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THE PARTICIPATION OF PARLIAMENT IN THE ELABORATION AND APPLICATION OF TREATIES

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The French Parliament's participation in the elaboration and enforcement of treaties is extremely slight, likewise with respect to their interpretation and application. The Executive has always tended to consider international relations an area reserved to itself. The Constitution of October 4th 1958, which the French people accepted on General de Gaulle's proposal, has accentuated this tendency.

As a result, some of the questions raised in other countries, most notably the United States, raise few difficulties in France.

Three points as evidence:

In the first place, traditionally, international relations are the privilege of the Executive. The Council of State has sanctified this tradition by refusing to decide legal suits in which a private individual opposes the government over issues which concern either the negotiating or conclusion of an international treaty.¹ The 1958 Constitution emphasized this by only granting Parliament very limited powers so that Parliament intervenes only when the treaty is concluded and only in order to either ratify or reject it. There is no parliamentary power to amend a treaty.

In the second place, Parliament has no power to interpret treaties. For a long time treaty interpretation was also the Executive's privilege. Today, as a result of the terms of the European Convention to Safeguard the Rights of Man and Fundamental Liberties² and also those of the United Nations Covenant on Civil and Political Rights³, it is more and more the responsibility of the judiciary. Here again Parliament cannot intervene.

In the third place, if a law conflicts with an international treaty, the French judge has the constitutional obligation to put aside the former

* Conseil Constitutionnel.

This article was translated from the original French text by Micky Forbes, a recent graduate of the Chicago-Kent College of Law.

1. See, e.g., Decision of March 5, 1926, Conseil d'Etat, 1926 Recueil Sirey, II, No. 96 at 245 (Fr.); Decision of Nov. 7, 1945, Conseil d'Etat, 1945 Recueil des décisions du Conseil d'Etat [Lebon] 189; Decision of July 31, 1961, Conseil d'Etat, 1961 Lebon 821; Decision of Oct. 4 1968, Conseil d'Etat, 1968 Lebon 478; Decision of Nov. 29, 1968, Conseil d'Etat, 1968 Lebon 607.

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.S.T. 221.

3. Convention on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171.

and apply the latter. Parliament cannot, therefore, interfere with the application of a treaty. In short, the denunciation of an international convention, insofar as international law allows it, can only come from the Government.

However, to each of these principles, certain very limited exceptions apply. All of this, together with parliamentary practice, permits one to appreciate the exact role of Parliament in the elaboration (and putting into force), the interpretation and the application of treaties.

I. ELABORATING AND PUTTING A TREATY INTO FORCE.

Article 52 of the Constitution asserts that "the President of the Republic negotiates and ratifies treaties."

Indeed, article 53 adds that for the subjects which it enumerates certain treaties or accords can only be "ratified by virtue of a law."

But, since Parliament does not participate in the elaboration of a treaty it cannot modify its terms, nor on its own can it attach either reservations or interpretations. Parliament can only pronounce on the treaty as a whole. No doubt the government could, at the time of signing the treaty, attach certain reservations or interpretations, but the Parliament can only pronounce on the treaty as a whole. No doubt the government could, at the time of signing the treaty attach certain reservations or interpretations to an article, and these reservations might appear in an annex to the treaty and, therefore, be known to Parliament when it is attached to the enabling legislation [*projet de loi d'autorisation* = authorizing government bill]. However, these reservations might also be incorporated at the time of the ratification and, therefore, after the vote on the enabling legislation. Parliament thus might not have known of them, and might also have been unaware of reservations incorporated by other signatory states.

The rules of the Assembly themselves limit the powers of Parliament. Senate rules stipulate that, "it does not vote on the articles of the treaty but only on the government bill which authorizes the ratification."⁴ National Assembly rules specify that, "it does not vote on the articles contained in these acts and that it cannot present amendments."⁵ It adds that "the Assembly concludes by the adoption, rejection or postponement of the enabling legislation, postponement may be for cause."⁶

4. *Réglement de l'Assemblée nationale* [hereinafter *Rules of the French National Assembly*] art. 47.

5. *Rules of the French National Assembly* art. 128.

6. *Id.* Motions to postpone are unusual, and have never been adopted. Meanwhile, it could happen that, in order to avoid the adoption of such a motion, where the cause is criticism of the

Some authors think that, even if Parliament cannot amend a treaty, the Constitution does not expressly forbid amending the law which leads to its authorization.⁷

The French Government is of a different opinion. According to the Minister of Foreign Affairs, "it is for Parliament only a question in fact of giving the authorization to the Government and not a question of issuing it any injunctions."⁸ Since this opinion is shared by the President of the National Assembly⁹, Edgar Faure, and the President of the Senate¹⁰, Gaston Monnerville, the members of Parliament have not insisted otherwise.¹¹

It is true that the above mentioned rule of the National Assembly, even more than that of the Senate, forbids such amendments. However, even though the rules of each Assembly have been declared to conform to the Constitution by the Constitutional Council, the rules are not of themselves of Constitutional status.¹²

However, to attach reservations to the authorizing legislation would once again be for Parliament to issue "injunctions" to the Government, and the Constitutional Council would not permit that.¹³ It would also be to grant Parliament the power to intervene in international relations, a power which the Constitution does not recognize.

