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Implications of the Conseil Constitutionnel's Immigration and Asylum Decision of August 1993†

INTRODUCTION

During its 1993 spring session and additional extraordinary session in July, the French Parliament adopted several new laws relating to immigration.¹ These laws were introduced by Charles Pasqua, the Interior Secretary for France's right wing political party, Rally for the Republic (RPR), a politician who has stated that his "aim is zero immigration."² Specifically, the legislation encompassed three areas of law: one relating to the entry, reception, and stay of foreigners in France; another reforming the nationality code regarding marriages of convenience; and the third tightening control of identity papers.³

The controversy surrounding the adoption of stricter immigration and asylum laws escalated when the Conseil Constitutionnel (Conseil), the body responsible for judicial review of legislative acts, struck down eight of the bill's fifty-one Articles in its *Immigration and Asylum* decision of August 1993, reasoning that those Articles deprived foreigners of basic rights guaranteed by the French Constitution.⁴ By examining the Conseil's *Immigration and Asylum* decision regarding the new immigration and asylum legislation, this Note attempts to evaluate the Conseil's increasing role as the protector of individual rights and freedoms. Part I presents an overview

† The author would like to thank Professors Daniel Kanstroom and Michael Ansaldi for their time, ideas, and helpful critique. Translations of the August 13, 1993 Conseil decision, as well as French newspaper articles and legal commentary, were completed by the author.

¹ *The Political Scene: Immigration questions have been to the fore*, Bus. Int'l Country Rep., Aug. 1, 1993, available in LEXIS, News Library, Curnws File. For purposes of this Note, Government refers to the executive branch, consisting of the President and the Cabinet of Ministers. Parliament and the legislature refer to the legislative branch. Finally, government without a capital "G" refers to the combination of the executive and legislative branches.

² Sean Mac Carthaigh, *France: Paris Splits Over Immigration*, Reuters, June 21, 1993, available in Westlaw, INT-News database.

³ *Id.*

⁴ See generally Decision of August 13, 1993, Con. const., 1993 J.O. 11722 (translation by author). **Note that the author has taken the liberty of using short titles for selected Conseil decisions throughout this Note for the convenience of the reader.

of the Conseil and its role in the French government. Part II explores past French immigration policy and the reasons underlying it. Part II then examines the demographic pressures existing in France today, how the new legislation is a response to those pressures, and how the new laws differ from the laws they replace. Part III explains the methods of constitutional interpretation employed by the Conseil in its decision-making process. Part III then analyzes the Conseil's decision to strike down key provisions of the new laws, and explores past decisions relating to rights of foreigners. Part IV discusses the Government's reaction to the Conseil's decision, including the recent constitutional amendment adopted to bring the Constitution in conformity with European asylum policy. Part V provides an analysis of the growing constitutional jurisprudence of the Conseil in relation to the Government, the legislature, and the other high courts of France. This Note concludes that the Conseil's role as protector of individual freedoms and rights, especially those of foreigners, is crucial to constitutional jurisprudence, especially in the areas of immigration and asylum law.

I. AN OVERVIEW OF THE CONSEIL CONSTITUTIONNEL

A. *History of the Conseil Constitutionnel*

Review of the constitutionality of legislation is a recent development in France, where parliamentary sovereignty and opposition to judicial review reigned since the time of the French Revolution.⁵ The political structure of the country centered around the sovereignty of the law as it existed in Codes enacted by Parliament.⁶ The people believed their will was represented by the lawmakers,⁷ and relied upon them for the protection of their fundamental rights and free-

⁵ JOHN BELL, FRENCH CONSTITUTIONAL LAW 1 (1992); Louis M. Aucoin, *Judicial Review in France: Access of the Individual Under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform*, 15 B.C. INT'L & COMP. L. REV. 443, 446-47 (1992). The antipathy toward a judicial body stems in part from the administration of law by institutions known as *parlements*. Aucoin, *supra*, at 446. These institutions consistently opposed legislative reform in order to protect the nobility. *Id.* (quoting RENE DAVID, FRENCH LAW: ITS STRUCTURES, SOURCES, AND METHODOLOGY 29 (Michael Kindred trans., 1972)). The abolition of the *parlements* was one of the first acts of the French Revolution. *Id.* at 447. Since that time, French authorities have associated a strong judiciary with the concept of a *gouvernement des juges*, or government by judges. *Id.*; see also *infra* text accompanying notes 338-81.

