con. const. 191. See the vain attempts by Caldagues and Lederman on 15 September 1992, and Le Pen (the leader of the National Front in France) on 18 September 1992, noted by Luchaire, *supra* note 188.

d'Etat on the ground of illegality.[222] Since the "legality" in question includes all norms superior to the act under review, including the Constitution, the supreme administrative court can find itself in the position of having to judge matters of constitutional importance. This was the case in *Meyet* of 10 September 1992,[223] following a complaint first lodged on 12 August that the *décrets* were in breach of Articles 34 and 21, amongst others.[224]

In terms of the balance of powers, this challenge provoked answers to two interesting questions: is the organisation of a referendum to be fixed by *loi* or *décret*?; and is any *décret* of organisation to be signed by the President or the Prime Minister? Paragraph 3 of Article 34 states that Parliament fixes the rules on "the electoral system of the Parliamentary assemblies and the local assemblies,"[225] but, according to the Conseil d'Etat in *Meyet*, a referendum is a different sort of vote from that in parliamentary elections. Paragraph 2 of the same article provides that Parliament also fixes the rules on "the [civic] rights and the fundamental guarantees granted to citizens for the exercise of their [civil] liberties . . .,"[226] but, it was held, in the absence of legislative provisions, the Executive may, within the framework of its powers, and respecting the rules and guarantees of Article 34(2) which appear in *lois* relating to elections, make the necessary arrangements. On the subject of the division of power between the two heads of the Executive, Article 13 provides that "The President of the Republic shall sign the ordinances [*ordonnances* of Article 38] and decrees [*décrets*] decided upon in the Council of Ministers,"[227] but then Article 21 provides that "Subject to the provisions of Article 13, he [the Prime Minister] shall have [the power to

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222. The presidential *décret* by which the Bill was submitted to a referendum is considered to be an *acte de gouvernement* which is immune from such control. *Cf.* the English doctrine of Act of State.

223. Conseil d'Etat, 1993 D.S. Jur. 293.

224. *Galland*, a second decision of 10 September 1992, related to the political parties that could take part in the campaign. Conseil D'Etat, 1992 Recueil Dalloz-Sirey, *Informations Rapides* 243. *See generally* Luchaire, *supra* note 188, at 1596-1603.

225. CONST. art. 34, para. 3, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 32.

226. CONST. art. 34, para. 2, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 32.

227. CONST. art. 13, para. 1, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 26.

make regulations]."[228] The plaintiff had argued that although the *décrets* in question *had* been decided upon in Council and signed by the President, there had been no constitutional requirement to this end, and so the Prime Minister should in fact have signed them. The Conseil d'Etat rejected this argument: a "*décret* in Council" is any *décret* which has been made in this way, and thus the President was quite entitled to do as he did.[229]

The challenges to the procedural acts for the referendum could not detract from the scale and fervour of the national debate about Maastricht. In truth, the complexity of the Treaty is such that the non-expert found it impossible to comprehend it:[230] the referendum campaign could be charged with emotive exaggeration. The "No" camp was powerfully led by dissidents from the central and right-wing parties, namely de Villiers[231] of the *Union pour la Démocratie Française*, and Pasqua[232] and Séguin[233] of the RPR. Joined by both Communists and members of the National Front, they used the EC as a scapegoat, loading it with all their frustrations over internal French politics. For those of a Gaullist persuasion, the EC leaders were plotting the disappearance of nations by planting "the pernicious germ of federalism,"[234] and for the Left, the rich technocrats in Europe were shutting out the underclass. The "Yes" camp was an equally disparate coalition led by the President and his Government, including the former President, Valéry Giscard d'Estaing, and Raymond Barre, the former Prime Minister. They spoke of the chaos which would ensue if the Treaty were renounced, of the destruction of Europe, of isolation for France and, a trump card, of the German energy which would no longer be channeled by the European institutions.

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228. CONST. art. 21, para. 1, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 28.

229. Luchaire is horrified. Luchaire, *supra* note 188, at 1599. The Conseil d'Etat would have been safer if it had relied on Article 5 to found the President's power: "The President of the Republic shall see that the Constitution is respected." CONST. art. 5, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 23.