The Constitutional Council confirmed the views of the Government

treaty arrangements, the government will prefer to withdraw the enabling legislation from the agenda.

7. See Alain Pellet, *Analyse de Article 53, in COMMENTAIRE DE LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1040* (François Luchaire & Gerard Conac eds., 1980).

8. *Rapport du Sénat* [hereinafter Senate Report] (June 23, 1977) (Statement of Jean Bernard Raimond, Minister of Foreign Affairs).

9. *Rapport de l'Assemblée nationale* [hereinafter National Assembly Report] (June 14, 1977) (Statement of Edgar Faure, President of the National Assembly).

10. Senate Report (June 10, 1963) (Statement of Gaston Monnerville, President of the Senate).

11. On this point see PIERRE AVRIL & JEAN GIRGUEL, *DROIT PARLEMENTAIRE* 199-200 (1988).

12. See, e.g., Decision of July 27, 1978, Conseil Constitutionnel [hereinafter Con. const.], 1978 Recueil des décisions du Conseil Constitutionnel [hereinafter Recueil const.], No. 78-97 at 31 (Examines changes in criminal procedure for the police judiciary and the jury of assises); Decision of May 23, 1979, Con. const., 1979 Recueil Con. const., No. 79-104 at 27 (Examines an act regarding the territory of New Caledonia and Dependencies which modifies the election method of the territorial assembly and the government council; and defines the general rules of technical assistance and State financial contracts); Decision of Dec. 30, 1982, Con. const., 1982 Recueil Con. const., No. 82-155 at 88 (The act of rectifying finances of 1982); Decision of July 26, 1984, Con. const., 1984 Recueil Con. const., No. 84-172 at 58 (Law regarding the control system for agricultural exploitation and the tenant farming statute); Decision of Oct. 11, 1984, Con. const., 1984 Recueil Con. const., No. 84-181 at 78 (Act regarding the newspaper industry: concentration, financial disclosure, pluralism).

13. See, e.g., Decision of Dec. 28, 1976, Con. const., 1976 Recueil Con. const., No. 76-73 at 41; Decision of Jan. 17, 1979, Con. const., 1979 Recueil Con. const., No. 78-102 at 26 (Examines an act approving a statement for the adaptation of the Seventh plan).

and the Presidents of the Assembly in judging that it was not up to Parliament to determine in the authorizing legislation the treaty's range of application.¹⁴ All the more reason then that Parliament could not exclude from its authorization the ratification of particular articles. It cannot, therefore, add anything to the enabling legislation which is restricted to a single article.¹⁵

The authority to ratify does not carry with it the obligation to proceed with it. Moreover, it is only the authorizing bill which must be promulgated within the 15 days which follow its definite adoption¹⁶ and thus be published in the Official Journal. The treaty itself is not published yet. Indeed, for that one must wait until the Head of State has first proceeded with the ratification, which he is free to either do or not. Parliament cannot constrain him to proceed within a certain period of time. There is still a wait for the instruments of ratification to be either exchanged or deposited. But, even if the treaty already commits France with respect to other States, it is not yet challengeable in the French courts. In order for that it must have been published in the Official Journal [Journal Officiel]. Publication is determined by the President of the Republic on the day when he sees fit. Here again Parliament has no judicial means to force him to either speed up or slow down these formalities of ratification and publication.

Certainly, the National Assembly could make a motion to censure the Government but it has never done so over the execution or non-execution of a treaty. Likewise, a member of Parliament could put a question, either oral or written, to the Government to which it would be obliged to respond. However, this is only for Parliament's information and the Government's response cannot be followed by a vote.

Meanwhile two difficulties present themselves:

A more or less lengthy period of time—and more rather than less—passes between the signing of the treaty and the Government's handing down an authorizing bill. Could a member of Parliament not make the first move by submitting a proposal for a law leading to the authorization?

The French Government has responded in the negative in the afore-

14. Decision of Jan. 17, 1979, 1979 Recueil Con. const. at 14 "Considering that the territorial range of application of an international convention is determined either by its stipulations or by the statutory rules of the international organization under whose auspices it was concluded, the determination of the range of application thus does not depend on the law which authorizes its ratification."

15. This article is drafted in the following way: "Authorized the ratification of the Treaty . . . signed on . . . date . . . the text of which is annexed to the present law."