⁶ Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 267 (1988).

⁷ *Id.*

doms as a political obligation.⁸ The concept of judicial review and a judicial body empowered to modify the law was unacceptable because it threatened to undermine the established democratic process.⁹ The rule of law, then, meant the subjection of the Government and its citizens to the laws created by Parliament; Parliament alone was considered competent to determine the legality of these laws.¹⁰

Despite France's deeply ingrained tradition of mistrust of quasi-judicial authority, the creation of the Conseil in 1958 removed Parliament as the sole guardian of constitutional values.¹¹ France's present system of government is based on the Constitution of the Fifth Republic, adopted in 1958.¹² The founders of the Fifth Republic based the Constitution on the principle of separation of powers.¹³ The new Constitution increased the power of the executive branch and divided legislative authority between the Government and Parliament.¹⁴ The 1958 Constitution created the Conseil Constitutionnel to maintain the balance of power between the Government and Parliament,¹⁵ and to prevent violations of the Constitution by the legislature.¹⁶

The Conseil is composed of nine members, three appointed by the President of the Republic, three by the President of the Senate, and three by the President of the National Assembly.¹⁷ One member is appointed by each of these three officials every three years for a nonrenewable term of nine years, and these appointments are neither subject to any confirmation process, nor can they be set aside.¹⁸ Past Presidents of the Republic are also members, but for a life

⁸ BELL, *supra* note 5, at 1.

⁹ Vroom, *supra* note 6, at 267.

¹⁰ BELL, *supra* note 5, at 1.

¹¹ See John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits In France and The United States*, 67 TUL. L. REV. 669, 681-82 (1993). It is important to note that "judicial" is used in a broad sense because, in theory, the Conseil is not a judicial court, but rather a special body set up to ensure that Parliament and the executive operate within their proper limits. See BELL, *supra* note 5, at 27.

¹² RENE DAVID, *FRENCH LAW: ITS STRUCTURES, SOURCES, AND METHODOLOGY* 19 (Michael Kindred trans., 1972). The First Republic existed from 1792 to 1804; the Second Republic from 1848 to 1852; the Third from 1870 to 1940; and the Fourth from 1944 to 1958. *Id.* at n.1.

¹³ Vroom, *supra* note 6, at 268.

¹⁴ *Id.* at 269.

¹⁵ *Id.* at 273.

¹⁶ FR. CONST. tit. 7; DAVID, *supra* note 12, at 29-30.

¹⁷ BELL, *supra* note 5, at 34.

¹⁸ ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 8 (1992).

term.¹⁹ The process clearly indicates that political affiliation is an important criterion for appointment to the Conseil. That importance seems to dwindle after appointment, however, because of insulation from political pressures.²⁰

The Conseil's members are retired persons, the average age of appointment being sixty-five.²¹ The absence of a further career in politics allows the members greater independence and insulation from political pressures.²² Consequently, stances taken by members of the Conseil have not always conformed with the political views of their nominators.²³

Additionally, nominees for appointment are not always of the same political party as their nominators, and the quality of a nominee often outweighs political allegiance.²⁴ This is reflected in the current make-up of the Conseil. The Conseil in March 1989 was the first to have a majority who had not been either members of Parliament or Government ministers.²⁵ Of the nine current members, three have predominantly legal distinction and two are principally administrators.²⁶ Finally, the prevalence of unanimous decisions²⁷

¹⁹ FR. CONST. art. 56. Stone states that political affiliation is the single most important consideration for appointment to the Conseil. STONE, *supra* note 18, at 50. Those appointed are selected primarily from among former members of Parliament and former government ministers, but also from among past political advisors, judges (only three since the Conseil's creation in 1958), and law professors. *Id.*; Odon Vallet, *Droit: Ces juges qui nous gouvernent (These judges who govern us)*, LE MONDE, NOV. 3, 1993, available in LEXIS, World Library, Monde File. Vallet reports that the composition of the Conseil has been criticized by French scholars because none of its members has ever attended the exclusive ENA (Ecole Nationale d'Administration), a prestigious school for the study of administrative law. *Id.*

²⁰ BELL, *supra* note 5, at 34-35.

²¹ *Id.* at 34.