230. One guide by François Siégel was entitled L'EUROPE DE MAASTRICHT: POUR CEUX QUI N'Y COMPRENNENT RIEN (1992).

231. An unsuccessful candidate in the presidential elections of April/May 1995.

232. *See supra* discussion of Obstacle No. 3.

233. Passionately attached to the French language. *See* Debbasch, *supra* note 145.

234. Pétot, *supra* note 30, at 383.

As a result of the "yo-yo" support for the Treaty, the result of the referendum was not a great victory for anyone. The results announced by the Conseil on 23 September[235] were

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|---|---|---|
| Registered voters | 38,305,534 | |
| Voting | 26,695,951 | |
| Abstaining | 11,609,583 | |
| Votes cast | 25,786,574 | |
| Yes | 13,162,992 | 51.04% |
| No | 12,623,582 | 48.96% |

These figures show a high rate of participation in the referendum (70%), but there are several uncomfortable observations to be made. Firstly, the difference between the "yes" and "no" votes is only 2% of the votes cast and even less of the number registered to vote. Equally, although the Treaty was approved, support was expressed by only 34.36% of the registered voters. This could not be interpreted as a clear message for anyone, although the voting map showed up a distinction between the positive attitude of the urban population and the negativism of the suburban and rural population. It is enlightening to note how wise (and patronising) we are after the event. "According to many commentaries, the French who vote 'no' in the referendum are, for the most part, uneducated, timorous, old-fashioned, rural, poor and worried about their future, they are failures when compared to the average. Cultivated and brilliant people vote 'yes.'"[236]

### *C. Significance for the Balance of Constitutional Power*

*Meyet* has two main implications for the balance of powers, one in the spirit of the Constitution and one apparently contrary to it. Since Article 11 provides that the President may consult the people by way of referendum, this power should not be denied by Parliament. Article 5 provides that the President must ensure the respect of the Constitution, and so it is reasonable for him to take those measures which will enable it

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235. Under Article 60, "The [Conseil constitutionnel] shall ensure the regularity of referendum procedures and shall announce the results thereof." CONST. art. 60, *reprinted and translated in* 6 CONSTITUTIONS, *supra* note 9, at 40. *See generally* Bruno Genevois, *Le Conseil constitutionnel et le référendum*, *in* LE RÉFÉRENDUM, QUEL AVENIR? 95 et. seq. (Gerard Conac & Didier Maus eds., 1990). In the case of Maastricht the Conseil found three irregularities and consequently disallowed the results in those communes. *See* Luchaire, *supra* note 188, at 1604.

236. Pétot, *supra* note 30, at 389.

to function. This does not mean however that he should be able to wrest power from the Prime Minister by consistently submitting to the Council of Ministers those *décrets* which come within Article 21.[237] The effect would be keenly felt during periods of cohabitation, when the Prime Minister, supported by the parliamentary majority, would suffer at the hands of the unaccountable President.

Through the referendum the President of the Republic had made a direct appeal to popular sovereignty in seeking approval of an Executive move which had already been supported by the parliamentary representatives of the people, but rejected by the Conseil in the name of constitutional principles. The people indirectly sanctioned the constitutional amendment made necessary by Maastricht and vindicated the Executive. The result was an uncomfortably small majority in favour but, according to the rules, only those votes cast can be counted, and so 34.36% of the electorate have delivered an expression of sovereign power. The people had their chance, but it should not be forgotten that, without actually seizing power, the people could not call a referendum themselves: they were at the mercy of presidential goodwill. Without a referendum, however, ratification of this fundamental treaty would not have been possible without another expression of direct support from the representatives of the people.

## VI. OBSTACLE NO. 5: THE THIRD REFERENCE TO THE CONSEIL CONSTITUTIONNEL (DECISION 92-313 DC OF 23 SEPTEMBER 1992)[238]

Once the people had finally shown their support for the Treaty it might be thought that all the remaining procedural requirements were under the control of the President. The *loi référendaire* had to be promulgated (Article 11) and the Treaty finally ratified. This belief ignores the reality of the third reference to the Conseil which resulted in a decision on the very day the results were proclaimed.