16. LA CONSTITUTION art. 10.

mentioned declaration by the Minister of Foreign Affairs of June 23, 1977.¹⁷ In this respect one could say that an authorization cannot be given unless it is asked for. Furthermore, the aforementioned rules for the National Assembly and the Senate only anticipate "government bills authorizing ratification," which is to say texts which originate from the Government, and not proposals, whose texts originate in Parliament.¹⁸

All the same, no constitutional requirement limits parliamentary initiative in this area. The only objection which one can offer is that if Parliament gave the authorization when the Government did not yet ask for it, its vote could be construed as an injunction to the Government to speed up the process. This would be for Parliament, thus, to interfere in international relations which the Constitution reserves for the Executive.

Again, for a member of Parliament to take the initiative by proposing a law to ratify a treaty, it would be necessary that there be official communication of its text. The Government would not fail to maintain its control over the elaboration of the treaty. It is its sole responsibility to determine the moment when it seems to it necessary that it be publicly discussed. A premature parliamentary discussion could disturb its international diplomacy.

The Overseas Territories (New Caledonia, Polynesia, Wallis Islands and Futuna) raise a difficulty which is reminiscent of those which are encountered in federal systems.

Does a treaty which commits France apply to them? The Constitutional Council of the French Republic reminds us that it is not up to Parliament to decide.¹⁹ It is the treaty itself which must specify whether it does or does not apply in the Overseas Territories. Absent clear indication in the treaty itself one must attempt to determine the authors' intentions. The law which authorizes the ratification can thus decide nothing on this issue.

Now, each Overseas Territory is endowed with a particular organization which cannot be altered without notice to its Territorial Assembly²⁰. Furthermore, in both New Caledonia and Polynesia the territorial organizations have powers, over some subjects, which take over from the mother country's State organizations (Parliament or Government). The

17. Senate Report, *supra* note 8 (Jean Bernard Raimond stated "Thus, Parliament does not have at its disposal the initiative of laws provided for by Article 39 of the Constitution.").

18. Rules of the French National Assembly, *supra* note 4.

19. Decision Jan. 17, 1989, Con. const., 1989 Recueil Con. const., No. 88-248 at 18, 28-29 (An act modifying Decision no. 86-1067 of Sept. 30, 1986 regarding freedom of speech).

20. LA CONSTITUTION art. 74.

laws referring to the particular organization of New Caledonia²¹ or of Polynesia²² thus stipulate that the Territorial Assembly should be consulted over Government bills which authorize the "ratification of international conventions dealing with matters within the jurisdiction of territorial power,"²³ or "within the power of the territory or the Caledonian provinces."²⁴

These powers of the Territorial Assembly are among the elements of the particular organization of the territory. As a result²⁵ a law authorizing ratification of a treaty, which is applicable in these Territories and which bears on an issue relevant to the territorial authorities, would be unconstitutional if it had not been preceded by notice to the Territorial Assembly concerned.

However, all that is required is notification.²⁶ Parliament can disregard a negative opinion, but if it follows that opinion, it cannot on its own authority exempt the territory from the application of the treaty. Parliament can only refuse to ratify the treaty which will lead the President of the Republic to renegotiate.

If Parliament passes the law authorizing the ratification without the territorial Assembly having been invited to give its opinion then the Constitutional Council will oppose the promulgation of the authorizing law, which thereby forbids the ratification of the treaty. In this case either the Government will hand down a new authorization bill after having consulted the Territorial Assembly, or else the President of the Republic will renegotiate the treaty so as to remove its application to Overseas Territories.

In sum, one perceives that for both the Mother Country and the Overseas Territories, Parliament has no more power to participate in the elaboration of a treaty than to determine its range of application and the date on which it enters into force. It can only say yes or no to the government bill authorizing the ratification of the treaty without being able to add a comma or attach the slightest reservation.

One understands, therefore, why the passage of bill authorizing the

21. Referendum of Nov. 9, 1988.

22. Act of Sept. 6, 1984, modified by that of July 14, 1990.

23. Law referring to the particular organization of Polynesia art. 68.

24. Law referring to the particular organization of New Caledonia art. 57.

25. Decision of Jan. 17, 1979, *supra* note 14.

26. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, Act of Sept. 6, 1984, modified by that of Sept. 4, 1984 and the referendum of Nov. 9, 1988. Polynesia art. 68; New Caledonia art. 57. Notice must be given within a certain period "in principle one month, and in 15 days in emergencies declared by the representative of the French Government" (New Caledonia). In Polynesia these notifications are shifted to 3 months and 1 month respectively. Past these times "notice is considered to have been given."

ratification of a treaty seems to be a simple formality to which Parliament devotes little time.

It is appropriate in this limited context to list the grounds upon which ratification of a treaty requires authorizing legislation.

Article 53 of the Constitution places in the category of treaties to be submitted to Parliament:

- Peace treaties,
- Trade treaties,
- Treaties referring to international organization,
- Treaties which commit the state's finances,
- Treaties referring to the condition of people,
- Treaties which include ceding, exchanging or adding territory,
- and in a more general way treaties which "alter arrangements of a legislative type."