²² *Id.* Another factor that insulates the Conseil from political pressures is the privacy in which decisions are reached. *Id.* at 47. The forum is a private meeting room where only the Conseil's members are in attendance, the meetings are confidential, and no written records are kept. *Id.* The nonpublic nature of the Conseil's deliberations might, on the other hand, permit the members greater discretion to make legislative decisions on an issue where there is little jurisprudence to look back upon. STONE, *supra* note 18, at 214.

²³ BELL, *supra* note 5, at 37. Similarly, United States Supreme Court Justices, like the Conseil's judges, are often appointed because of their political affiliation, but "one cannot predict how a justice will vote." THE SUPREME COURT AND ITS JUSTICES 234-35 (Jesse H. Choper ed., 1987). "There is a real spark of independence that ignites men once they become immune from all political pressures." *Id.* at 235. This same concept applies to the Conseil judges.

²⁴ BELL, *supra* note 5, at 37.

²⁵ *Id.*

²⁶ *Id.* Even those members with political careers have law degrees. *Id.* President Robert Badinter, a former Minister of Justice, is also a law professor. *Id.* Marcel Rudloff, a leading senator, is also a practicing *avocat* [lawyer]. *Id.*

²⁷ BELL, *supra* note 5, at 47.

further evidences the psychological shift of a Conseil member's perspective from a retired politician to a constitutional judge.

In addition to the political nature of the Conseil's composition,²⁸ there is inevitably some degree of politics involved in the context of decision-making because the issues are most often referred by members of the legislature after political debate.²⁹ But if the Conseil's decisions were based purely on political considerations, they would lack legitimacy and authority.³⁰ Instead, the Conseil's legalistic approach to decision-making ensures legitimacy and authority: its opinions have legal application and are analyzed by lawyers as well as other courts.³¹

B. *Functions of the Conseil Constitutionnel*

The Conseil's functions include: overseeing presidential elections; acting as advisor to the President when he seeks to use emergency powers; and ruling on the constitutionality of treaties, organic laws, parliamentary standing orders, and legislation proposed by Parliament or the Government.³² This last function is the Conseil's primary one, and permits the referral of any proposed law to the Conseil upon request by the President, the Prime Minister, the President of either the Senate or the National Assembly, or any group of sixty senators or deputies.³³ Review initiated by this latter group was made possible only as recently as 1974 through an amendment to Article 61 of the Constitution.³⁴

C. *Authority of the Conseil Constitutionnel*

The authority of the Conseil Constitutionnel is presented in Article 62 of the Constitution.³⁵ This Article states that a provision of law found to be unconstitutional may not be promulgated or imple-

²⁸ JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 137 (2d ed. 1990). The original composition of the Conseil evidenced its nonjudicial nature. *Id.* The Conseil's review of legislation was characterized as "political" rather than "judicial." *Id.* Recently, the Conseil's review has taken on a more judicial character as lawyers perceive the Conseil to be a more court-like institution. *Id.*

²⁹ See BELL, *supra* note 5, at 35.

³⁰ *Id.* at 35.

³¹ *Id.* at 35, 229.

³² *Id.* at 30-32.

³³ FR. CONST. art. 61.

³⁴ See STONE, *supra* note 18, at 8. The Conseil has asserted its power to annul any part of the referred bill, including provisions that were not the subject of the arguments submitted in the referrals. *Id.* at 130.

³⁵ FR. CONST. art. 62.

mented.³⁶ It further states that the Conseil's decisions shall be binding on public powers and all administrative and judicial authorities.³⁷ Although the Conseil D'Etat, France's highest administrative court, and the Cour de Cassation, its highest ordinary court, are not legally bound by the Conseil's decisions, these courts have also recognized its constitutional interpretations as authoritative.³⁸ The Conseil itself is not bound by its prior decisions, but rather refers to previous decisions in its pronouncements in order to establish continuity and maintain authority.³⁹

The constitutional control exercised by the Conseil is limited to an *a priori* basis: laws may only be reviewed prior to promulgation, and once a law has gone into effect its constitutionality may no longer be challenged.⁴⁰ One criticism that has been leveled at such a system is that a law containing unconstitutional provisions can be promulgated simply because it was not first submitted to the Conseil for review.⁴¹ Furthermore, past laws may become unconstitutional as constitutional law develops, but will still be applied by the ordinary courts because a French judge does not have the power to declare a law unconstitutional.⁴² Another criticism of this *a priori* system is that an individual is not permitted access to constitutional justice, since laws can only be reviewed if they are referred by certain government officials and if they have not yet been promulgated.⁴³ On the other hand, an advantage of this system is that it allows a legislator to revise a law before enactment, in accordance with a Conseil decision.⁴⁴

³⁶ *Id.*

³⁷ *Id.*

³⁸ Vroom, *supra* note 6, at 310–11, 313–14.