### *A. Procedural Significance: Rarity*

Under Article 61(2) of the Constitution ordinary *lois* may be referred to the Conseil for a ruling on their constitutionality. This is

237. *See supra* text accompanying note 229.
238. 1992 Rec. Con. const. 94.

exceptional in the case of a *loi* the object of which is to authorise the ratification of a treaty. Before 1992 there had been only four decisions of the Conseil, all at the request of parliamentarians: 78-93 DC of 29 April 1978[239] on the organisation of the IMF, 80-116 DC of 17 July 1980[240] on the Franco-German Convention on mutual legal aid, 88-247 DC of 17 January 1989[241] on International Labour Convention No. 159, and 91-294 DC of 25 July 1991[242] on the application of the Schengen Convention.[243] None of the agreements had first been referred to the Conseil under Article 54, all of the *lois* had been adopted by Parliament, and all of them were declared to be in conformity with the Constitution.

The Conseil was seised of the *loi* authorising ratification of the Maastricht Treaty on 20 September by more than sixty deputies. The parliamentarians correctly made their move before promulgation by the President but, curiously, they did not wait for the Conseil's official proclamation of the referendum results on 23 September. This could have caused difficulty, since the parliamentarians were relying upon unofficial, though public announcements. In the light of the Conseil's power under Article 60 to disallow results in the case of procedural irregularity[244] and the predictable closeness of the final vote, it would have been ironically possible for the reference to be completely unnecessary. The Conseil would have been in the position of judging the constitutionality of a text which had not even been adopted.

### *B. Limits of the Decision*

In its succinct decision of 23 September the Conseil confirmed its lack of jurisdiction to judge the constitutionality of legislation by referendum.[245] The words of Decision 62-20 DC of 6 November

239. 1978 Rec. Con. const. 23.
240. 1980 Rec. Con. const. 36.
241. 1989 Rec. Con. const. 15.
242. 1991 Rec. Con. const. 91.
243. *See* Genevois, *supra* note 19, at 373.
244. *See supra* note 235.
245. As predicted by van Tuong, *supra* note 31. Genevois believes that *l'autorité de la chose jugée* would prevent the constitutional review of a parliamentary *loi* authorising the ratification of a treaty which had already been judged by the Conseil to be constitutionally acceptable, unless the *loi* itself was procedurally irregular. Genevois, *supra* note 161, at 942.

1962[246] on direct presidential elections were largely repeated, although the Conseil's reasoning was slightly modified.[247]

In substantive terms the parliamentarians were again arguing that the Treaty could not be ratified because of the negative Danish vote (which was not reversed until the second referendum in May 1993). This matter was eclipsed, however, by the obstacle of the 1962 precedent. The Conseil's 1962 refusal of jurisdiction to review the people's approval of direct presidential elections was made on four grounds. Firstly, the Conseil underlined the circumscribed nature of its own jurisdiction which is a product of the Constitution as completed by the *loi organique* of 7 November 1958.[248] Secondly, although Article 61 does not specify whether the products of referenda may be reviewed or not, "it results from *the spirit of the Constitution* which has made of the Conseil constitutionnel *a regulatory organ of the activity of the public authorities*, that the laws which the Constitution was meant to target in Article 61 are solely the laws voted by Parliament and not those which, adopted by the people after a referendum, constitute *the direct expression of national sovereignty*."[249] Thirdly, Articles 60 and 11 leave no opportunity for review between the adoption and promulgation of *lois référendaires*. Fourthly, by contrast, the text of 7 November 1958 provides for the President to request parliamentary reconsideration of any *parliamentary* legislation which has been judged unconstitutional by the Conseil.

In their reference to the Conseil on 20 September 1992[250] the deputies argued that the 1962 precedent could be ignored because of its uniqueness and consequent inability to constitute established *jurisprudence*. Indeed they put forward a number of grounds on which the old decision could be seen as no longer valid and certainly inapplicable to the present case:

- this was not a "constitutional" law as in 1962[251] but an "ordinary" law;

246. 1962 Rec. Con. const. 27.

247. *See generally* Rousseau, *supra* note 74, at 33-35, and the Note by van Tuong, 66 J.C.P. II, No. 21956, at 419 (1992). On the 1962 decision, see FAVOREU & PHILIP, *supra* note 11, at 175-86.

248. *Supra* note 220.