This last category raises a difficulty. In effect the Constitution in Articles 34 and 37 enumerates the matters reserved to legislation, while other subjects may be regulated by governmental decree. The drafters of the Constitution had thus thought that by "arrangements of a legislative type" one should understand those which bear on the subjects reserved to legislation. One could, therefore, believe that there was no reason to stop at the verb "alter" and that treaties should be submitted to Parliament which bear on those subjects even on points which have not yet been legislated. This interpretation has logic on its side: Parliament having sole competence to legislate in these areas it ought to be obligatory that it be apprized of all treaties bearing on these same areas.

However, the Constitutional Council, since its decision of July 30 1982,²⁷ is of the opinion that a law which intervenes in an area not reserved to legislation is not for that reason in conflict with the Constitution. The law can simply be declared obsolete [*declassée*] by the Constitutional Council, by applying Article 37, paragraph 2 of the Constitution, thereby allowing the Government to alter it by decree. Thus, it seems in this way that as long as a law has not been declared obsolete by the Constitutional Council, a treaty which alters its disposition cannot be ratified without Parliament's authorization.

Finally, it is generally agreed that what justifies Parliament's power is either the existence of a disposition by an earlier law, or it is the subject on which the international engagement bears, and not the form of the

27. Decision of July 30, 1982, *Con. const.*, 1982 *Recueil Con. const.*, No. 82-143 at 57, 59 (Decision about prices and revenues).

latter. In this respect, Article 53 of the Constitution treats the treaty submitted for ratification the same way as it treats an accord not submitted for ratification through simple approval of the Executive. The so-called accords thus enter in simplified form into the range of Article 53's application when it bears on these subjects, or alters the above-mentioned dispositions.

The Constitutional Council, in a decision on December 30, 1975,²⁸ had to settle a difficulty concerning technical agreements with respect to finance. It decided in effect that these agreements²⁹ could dispense with legislative authorization in the case where Parliament had already passed a global funding of credit which ensured their performance.

This decision was much criticized however. In the area of financial procedure it was understandable because the Government is acting within the credit limits passed by Parliament. However, in the field of international relations it reduces Parliament's power once more because it could not vote on any of these technical agreements, even though in fact financial aid granted to a foreign country (in this case Chile) commits not only France's finances but also its international diplomacy.

II. TREATY INTERPRETATION

A Parliament which can only decide on a treaty with a yes or a no obviously cannot impose any interpretation upon it. Meanwhile, after the ratification (which it authorized) could it enact a law which would interpret its arrangements?

The question has never been put since the 1958 Constitution.

In fact treaty interpretation complies with other rules. For a long time there was a tradition in France: whenever a judge was confronted with a problem of interpretation of an international agreement he asked the Minister of Foreign Affairs to give him the official interpretation of the French Government. Then he would apply it. Treaty interpretation thus depended either on the judge when he felt no doubt about the meaning of the agreement, or on the Government when the judge had serious doubts.

Today however this practice has fallen into disuse for a very simple reason. It conflicts with the agreements of both the European Council and the United Nations concerning the Rights of Man. The Council of

28. Decision of Dec. 30, 1975, Con. const., 1975 Recueil Con. const., No. 75-60 at 28 (Examined the act of finances of 1976 and, notably, arts. 41-III and 47) [hereinafter Decision of Dec. 30, 1975].

29. *Id.*

State renounced the practice in its decision of June 29, 1990³⁰ and itself interprets treaties.

In fact interpreting the law, like a contract or an international agreement, is the normal fare of a judge. Now the Convention to Safeguard the Rights of Man and Fundamental Freedoms³¹ asserts in article 6: "In the determination of his civil rights and obligation or of a criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."³²

To the extent that the dispute involves the interpretation of a treaty neither the Minister of Foreign Affairs nor even the Parliament can be considered an "independent and impartial tribunal."³³

Therefore, the interpretation can only be made by the judge. Within the setting of the European Economic Community, and several other conventions concluded between its twelve members, this principle is enshrined in a procedure which standardizes the interpretation of Community texts throughout the entire territory of the Community. Indeed, according to Article 177 of the Treaty of Rome, when a jurisdiction ruling without possibility of appeal encounters a difficulty in interpreting Community law it must ask the European Court of Justice to rule on this question.³⁴ It is then bound by the decision of the Court.

Suppose, meanwhile, that a law subsequent to the entry into force of the treaty should interpret its arrangements.³⁵ If it were the Treaty of Rome this law would have no effect because—as we will see below—the judge applies the treaty even if there is a law which conflicts with it. The judge would thus be led to ask the European Court of Justice its interpretation by application of Article 177 of the Treaty of Rome.

If it involved an international agreement other than those of the European Community the answer to this question would be more complicated. In fact, either the interpretive law seems to the judge to conflict with the treaty and so he applies the treaty and not the law, or the interpretation does not conflict with the treaty and the judge considers it a step facilitating the execution of the treaty by specifying its meaning and he will consequently apply it. However, naturally this strictly French

30. Decision of June 29, 1990, Conseil d'Etat, 1990 Lebon 171.

31. *Supra* note 2.