³⁹ BELL, *supra* note 5, at 51. When the Conseil wants to follow a prior decision, it repeats the particular wording of that decision verbatim, without citing to the decision. *Id.* This is a method practiced by the higher French courts. *Id.*

⁴⁰ Vroom, *supra* note 6, at 270. This is unlike the U.S. Supreme Court, which has a "case or controversy" requirement as provided for in article III, section 2 of the U.S. Constitution. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 84 (2d ed. 1991). The requirement ensures that constitutional issues will be resolved only in the context of concrete disputes, rather than in the form of advisory opinions. *Id.* at 84–85. It also ensures that constitutional decisions are rendered for those actually injured by a constitutional violation. *Id.* at 85.

⁴¹ Vroom, *supra* note 6, at 270–71.

⁴² *Id.* at 271. Judges of ordinary courts follow France's traditional view that the role of the judiciary be limited to the narrow interpretation of statutes. MERRYMAN, *supra* note 28, at 36. "The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one. The great names of the civil law are not those of judges (who knows the name of a civil law judge?) but those of legislators and scholars." *Id.* at 36–37.

⁴³ Vroom, *supra* note 6, at 271.

⁴⁴ *Id.* at 272.

D. *The Conseil Constitutionnel's Role as Protector of Individual Rights and Freedoms*

The Conseil Constitutionnel was created to maintain the balance of power between the Government and Parliament, as well as to oversee the election process.⁴⁵ The protection of individual rights and freedoms was not a major concern of the drafters of the 1958 Constitution.⁴⁶ At the time, fundamental values were not legally enforceable against Parliament and, in any case, the Government felt that it was not in a position to set out such values because that responsibility would be more appropriate for a Constituent Assembly, rather than the government actors who actually drafted the Constitution.⁴⁷ The Conseil has nevertheless managed to operate in the area of individual rights and freedoms and impose constitutional control.⁴⁸ The Conseil did so in its *Associations Law* decision of July 16, 1971, where, in a judgment affirming the right to form political associations, the Conseil cited the Preamble to the 1958 Constitution as the basis for the decision, thus giving constitutional value not only to the Preamble but also to the sources it incorporates.⁴⁹ This group of sources having supralegislative value has come to be known as the *bloc de constitutionnalité* (block of constitutionality), and consists of the written texts of the 1958 Constitution, the 1789 Declaration of the Rights of Man, and the Preamble to the 1946 Constitution.⁵⁰ In addition to substantive writings, the Conseil also recognizes the "fundamental principles recognized by the laws of the Republic" as an integral part of the *bloc de constitutionnalité*.⁵¹

The inclusion of these other constitutional sources is important because although the 1958 Constitution mentions some rights, such

⁴⁵ *Id.* at 273.

⁴⁶ BELL, *supra* note 5, at 64.

⁴⁷ *Id.* It is also important to note that the drafters were subject to time constraints when they created this Constitution. *Id.* The Algerian crisis and certain conditions demanded by de Gaulle greatly accelerated the drafting process. *Id.* at 13. The rapid drafting of the Constitution caused a lack of attention to the enumeration of individual rights and freedoms. *Id.*

⁴⁸ Vroom, *supra* note 6, at 274-75.

⁴⁹ See Decision of July 16, 1971, Con. const., 1971 J.O. 7114 (decision invalidating proposed legislation which would have subjected certain associations to the *a priori* approval of administrative or judicial authorities). It is notable that the court uses the phrase: "In the light of the Constitution, and especially of its Preamble." *Id.* This usage has been treated as giving all the Constitution's incorporated texts legally binding force. BELL, *supra* note 5, at 66.

⁵⁰ Vroom, *supra* note 6, at 275 n.48.

