Is France Desacralizing its Constitution?

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On October 29, 2023, President Emmanuel Macron made a significant announcement on X (formerly Twitter): "In 2024, the right of women to choose abortion will become irreversible". The statement marked the President's intent to successfully conclude his new project aimed at amending the Constitution. The objective is to enshrine in the Constitution that "the law establishes the conditions under which women have the freedom, guaranteed to them, to resort to voluntary termination of pregnancy".

The combination of these two elements – the President's message and the adopted text – represents a striking paradox rooted in a reality marked by a contest of constitutional innovations. Two major problems arise in this context. The first relates to the normative value of the Constitution in its formal sense, where all hopes and faith are vested. A right or a freedom would be better safeguarded because it now holds constitutional value. Even more so, they would be *supraconstitutional* for the ages to come. Yet, claiming that a freedom is "irreversible" is as naïve as it is dangerous. The second problem involves an inflation of constitutional revisions. The consequence is a diminishing normative relevancy of the Constitution, which is then conceived as a normal text that should encompass everything. In a material sense, it is reduced to an inventory of provisions that could easily be included in ordinary legislation. Ultimately, the Constitution is stripped of its privilege: in attempting to revitalize it, the constituent power may inadvertently extinguish it.

Inflation of constitutional laws

From 2002 to the present day, hundreds of constitutional bills have been proposed by delegates in Parliament, with forty of them being introduced within a year following the renewal of the Assemblée Nationale after the 2022 legislative elections. Each bill contains unique and far-reaching provisions. For example, a proposed constitutional law "relating to the sovereignty of France, nationality, immigration and asylum" suggests that "no one may become French unless he or she can prove assimilation into the French community"[1]. Other proposals state that "the Republic shall ensure the reasoned use of natural water resources"[2]; that "the French Constitution takes precedence over international treaties and agreements, including European Union standards"[3]; that "the languages of the Republic are French and French sign language"[4]; and that the Republic "shall protect the dignity of the human person and his or her living conditions[5]". None of these proposals succeeded, either because they were rejected by a majority vote by Parliament at the first stage of the procedure or because priorities changed and the process never

came to an end. And yet, these proposals are not insignificant. They illustrate a shift within secondary constituent power, which no longer perceives the Constitution as a sacred text, the supreme standard of the French legal order, but as a wish list, and as an object of political communication subject to trivial media considerations. Professor Guy Carcassonne captured this problem perfectly when he wrote that “any subject on the evening news is virtually a law”[6)]. Unfortunately, such reasoning can now be applied to constitutional law, too.

This situation is quite paradoxical as the Constitution of the Fifth Republic was initially designed to be “rigid” to ensure that its amendment would not be similar to that of ordinary law, thereby providing stability to the new regime. In order to amend the Constitution, a special procedure must be respected. Article 89 reads as follows:

> *“The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution. A Government or a Private Member’s Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.*
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> *However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly”.*

The Constitution as a communicational instrument

Despite the “rigidity” of this procedure, Élodie Derdaele commented on its evolving status that the Constituent is often too emotional and, therefore, more prone to use the Constitution as “a tool for political communication”[7)]. Naturally, as a living instrument, the Constitution should not be set in stone. It has evolved considerably, as other texts such as the Declaration of the Rights of Man and of the Citizen have been conferred a constitutional value equivalent to that of the 1958 Constitution, thereby forming a constitutional corpus with it. The Constitution has also been amended twenty-four times since its enactment, not to mention the decisions made by the Conseil constitutionnel, all contributing to its living nature. On the other hand, however, overburdening this supreme norm could lead to a normative race to the bottom.

From the examples cited above, it is possible to identify several categories of proposals for constitutional amendments. There are purely *political* proposals, the aim of which is to draw attention and debate, knowing that the revision will not reach its conclusion. There are also *cosmetic* proposals whose purpose is to add text without any real normative value to the Constitution. Lastly, there are *fundamental*

proposals which aim to alter the Constitution's content, whether by modifying the separation of powers or by enshrining rights and liberties. Such proposals appear legitimate because, in this case, the true meaning of the Constitution is respected. The process of constitutionalizing women's right to abortion is an example of a *fundamental* proposal.

And yet, even though Macron's announcement is undoubtedly a legitimate form of constitutionalization, this proposal, unfortunately, has a rather symbolic dimension. In response to the backlash of the Dobbs[8)] ruling by the US Supreme Court, numerous proposals to amend the Constitution have emerged to ensure that the right to abortion, currently provided for by ordinary law in France, would not be abolished. Rather than examining the reasons underlying the decision or the idiosyncrasies of the American system, the *Assemblée nationale* opted for a hasty reaction, resulting in a significant number of constitutional bills.