32. *Supra* note 2, art. 6, at 228.

33. *Id.*

34. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 177, 298 U.N.T.S. 11, 76-77. (If it is not ruling without possibility of appeal, it may refer it to the Court of Justice.)

35. This is a merely academic exercise since it has never happened.

interpretation has no force in the international order and thus does not apply to other countries. According to the well-known rule, a country's domestic law is for other countries and for international jurisdictions merely a fact and not an obligation.

Finally, it often happens that in responding to parliamentary questions the Government makes known its interpretation of such and such a treaty already in force. This gives Parliament useful information but this interpretation does not bind the judge at all. The Council of State has in effect decided that in no case do governmental responses to parliamentary questions constitute a legal rule which an individual could invoke at law.³⁶

By contrast, the interpretation which the Government can be lead to provide at the time of the parliamentary debate on the law authorizing ratification can give the judge an important clue about the intentions of this treaty's authors. Thus, in this way, this interpretation can weigh in the decision of the judge who, when he asks himself about the meaning of a term in the treaty, intends to refer to the intentions of its authors. This is, therefore, a way (rather indirect and of limited effect) for Parliament to get an interpretation of the treaty which suits it.

III. TREATY APPLICATION

Can Parliament object to the application of a properly ratified and published treaty?

The answer is a resounding no.

Article 55 of the Constitution reads: "treaties or accords properly ratified or approved have, from the moment of their publication, a superior force to legislation (for each treaty or accord), subject to its application by the other party."

The Constitutional Council has on several occasions recalled this primacy of treaties over legislation. Notably, it criticized a legislative arrangement which restricted the extent of this primacy.³⁷ Moreover, it has considered that this extends to derived law, that is to say to the rules established by international bodies in compliance with the treaties that established them.³⁸

36. Decision of Nov. 2, 1955, Conseil d'Etat, 1955 Lebon 515.

37. Decision of Sept. 3, 1986, Con. const., 1986 Con. const., No. 86-216 at 135 (Act regarding the conditions of entry and visitation of foreigners in France).

38. See, e.g., Decision of Apr. 29, 1978, Con. const., 1978 Recueil Con. const., No. 78-93 at 23 (Examines the act which authorizes an increase of the French quota for the International Monetary Fund); Decision of Dec. 30, 1977, Con. const., 1977 Recueil Con. const., No. 77-89 at 46 (Examines the Financial Act of 1978 and, notably, articles 1 and 38, as well as state appendix A.).

For the Constitutional Council control over the conformity of law with treaties is different from control of the conformity of law with the Constitution. This is why the Council only proceeds against the latter and not the former.³⁹ However, it invites other jurisdictions to apply the treaties (decision of September 3, 1986)⁴⁰ and thus to set aside laws which conflict with them. The Supreme Court of Appeal (decree of May 24, 1975)⁴¹ and more recently the Council of State (decision of October 20, 1989)⁴² have accepted this invitation and were thus led to apply the treaty despite a conflicting law whether it be prior or subsequent to the treaty. The Constitutional Council does the same thing when it rules on the regularity of an election, because in this case it is, like all other jurisdictions, judging legality and not constitutionality.

To these rules it is proper to apply an exception because the above mentioned Article 55 of the Constitution asserts that the superiority of treaties over laws is "for each treaty or accord, subject to its application by the other party."

Consequently, if a country which has co-signed a treaty with France does not apply the treaty then Parliament can pass a law which conflicts with it. This is the application of the old adage, the exception does not fulfill the contract (*exceptio non adempti contractus*). But, such a law is only conceivable to the extent that this exception is admissible. We know, following the Vienna Convention, that with respect to the application of the Human Rights Conventions it is not admissible because these afford as much protection to the nationals of a signing party as to its partners.

One should also consider that an exception can only apply to bilateral treaties or legal treaties. For example, the fact that a state does not apply a convention concerning patents does not allow other signatory states to excuse themselves from applying it.

In this respect, especially within the European Community, the exception for non-reciprocity cannot be invoked. In effect the Court of Jus-

39. See Decision of Jan. 15, 1975, Con. const., 1975 Recueil Con. const., No. 74-54 at 19 (Examines the act regarding abortion); Decision of July 20, 1977, Con. const., 1977 Recueil Con. const., No. 77-83 at 39 (Examines the act modifying article 4 of the financial amendment act of 1961 concerning the obligation of service of civil servants); Decision of July 27, 1978, Con. const., 1978 Con. const., No. 78-96 at 29 (Examines the completing act of August 7, 1974 regarding radio and television broadcasting).