⁵¹ *Id.* The "fundamental principles recognized by the laws of the Republic" are the laws promulgated during the first three Republics, relating to rights and liberties. *Id.*

as the equality of all citizens before the law,⁵² the Preamble to the Constitution announces a commitment to individual rights and freedoms by incorporating the Declaration of 1789 and the Preamble to the 1946 Constitution.⁵³ The 1789 Declaration enunciates the principle that "the final end of every political institution is the preservation of the natural and imprescriptible rights of man. These rights are those of liberty, property, security, and resistance to oppression."⁵⁴ The Preamble to the 1946 Constitution lists fundamental political, social, and economic rights that include equality as well as rights to asylum.⁵⁵

What is interesting is that the Preamble to the 1958 Constitution was not considered legally binding at the time of its creation.⁵⁶ The Preamble's purpose was to express good intentions, rather than to have any legal consequences.⁵⁷ The Conseil changed that status, however, in the revolutionary *Associations Law* decision.⁵⁸ Thus, this decision is significant because it gave constitutional force to the Preamble, the 1789 Declaration, and the Preamble to the 1946 Constitution.⁵⁹ The *Associations Law* decision also gave constitutional force to the "fundamental principles recognized by the laws of the Republic,"⁶⁰ which consist of provisions found in legislation passed prior to the Preamble of 1946.⁶¹ Thus, the *Associations Law* decision established the Conseil as the protector of individual rights and freedoms.⁶² Since the decision, the Conseil has continued to act as protector of individual rights and freedoms, establishing constitutional values derived from the *bloc de constitutionnalité* that are imposed upon the Government and Parliament in the process of creating legislation.⁶³

This restriction of the freedom of action of the legislature imposed by constitutional values has surfaced in the area of immigra-

⁵² FR. CONST. art. 2. This article provides: "France is an indivisible, lay, democratic, and social Republic. It ensures equality before the law for all citizens, without distinction as to origin, race, or religion. It respects all beliefs." *Id.*

⁵³ BELL, *supra* note 5, at 66.

⁵⁴ *Id.*

⁵⁵ FR. CONST. of 1946, pmb.

⁵⁶ BELL, *supra* note 5, at 66.

⁵⁷ *Id.*

⁵⁸ Decision of July 16, 1971, Con. const., 1971 J.O. 7114; *see also supra* text accompanying n.47.

⁵⁹ BELL, *supra* note 5, at 66.

⁶⁰ Decision of July 16, 1971, Con. const., 1971 J.O. 7114.

⁶¹ Vroom, *supra* note 6, at 275 n.48.

⁶² *Id.* at 275.

⁶³ BELL, *supra* note 5, at 71.

tion, but there have been few Conseil decisions specifically pertaining to the rights and freedoms of foreigners.⁶⁴ Recently, the French legislature, feeling pressure due to increased problems of immigration and asylum,⁶⁵ responded by proposing a bill introducing laws aiming to curb these problems.⁶⁶ The proposed legislation raised constitutional issues and both senators and deputies referred the laws to the Conseil Constitutionnel for review.⁶⁷ The political aspects of the immigration and asylum problems in France provide a litmus test for the Conseil's constitutional authority, as detailed in the following discussion.

II. IMMIGRATION AND ASYLUM IN FRANCE: RECENT DEVELOPMENTS

A. *End to Tradition of Liberal Immigration and Asylum Policies*

Although historically France encouraged immigration, its process of integration has been tested in recent years by a greater influx of people from North Africa and Eastern Europe.⁶⁸ According to the 1990 census, an estimated fourteen million French nationals, nearly a quarter of the total population, are of recent foreign origin, either immigrants themselves or the children or grandchildren of immi-

⁶⁴ Guendelsberger, *supra* note 11, at 682.

⁶⁵ Paul Webster, *Migrant Laws Set France on the March*, THE GUARDIAN, June 19, 1993, available in Westlaw, INT-News database. Protest leaders against the proposed immigration and asylum legislation (Pasqua Bill), including members of the Socialist and Communist parties, argue that the government is using immigrants and asylum-seekers as the scapegoat during France's economic crisis. *Id.* Interior Minister Charles Pasqua, author of the proposed legislation, argued that the bill was necessary because immigrants increase the crime rate and have an impact on unemployment. Emile Picy, *French Parliament Approves Identity Checks Bill*, REUTER NEWSWIRE, June 11, 1993, available in Westlaw, INT-News database. France's unemployment rate, currently at 12%, is above the European Community average. *Edouard Balladur and the triumph of politics*, ECONOMIST, Feb. 5, 1994, at 50. It is important to note that the article's author mentions that the government's high interest rate policies are partly responsible for this high figure. *Id.* This economic crisis is said to have prompted resentment against foreigners, particularly immigrants from North Africa. Roger Cohen, *French Immigration Curbs Provoke Cabinet Rift*, N.Y. TIMES at A12, June 23, 1993. This resentment is at least partly responsible for the pressures felt by the legislature and the government. See *infra* text accompanying notes 68-82.