This surge of constitutional bills, under the guise of enhancing the protection of the right to abortion, does not represent an appropriate legal response to this social concern. Rather, it serves as a political tool where the constitutionalized right becomes a quick proof of success for the dominant political party, seeking to boost its popularity while portraying itself as a champion of freedom.

A closer look at the adopted text reveals this. The place and choice of words in the Constitution carry decisive value. Article 34 of the Constitution, which gives the legislator the exclusive power to regulate civic rights – and therefore to limit them – would be supplemented with the following text: "the law determines the conditions under which the freedom of women to have recourse to an abortion, which is guaranteed, is exercised". The term "freedom" is inherently problematic. As Jean Rivero wrote: "Freedom is a power of self-determination, by virtue of which Man himself chooses his personal behavior"[9)], and the author went on to point out that "freedom also poses a series of social problems. Society, to a large extent, determines Man's exercise of his power of choice, either by forcing him to behave in certain ways, or, more subtly, by nudging him so as to make the exercise of freedom impossible, or even, at the limit, by suppressing the desire for it"[10)].

Abortion undoubtedly raises numerous social issues. If the executive branch adopts the draft revision, it will have to resort to Parliament convened in Congress[11)] rather than a referendum. The reluctance – and hypocrisy – of the French government and delegates are evident in the version adopted by Parliament after the Senate had amended the provisions. If the constituent had sought to enshrine and guarantee a woman's freedom to have an abortion, it would have referred to a "right to" (implying a positive obligation of the State) instead of a mere "freedom of", as was the case in the first version proposed by the Assemblée. As a consequence, this attempt at constitutionalizing a woman's freedom to have an abortion is marred by two illusions: first, the alterability of the supreme text. What can be done can also be undone; and second, that constitutionalization equates to providing material means for a woman to have an abortion. It is important to understand that the question is not whether to grant women such a right, but how to achieve this in a manner

that it can be made equally accessible and exercised under the best possible conditions. This right has become increasingly important and widely recognized in French society, with a majority of the French population not opposing its exercise[12]. However, this does not mean that this support will last forever. If the amendment is accepted, it will certainly have some impact. The protection currently provided to this right under national and European law is relative. Constitutionalizing this right would undoubtedly offer it enhanced, albeit not absolute, protection. However, the implementation must be done appropriately. Regrettably, the proposed amendment does not meet this criterion.

The future of an ill-used Constitution

This political instrumentalization, along with the inability of the Constitution to guarantee permanent and effective access to abortion, reveals a number of legal weaknesses. In the secondary constituent's mind, what matters most is no longer assigning constitutional value to a right or freedom. It seems as though mere speech and goodwill are deemed sufficient to elevate a norm within the hierarchy automatically. This also raises questions about the value attributed to the Constitution by the secondary constituent power itself. If all norms were to become supreme, then being supreme would actually become the norm. Finally, the inflation of proposed amendments bears witness to the dissonance and divisions that the French people are experiencing, despite being governed by a Constitution that enshrines a set of values that should be shared by all. Unlike beauty pageants, which repeatedly highlight how fragmented, contingent, and contested the concept and meaning of beauty are, constitutional reforms and the pursuit of greater freedom follow a different logic. Delegates and governments should refrain from blind and unconditional support for drafts proposed by their party when such additions to the constitution are at stake. As beauty is in the eye of the beholder, constitutional fitness should not be subject to political salience.

References

- Proposition n°1322 relative à la souveraineté de la France, à la nationalité, à l'immigration et à l'asile.
- Proposition n°1187 inscrivant la préservation des ressources naturelles en eau dans la Constitution, afin d'assurer une eau potable en quantité et en qualité suffisantes pour les générations futures.
- Proposition pour une Constitution suprême, garante d'une nation souveraine (Sénat).
- Proposition n°606 visant à inscrire la langue des signes française dans la Constitution.
- Proposition n°268 visant à garantir le droit à la vie digne.
- G. Carcassonne, « Penser la loi », Pouvoirs, n° 114, 2005, p. 40.
- E. Dardaele, "La Constitution entre norme et symbole, réflexions sur le constitutionnalisme contemporain".
- Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ [2022]

- J. Rivero, Les libertés publiques. T. 1., Les droits de l’homme, Paris, Puf, 1973, p. 14.
- Ibid.
- As exemplified by article 89 of the Constitution.
- According to recent polls, 80% of the French people would like the women’s right to have an abortion to be enshrined in the Constitution. See https://www.jean-jaures.org/publication/les-francais-veulent-ils-constitutionnaliser-le-droit-a-lavortement-en-france/.