40. See Decision of Sept. 3, 1986, Con. const., 1986 Recueil Con. const., 31 [hereinafter Decision of Sept. 3, 1986].

41. Decision of May 24, 1975, Cours d'appel, 1975 Recueil Dalloz-Sirey, *Jurisprudence*, 497.

42. Decision of Oct. 20, 1989, Conseil d'Etat, 1989 Lebon 190.

tice, whose role in standardizing the interpretation of Community law we have already seen, has the power to compel the execution of this law.

The power of the Executive resurfaces with respect to the non-application of a bilateral treaty to which France is committed by a foreign country. Indeed, the internal/domestic judge is not well placed to determine whether a foreign country is or is not applying a treaty. In these circumstances the Council of State suspends ruling until the Foreign Minister has made it known whether the country involved in the case is applying the treaty or not. The judge then derives from the Foreign Minister's reply the consequences he considers necessary.

Can this finding that a foreign country is not applying a treaty be made by Parliament?

Certainly not! It would in effect be interference by the Assembly in international relations. All that Parliament could do is pass a law contrary to the treaty which the judge would apply or not depending on the answer the Foreign Minister gives to the preceding question.

Parliament's lack of competence to oppose the execution of a treaty should be tempered by two considerations.

In the first place, even though a judge has the possibility and even the obligation to set aside the law, he does not like to do so. Largely using his powers of textual interpretation the judge tries as much as possible to give the law a meaning which makes it compatible with the treaty.

In the second place, when it comes time for Parliament to vote on the budget it can always refuse the funding necessary to execute the treaty. However, this possibility is limited within the context of the European Community by the Constitutional Council's above-mentioned decision of December 30, 1975.⁴³ It effectively decided that Community rules "are obligatory in all their elements and are directly applicable in the member states,"⁴⁴ and consequently when these rules determine the base and the rate of fees imposed on certain businesses it is no longer up to Parliament to make the determination. This is, however, a situation peculiar to the European Community.

Meanwhile, one can ask what the Constitutional Council would do if faced with a law cutting off the funding necessary for the execution of a treaty. It is understood that it is unnecessary to resist a law which conflicts with a treaty because the judge will not apply such a law. The situation is obviously different in the case of a refusal of funding essential

43. Decision of Dec. 30, 1975, *supra* note 28, at 46.

44. Decision of Dec. 30, 1975, *supra* note 28.

for France's international commitments. The Constitutional Council is critical of laws which create the defect of a "negative incompetence", which is to say do not include the "legal guarantees for needs of a constitutional character."⁴⁵ To the extent that, "it belongs to the various organs of government to oversee the application of these international agreements within their respective competence,"⁴⁶ a law which denies the funding necessary for this application may appear contrary to the Constitution.

The denunciation of a treaty is also not dependent on the powers of Parliament.

Its lack of competence in this regard is even greater than in the elaboration of a treaty.

In fact, when denunciation is not forbidden, or limited for the time being, by the treaty itself, denunciation can be freely accomplished by the Executive without having to ask for authorization from Parliament. Thus, Parliament which is competent to authorize the ratification of certain treaties is not to intervene in order to authorize their denunciation.

This is a novelty introduced by the Constitution of 1958, because the previous Constitution—of 1946—required this authorization except for the denunciation of trade treaties.⁴⁷

Doctrine explains this lack of parliamentary power by the fact that since 1958 it has only had allocated powers. However, it is most certain that the authors of the Constitution of 1958 were aware of the effects of their silence concerning the denunciation of trade treaties.⁴⁸

IV. THE ROLE OF PARLIAMENT.

What then can Parliament do in the sphere of international relations?

What remains are all the techniques of the parliamentary system to which are added certain practices which depend, however, on the good will of the Government.

Members of Parliament can:

45. See Decision of July 29, 1986, Con. const., 1986 Recueil Con. const., No. 86-210 at 110; Decision of Sept. 18, 1986, Con. const., 1986 Recueil Con. const., No. 86-217 at 141.

46. Decision of Sept. 3, 1986, *supra* note 40.

47. It is true that under the 3d Republic (Constitution of 1875) the government was in practice acknowledged to have the discretionary power to denounce treaties.

48. Indeed General de Gaulle's representative declared that if trade treaties were included among treaties which require authorization for ratification, then it must be specified that the government is free to denounce these trade treaties. Afterwards silence was kept about denunciation. On this point see the discussion before the Constitutional Council, Documentation Francaise, 2 DOCUMENTS TO ASSIST IN THE HISTORY OF THE ELABORATION OF THE CONSTITUTION OF 1958, at 132.

- introduce a proposal for a law authorizing the Government to ratify a treaty which the Government is tardy in submitting. Even though, as has been mentioned, the Government does not acknowledge that they have this power;
- ask all useful questions, but only for Parliament's information, concerning international relations;
- "audition" the government via the commissions responsible for foreign affairs;
- introduce (only in the National Assembly) a motion of censure criticizing the Government's foreign policy and obliging the Government to resign. That is obviously, if the censure passes.