249. Decision 62-20 DC of 6 Nov. 1962, 1962 Rec. Con. const. 27 [author's emphasis].

250. J.O., 25 Sept. 1992, at 13338 et. seq.

251. And as in the second reference, discussed *supra* under Obstacle No. 3, pp. 68-76.

- Article 61(2) does not exclude the review of legislation by referendum;
- legislation by referendum is no longer special, since its provisions may be amended by parliamentary legislation[252];
- the constitutional amendment of Article 61 in 1974 had not been limited to parliamentary legislation;
- legislation by referendum should not escape constitutional control;
- over the last thirty years the role of the Conseil had changed from that of the "regulatory organ of the activity of the public authorities"[253] to that of the "guarantor of the whole of the legal system" (in the words of the deputies in their reference);
- the constitutional balance had been changed since 1958 by the revisions of 1962, 1963, 1974 and 1992.

In spite of the logical strength of these arguments the Conseil could not be swayed. As in 1962, and as in the second Maastricht decision, the Conseil pointed out the limits to its own jurisdiction. It is true that Article 61 does not exclude the review of legislation by referendum, but the "balance of powers established by the Constitution"[254] does exclude such a review. This phrase was substituted by the Conseil for its more subjective 1962 reference to "the spirit of the Constitution." The texts of reference for the Conseil's conclusion were the same as in 1962, namely, Articles 60 and 11 of the Constitution and the text of 7 November 1958. In summary, although the Conseil did not repeat its self-designation as "regulatory organ of the activity of the public authorities," it clearly believed that the people does not constitute one of those authorities. The Conseil has no jurisdiction in respect of a "direct expression of national sovereignty."[255] Perhaps the Conseil is

252. The *loi* of 18 June 1976 amended the *loi* of 6 November 1962 and was declared to be constitutional in Decision 76-65 DC of 14 June 1976, 1976 Rec. Con. const. 28.

253. As the Conseil had styled itself in 1962.

254. 1992 Rec. Con. const. at 95.

255. *Id.* The phrase from 1962 is reproduced in Decision 92-313 DC. Rousseau suggests that review of the *projet de loi* should be possible *before* the organisation of the referendum, *supra*

again signaling that although its own jurisdiction is limited, the ordinary and administrative courts are free to censure any act which, although in accordance with the law, is not constitutional.[256]

### *C. Significance for the Balance of Constitutional Power*

The third reference to the Conseil resulted in another pro-Maastricht decision. Before the final promulgation of the *loi référendaire* authorising the ratification of the international agreement, the Opposition made a last-ditch attempt to use the Conseil as a political weapon to defeat the Executive which, by then, had already attracted the support of both Parliament and the people. In response the Conseil repeated its conviction that the mouthpiece of the original constituent power must give way to popular sovereignty, the guardian of today's constituent power.

After the 1962 decision the President of the Senate, Gaston Monnerville (who had invited the Conseil to review the *loi*), announced that the Conseil had committed suicide by declining jurisdiction.[257] Vedel reminded the critics that the Conseil's powerlessness was not of its own making but due to the limitations imposed by the draftsmen of the Constitution.[258] After the final Maastricht decision of 1992 van Tuong argued that there is no need to worry unduly if there is no constitutional review of *lois référendaires* because, since de Gaulle departed, referenda have been uncommon.[259] This very untidy answer can surely be interpreted as an invitation to legislate by referendum, a route which is permitted by the Constitution, but which is not seen as "ordinary." A more astute conclusion would note that the Conseil is already criticised for going against "indirect" expressions of national sovereignty by the representatives of the people,[260] and thus it was politically unthinkable for the Conseil to go directly against the people. In the words of Conac,

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note 74, at 35, as does the Vedel Report, *supra* note 25. At present it is the Conseil d'Etat which exercises this power. *Supra* note 219.

256. *See supra* text accompanying note 192.

257. Pierre Viansson-Ponté, *Aprés la décision du Conseil constitutionnel: Le général de Gaulle promulgue la loi sur l'élection du chef de l'État au suffrage universel*, LE MONDE, 8 Nov. 1962, at 1, quoted by FAVOREU & PHILIP, *supra* note 11, at 177.

