

A Conservative Constitutional Council Watching over a Conservative Constitution

Thomas Perroud

2023-04-26T20:44:11

On 14 April 2023, the French Constitutional Council handed down its decisions on the constitutionality of the controversial [pension reform](#) and on the [referendum](#) that was supposed to stop it. In substance, the decisions were met with little surprise. What is noteworthy about them, however, is something else: Both decisions are excellent indicators of the profoundly conservative nature of the French Constitution and of the judges watching over its observance.

Why the pension reform is so unpopular

The bill to raise the retirement age from 62 to 64 was decreed on 23 January 2023 by the Council of Ministers and signed into law on the 14th of April. Within three months, the government pushed through a reform that an overwhelming majority in the French society is vehemently opposed to. It is not the purpose of this text to discuss the merits of the reform. However, some elements of context on the situation of the labour market are important to have in mind to understand this fierce opposition. As the activity rate of the French workforce after 55 is one of the lowest in the European Union, increasing the retirement age means mostly unemployment for those that are laid off after 55, particularly men, and therefore a lower pension. Therefore, according to Nobel Prize laureate and world specialist of poverty studies [Esther Duflo](#), the savings the government aims to achieve are paid for, first of all, by „those who are by definition the poorest“. The French society was unable to stop the reform in Parliament or on the street, which is why all efforts concentrated on the Constitutional Council and on a proposal to hold a referendum on the issue, which also has to be cleared by the Constitutional Council.

Probably the most striking thing about these decisions is the way in which they reveal the democratic and social poverty of the French constitution of 1958. Its predecessor, drafted after WWII, was a progressive, democratic and social constitution in the line of many constitutions adopted at that time, rich in fundamental rights. The Constitution of the Fifth Republic that replaced it puts the state and, within the state, the executive at the centre. At its inception, the Constitutional Council was not envisaged as a counter-power in the hands of individuals but, to use the expression attributed to prominent public law professor [Charles Eisenmann](#), as a “gun pointed at Parliament”. The 1958 constitution, unlike most other democratic constitutions, contained no catalogue of fundamental rights until, in 1971, the Constitutional Council filled that gap to some extent by judicial decree as opposed to a democratic procedure. To this day, the democratic principle, cardinal in German constitutional law, plays no role whatsoever in France.

In France, the question of truth is not a constitutional question

Several elements stand out in the decisions: the Court is indifferent to the fact that the Government gave wrong estimates of the consequences of the reform for certain categories of people and is unmoved by the combined use of all the legal tools possible to shorten parliamentary debates.

In the middle of the rise of populism and the post-truth era, the executive in France has no obligation to objectivity, and the constitutional judges, who should protect the democratic debate based on reason, do nothing about that. For the French Constitutional Council, the question of truth is not a constitutional question.

With this, the Council indicates that the French Constitution has no bearing on the quality of democratic debate. If one compares this with the great Hartz IV decision of the German Federal Constitutional Court in 2010 (BVerfGE 125, 175), there is an interesting contrast. In this decision, the FCC considered the amount of social benefits for adults and children calculated by Parliament to be unconstitutional, as it was not based on sufficiently sound statistical assessments. The legislator had thus relied on „arbitrary estimates“ (§ 171). While not completely rejecting the statistical methods used, the Court considered that it did not apply this method in a sufficiently consistent manner throughout the text. In other words, where the Council is indifferent to the way in which the government feeds the democratic debate, the German Court is protective, in the name of the fundamental right to a guaranteed minimum subsistence income and the principle of the social state, of a vision of democracy as a 'space of reasons' ([Claudine Tiercelin, Cour au Collège de France, 2011](#)).

According to the Constitutional Council, democracy in this country can only be executive. The government is not obliged to carry out a debate based on facts and evidence, it can use any means to pre-empt the discussion. In fact, the government used all the resources of the Constitution to do exactly that.

The MPs who challenged the law, as well as most amicus briefs, developed the idea that the combined use of all these devices amounted to a breach of the principle of “clarity and sincerity” of parliamentary debates, a principle that was [created by the Constitutional Council](#) itself but that never had any bite. Here, the Council refused to uphold the claim.

The Constitutional Council is not – in fact never has been – a protector of democratic debate. It is not there to correct the inequality of power between the executive and the legislature. How, under these conditions, can we have good laws if they only reflect the preferences of a minority of the population that voted for the President of the Republic in the first round of the presidential elections?

The decision on the pension reform is therefore shocking from a democratic point of view, and all the more so because the reasoning is so poor. And this is perhaps where the truth of power in France lies: that it does not even need to explain itself.

Whereas the decisions of equivalent courts in Germany, the United Kingdom, Italy, Spain, the United States, and Europe (the European Union and the Council of Europe) are all concerned with making themselves understood, with explaining the exercise of their power and gaining acceptance for it, French judicial power is not even concerned with any of that at all. In no other equivalent democracy, this would be acceptable.

A gun pointed at society

The second decision by the Constitutional Council was about the referendum the MPs intended to initiate after they had realized their defeat. A referendum of that kind has to be cleared by the Council before taking place. Its introduction in the Constitution in 2008 was a conservative project. Such a referendum „may be held on the initiative of one fifth of the members of Parliament, supported by one tenth of the electors registered on the electoral rolls“ (article 11, § 3). 185 MPs out of 925 must sign the proposition. Article 11 also provides that the bill must relate to the specific domains: „the organisation of public powers, reforms relating to the nation’s economic, social or environmental policies and the public services that contribute to it.”

The requirements for such a referendum, according to the Constitutional Council, are not met in this case. In this decision, the Council endorsed the government’s reasoning that the proposal did not concern a “reform” within the meaning of the Constitution, since it merely enshrined the state of the law, even though this state of the law was to change a few hours later. A proposal for a referendum should aim at changing the law according to the Constitution. However, at the time of the decision of the Council, the proposal changed nothing since the law reforming pensions was not in force yet. That’s why the Council chose to make both decisions at the same time... If the Council had decided to make its decision on the referendum one day later, when the pension reform was in force, it would have been accepted. The institution is, once again, deaf to the interest of promoting the collective deliberation on the retirement age. A new proposition of referendum is to be presented soon. Whether or not it will pass the Council remains to be seen.

Does the sociology of the Council help to understand these decisions? Is it not ironic that Emmanuel Macron’s reform is accepted by an institution in which Alain Juppé, who had failed to implement the same project, is sitting?

The Constitutional Council comprise more politicians than Juppé. Only two of them are from the left. One of its members has himself attempted to enact a similar reform, two others have been ministers under the presidency of Emmanuel Macron. The outcome was therefore quite predictable and shows that the Council is not only a gun pointed at Parliament, it is now above all a gun pointed at society.