The Government may seek—and often does seek—to associate Parliament in its foreign policy. In this regard several recent practices should be noted.

In the first place the Government has adopted the habit of communicating to the Foreign Affairs Commissions of both Houses the list of treaties or agreements that France has concluded. A commission can ask for the texts, and not only is this communication useful for Parliament's information, but it also allows members of Parliament to check whether these treaties should be submitted to Parliament, and may apply pressure on the Government because the commissions put the treaties to the Assemblies, or even introduce proposals for authorizing legislation.

In the second place, the parliamentary left, when it was in opposition always protested when the Government did not communicate the reservations which it proposed to attach to the ratification. Once in power the left has nearly always made known to Parliament these reservations.

Thirdly, at the time of the debates over the authorizing legislation, members of Parliament can "advise" the Government to attach certain specific reservations to the ratification. The Government will take note of this "advice" either for political advantage, or simply because the reservation are clearly justified. Thus it happens that at the time of the debate the Government undertakes to formulate the reservations proposed by members of Parliament.

Fourthly, when the Government has to take a particularly serious decision it may wish to "soften" Parliament by associating it in its decision taking. This was the case, for example, with the France-Germany Treaty of January 22, 1963 which bore on none of the issues enumerated in Article 53 of the Constitution. For the same reason the Government wanted a vote in both Houses on January 16, 1991 at the time of its

decision to participate in the military operations to liberate Kuwait. Certainly, Article 35 of the Constitution stipulates that "declaration of war is authorized by Parliament." France however, never considered itself legally [juridically] at war with Iraq, it was participating in an international police operation authorized by the United Nations Security Council. The President of the Republic, Commander-in-chief of the armies,⁴⁹ has no need for authorization from Parliament to give them orders to intervene.

Nonetheless, in order to get Parliament's agreement, the Government used Article 49 of the Constitution. By virtue of the lead paragraph of this article it committed its responsibility before the National assembly with a "declaration of general policy." By virtue of the last paragraph of the same article it asked the Senate to approve a declaration of general policy.

However, none of the procedures which have just been cited in this section are required of the Government, and they do not constitute binding precedent. The French Constitution is written, and no rule resulting from custom can bind the power of the Executive.

A recent and particularly interesting example of Parliament's intervention in the elaboration of an international convention can be given by what is known as the Schengen accord.⁵⁰

On June 14, 1985 government representatives of certain member states of the European Community (France, Belgium, Netherlands, Germany, Luxembourg) signed agreements at Schengen, a small town in Luxembourg, leading to the gradual suppression of border controls at their common frontiers.⁵¹ This very discreet agreement was not submitted to the French Parliament since it only defined goals and enacted no positive regulations. After four years of discussion, on June 19, 1990, in the same town, the same governments signed a document entitled "Convention d'application de l'accord de Schengen."⁵² Subsequently, they signed an agreement with Italy which granted it admission to the aforementioned convention. Both this and the admission accord became the object of two government bills authorizing their ratification.

The Council of State, when asked for an opinion as required by arti-

49. LA CONSTITUTION art. 15.

50. Schengen Agreement on the Gradual Abolition of Checks at Common Borders, June 14, 1985, 30 I.L.M. 68 (1991).

51. *Id.*

52. Convention Applying the Schengen Agreement on the Gradual Abolition of Checks at Common Borders, June 19, 1990, 30 I.L.M. 68 (1991).

cle 39 of the Constitution, gave a favorable opinion on May 23, 1991.⁵³ However, in so doing it gave a very specific interpretation—which was confirmed by the Government—of one of the Convention's arrangements. One which in effect instituted an "Executive committee" endowed with normative powers. The Council of State affirmed that the decisions of this committee could not have direct effect on the territories of the contracting parties without violating the French Constitution.⁵⁴

At the National Assembly the accord generated a certain amount of feeling in the ranks of the opposition. Did the abolition of border control at the frontiers separating France from the other countries of the European Community not risk facilitating both drug traffic and illegal immigration? What would become of Customs' personnel and of the Air and Frontier Police? How would Parliament be informed of the application of the Convention?

The opposition demanded a solemn declaration from the Government on all these points, to be added to what it would say before the Assembly. The Prime Minister, Edith Cresson, believed that she was satisfying the demand by addressing a fairly detailed response to Mr. Charles Millon, President of the U.D.F. Party in the National Assembly on June 8, 1991.⁵⁵ However, while the latter would have liked to install a "French parliamentary observer of Schengen," the Prime Minister thought it simpler to "let the national representatives determine the most appropriate terms and conditions within the framework of existing procedure." In the Senate, the reporter, Mr. Paul Masson, thinks that the negotiations at Schengen have been conducted in such a discreet fashion "that Parliament was presented with a *fait accompli* and that it would, therefore, be difficult to decide with any degree of calm."⁵⁶ Examining the Constitutional problem he declared that the powers conferred on the Executive Committee of the Schengen Accord were contrary to the Constitution. Finally, he got the Senate to create a Control Commission, of which he is today the president, which is charged with tracking the execution of the Schengen agreements.