258. Georges Vedel, *Le Conseil constitutionnel n'est pas Madame Soleil*, LE MONDE, 30 Dec. 1971, at 1, quoted by FAVOREU & PHILIP, *supra* note 11, at 185.

259. Van Tuong, *supra* note 247, at 420.

260. See the characteristic outburst by Pasqua after the Conseil's decision on his immigration law, *supra* note 169. LE FIGARO, 17 Aug. 1993.

"If legislation by referendum has more weight than parliamentary legislation, this is by reason of its origin, but this establishment of a hierarchy is of a political nature."[261]

Since Article 61 was ineffectual in this area of constitutional review, *loi* No. 92-1017 authorising ratification of the Treaty could be promulgated on 24 September 1992.[262]

## VII. CONCLUSION

On 4 November 1992 France finally deposited the instruments of ratification of the Treaty on European Union with the Italian Government. In the clearest test so far of national sovereignty numerous articles of the French Constitution had been interpreted and applied, and all the constitutional authorities had contributed to the decision over how much power France should cede to the European Union. But had the Executive proved its predominance in the balance of powers?

The Fifth Republic, although nominally a parliamentary democracy, was planned on the basis of a rationalised Parliament. Ordinary parliamentary sessions last for less than six months of the year,[263] the domain of Parliament's normative power is limited[264] and subject to constitutional control,[265] the opportunity for Parliament to overthrow the Government is strictly circumscribed,[266] and it is the Government which controls the parliamentary agenda.[267] In addition, in times of emergency,[268] all governmental and legislative powers are concentrated in the hands of the unaccountable President,[269] imbued with competing political legitimacy by virtue of his direct election by the people.[270] Political circumstances have also led to *de facto* presidential domination throughout the years 1962-1986 when the parliamentary

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261. Gerard Conac, *L'article 11 de la Constitution*, *in* FRANÇOIS LUCHAIRE & GERARD CONAC, LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 459 (2d ed. 1987), *quoted by* van Tuong, *supra* note 247, at 420.

262. J.O., 25 Sept. 1992, at 13294.

263. CONST. art. 28.

264. CONST. arts. 34 & 37.

265. CONST. arts. 41 & 61.

266. CONST. art. 49.

267. CONST. art. 48.

268. CONST. art. 16.

269. CONST. art. 68.

270. CONST. art. 7.

majority was the same as the presidential majority. Successive Presidents thus developed the questionable tradition of the *domaine réservé* within which policy on defence and foreign affairs is determined by the hierarchically superior President rather than the Government led by the Prime Minister.[271] It was no longer a question of whether the Executive took the lead, but of which individual controlled the Executive.[272]

Pétot forcibly argues that France and the EC are comparable in their "institutional imbalance at the expense of Parliament, the impotence of the opposition, and the concentration of supreme power exercised with a very great freedom, without responsibility or control."[273] Just as the "twelve co-princes"[274] are beyond competition and can deliver decisions from on high to the people of Europe, the magic circle of arrogant decision-makers who have signed a treaty expect it to be unreservedly accepted by their nations. Parliaments and electoral bodies have been turned into rubber-stamping agents in defiance of the self-evident truth that, if the power of authorities is to have a legitimate, democratic basis, the people must be sovereign.

It is generally agreed that the European Community/Union is not run on democratic lines.[275] It is also true that President Mitterrand was permitted to ratify the Treaty on European Union. This does not mean, however, that a President with failing popular support and a Government without any representative mandate[276] had managed to flout democracy within France. In the area of important treaty-making, Pétot's view would seem to be exaggerated precisely because of the complex politico-legal process in which every constitutional power known to the Fifth Republic was involved before the Maastricht Treaty could be applied to France. The process took place at a time not of cohabitation with an unfriendly Prime Minister (1986-1988), but when the President could count on the support of only a relative majority in the National Assembly

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271. CONST. arts. 20 & 21.

272. *See* Jean-Claude Zarka, *Le "domaine réservé" à l'épreuve de la seconde cohabitation*, 969 REVUE POLITIQUE ET PARLEMENTAIRE 40 (1994).

273. Pétot, *supra* note 30, at 388. *See generally id.*, at 386-90.

274. Fifteen since the accession of Austria, Sweden, and Finland on 1 January 1995.

275. *Cf.* Philip Raworth, *A Timid Step Forwards: Maastricht and the Democratisation of the European Community*, [19] 1 EUR. L. REV. 16 (1994), and, more positively, the Director-General of the Legal Service of the Council of the European Union, Jean-Claude Piris, *After Maastricht, are the Community Institutions more Efficacious, More Democratic and More Transparent?*, [19] 5 EUR. L. REV. 449 (1994).

276. CONST. art. 23.

(1988-1993). During the review of the Executive move the will of the original constituent power was clarified, the potency of the instituted constituent power was recognised, the Opposition was able to test the strength of its challenge, the entire project was extensively debated in Parliament, and the nation was consulted about the wisdom of further European integration. The Executive was certainly not able to impose its political will.

Since it was the Conseil constitutionnel which first declared the Treaty to be unacceptable, and it is the Conseil which has the power to review the constitutionality of the legislation adopted by elected representatives, it is necessary to ask whether parliamentary democracy *and* domination by an unaccountable President and his unelected Government have both been exchanged for government by politically appointed judges.[277] Since 1971 the Conseil has widened its own remit in order to uphold a broad and incompletely defined set of principles, and since 1974 the Conseil has regularly been used by the Opposition as a political weapon, as a "third chamber of parliament."[278] Are the ideals of the draftsmen of the Constitution being upheld in defiance of the will of the people in which, according to French tradition and the Constitution, national sovereignty is vested? Is the Conseil undemocratic? Hamon argues that the legitimacy of the Conseil rests not on the Rousseau ideal of majoritarian or representative democracy which defends the sovereignty of Parliament, but on the Montesquieu theory of pluralist or constitutional democracy.[279] Legitimate decisions are those which result from a complex balance of powers where the respect for fundamental rights is an integral part of the democratic principle. Since parliamentary representatives do not always act in the interest of their electors, the Conseil serves to restore sovereignty to the people by relying on the document which is the superior expression of the popular will. "Paradoxically perhaps, constitutional control introduces into the heart of representative logic an element of direct democracy."[280]

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277. CONST. art. 56.

278. Alec Stone, *Where Judicial Politics are Legislative Politics: The French Constitutional Council,* [15] 3 W. EUROPEAN POLITICS 29 (1992).

279. LÉO HAMON, LES JUGES DE LA LOI: NAISSANCE ET RÔLE D'UN CONTRE-POUVOIR: LE CONSEIL CONSTITUTIONNEL ch. 8 (1987).

280. DOMINIQUE ROUSSEAU, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES: LA VE RÉPUBLIQUE 120-21 (1992).

If the decisions of the Conseil on the Maastricht Treaty were in the interests of democracy, it must not be forgotten that these same decisions were publicly circumvented both by constitutional revision and by referendum. This would appear to have ensured that, in the ultimate test of national sovereignty, that very sovereignty was seen within France to belong to the people. Unfortunately, although legislation by referendum, the direct expression of popular sovereignty, is left unchecked by the Conseil, the people cannot call their own referendum and remain at the mercy of the President. In the event of a negative referendum result the President could also resort to legislation by Parliament. Equally, constitutional revision can be effected without the people, and even if the people could seise the Conseil of the resulting text, it is apparently unwilling to review the decision of even an instituted constituent power.

The relative position of popular sovereignty would have been reinforced if there had been time to implement the Vedel Report before the advent of "*cohabitation bis*" in March 1993. The Committee proposed a stronger Parliament, a better defined Executive, a more independent Judiciary and a citizen with more real power. More specifically the *exception d'inconstitutionnalité*[281] was to be introduced, and a referendum on a legal text could be called both on the subject of fundamental rights and at the initiative of a parliamentary minority. These proposals were not adopted precisely because of fears that parliamentary sovereignty would be further eroded.

Further constitutional reform is extremely unlikely in the short term because of the failing health of President Mitterrand and the imminence of the 1995 presidential elections. In any future challenge to national sovereignty the citizen will have to be content to rely upon the *recours pour excès de pouvoir* before the administrative courts and the good sense of the other constitutional authorities. His faith in the power of the Opposition will perhaps be outweighed by the knowledge that it is France's unelected ministers who are participating in the Council meetings of the European Union.

281. *See supra* note 102.