However, the creation of this commission is as a sword striking water, since in fact, like all inquiry commissions the Control Commission cannot function for more than six months. It must, therefore, finish its

53. The judgment has not been published but was discussed in parliamentary debates.

54. *Id.*

55. Letter from Edith Cresson, Prime Minister of France, to Charles Millon, President of the U.D.F. Party (June 8, 1991) (unpublished in author's files).

56. Parliamentary debates.

work in December 1991, even though the Schengen accords will not have begun to apply by that date.

The law authorizing the approval of these accords was submitted to the Constitutional Council by 64 deputies who reproached them for violating French sovereignty. Curiously enough they did not resort to questioning the constitutionality of the Executive Committee provided for by the accords. However, the Council automatically raised this grievance only to reject it by giving what one calls a "neutralizing interpretation" of the arrangement in question.⁵⁷ Like the Council of State they in effect judged that no stipulation of the Convention gave this committee's decisions a direct effect, and that "the measures taken by the French authorities, following any decisions of said committee, would themselves be under the control of French jurisdiction."⁵⁸

This decision of the Council prompts several observations:

In the first place, this is the first time that the Council officially raised a grievance in order to reject it. Until now it had only officially raised grievances which it sustained. This departure is useful because it allows it to give a neutralizing interpretation to a questionable arrangement.

In the second place, if the Constitutional Council proceeded in this way, it is because it was alerted not only by the opinion of the Council of State, but also by the parliamentary debates and notably by the intervention of Senator Paul Masson. One sees in this way that parliamentary debate can have an influence, although not directly on a treaty whose approval is submitted for parliament's authorization, but on the interpretation which the Constitutional Council is led to give it.

In the third place, is the Constitutional Council's interpretation essential? In the international order certainly not. Senator Paul Masson feared as much and with reason since an interpretation by a French jurisdiction, even of the level of the Constitutional Council, is not binding on judges from other countries.

Does it bind a French judge? Certainly, according to Article 61 of the Constitution the decisions of the Constitutional Council are binding on all authorities both administrative and judicial, but what does its decision mean? That an interpretation other than its own will render the treaty contrary to the Constitution. However, a judge—other than the Constitutional Council—is not the judge of the constitutionality of legis-

57. Decision of June 23, 1991, Con. const. no. 91-293; reprinted in François Luchaire, *Commentaire à la Décision de Juin 23, 1991*, 1991 REVUE DE DROIT PUBLIC 1514.

58. *Id.*

lation, even less of international conventions. One cannot, therefore, discard an international convention on the pretext that it is interpreted in a manner contrary to the Constitution. In contrast, one can argue that, in the decision of the Constitutional Council, what binds the judge is not only the unconstitutionality of a particular interpretation, but the conforming interpretation itself. This is as much true as that a text should be interpreted in the manner most suited to the subject matter⁵⁹ since it is obvious that the interpretation which renders a text consistent with the Constitution is the one which is most suited to the subject matter.

One ascertains in this manner that even if members of Parliament cannot impose on an international convention the interpretation of their choice, they can, very indirectly, get from the Constitutional Council the interpretation which is consistent with the Constitution. For want of either reservations or interpretation based on opportunity there remains to them the constitutional route.

The powers of the French Parliament seem very weak in comparison to those of the United States Senate. If the latter disposes of perhaps too much, the former seem to be wanting.

This double result comes from failure to adapt the competence of institutions to the evolution of society and relations between nations. The United States Senate received power over the subject of international treaties, not so much as a legislative Assembly, but as assistant, in the name of the federation of States, to the President of the United States. At issue were treaties which concerned individuals only very indirectly. Today many treaties which are submitted to it bear on issues which are the object of legislation and which thus concern the lives of private individuals. Consequently, it would be much more normal that their approval be the work of Congress ruling according to its normal procedure.

As to the French Parliament it is witnessing the progressive erosion of its legislative competence first, as a result of the expansion of Community legislation, and then, as a result of the increase in multilateral conventions.

Does the slight role of Parliament in the elaboration, interpretation and execution of treaties fit with the requirements of democracy.

Many doubt it.

A distinction could be made between treaties: some of them concern State to State relations, which one conceives to be an area reserved to the Executive, and where Parliament, having simply the power of

59. CODE CIVIL art. 1158.

political control, complies with the principles of the parliamentary system. However, other treaties contain laws, in the material sense of the word. These treaties will replace domestic law, it would, therefore, be more normal for the Legislature to contribute to their elaboration.

The Constitution of 1958 makes no such distinction.

For General de Gaulle who wanted this Constitution, if not in its details at least in its fundamental principles, Parliament's role in international affairs could never be more than secondary. His successors have made a very good adjustment to it, including President Mitterrand who did not approve of the Constitution. Today, however, he feels that Parliament is too stifled!