⁶⁶ See *Immigration Questions*, *supra* note 1.

⁶⁷ Thierry Bréhier, *Le texte de M. Pasqua comporte des "atteintes excessives" aux droits fondamentaux [The Pasqua Bill deals serious blows to fundamental rights]*, LE MONDE, Aug. 15-16, 1993, at 7.

⁶⁸ SERVICE DE PRESSE ET D'INFORMATION, AMBASSADE DE FRANCE A LONDRES (Press Service, French Embassy in London), *France's Policy On Integrating Immigrants* 1, 4 [hereinafter "Policy on Integrating Immigrants"]. Among the largest foreign communities are the Algerian and Moroccan. *Id.*

grants.⁶⁹ Of the approximately 3.6 million foreigners in France, 1.3 million were European Union (EU: formally the European Community) nationals and 2.3 million were from outside the EU.⁷⁰ Overall, foreigners account for roughly six percent of the total population.⁷¹ Although France does not have a large foreign population in comparison to other European countries, its European population has decreased dramatically over the past quarter century.⁷² In 1970, seventy-five percent of foreigners living in France were Europeans, while today, less than forty percent of the foreign population are Europeans.⁷³ Arabs and Africans account for almost fifty percent of the foreign population.⁷⁴ Roughly 100,000 legal immigrants enter the country every year along with between 35,000 and 100,000 illegal immigrants.⁷⁵ Applications for political asylum in France range from between 30,000 and 60,000 annually.⁷⁶ Considering these demo-

⁶⁹ *Id.* at 2. The same census showed that metropolitan France has the following demographics:

people born in France who acquired citizenship:	51.7 million
people born outside France who acquired citizenship:	<u>1.3 million</u>
total number of French citizens:	53 million
people born outside France who acquired citizenship:	1.3 million
foreigners born outside France:	<u>2.8 million</u>
total number of immigrants:	4.1 million
foreigners born outside France:	2.84 million
foreigners born in France:	<u>.74 million</u>
total number of foreigners:	3.6 million

Id.

⁷⁰ *Id.* at 3.

⁷¹ Policy on Integrating Immigrants, *supra* note 68, at 3. Approximately 40% of the foreign population is concentrated in the Paris area. *Id.*

⁷² *France; Zero Option*, *ECONOMIST*, June 12, 1993, at 57.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* Of the 100,000 legal immigrants entering the country each year (not including foreign students, seasonal workers and asylum seekers), roughly 25% are permanent workers from either the EC or one of the Asian or African countries involved in an agreement with France, 35% are family members of immigrants already residing in France, 20% are foreigners married to French citizens, and 15% are political refugees. *Id.*

⁷⁶ Frances Kerry, *French Parliament Approves Immigration Law*, *REUTER NEWSWIRE*, June 18, 1993, available in Westlaw, INT-News database. Although the number of asylum requests seems high, the peak for applications occurred in 1989 and 1990 at about 60,000, and fell to under 29,000 in 1992. Claire Rosemberg, *Row On Political Asylum Threatens Power-Sharing Pact*, *REUTER EUR. COMMUNITY REP.*, Aug. 31, 1993, available in LEXIS, News Library, Curnws File; see also Bruno Frappat, *Le Projet de Révision Constitutionnelle Adopté par Le Conseil des Ministres (The Project of Constitutional Revision Adopted by the Council of Ministers)*, *LE MONDE*, Oct. 21, 1993, available in LEXIS, World Library, Monde File. Of those 1992 requests, 30% were granted asylum. *Id.* Charles Pasqua, the Interior Minister, argues that those whose requests

graphic pressures, the right wing Interior Minister, Charles Pasqua, received tremendous support for his proposed bill which aimed at "zero immigration."⁷⁷

The effort to clamp down on immigration and asylum, however, challenges France's traditional role as a haven for immigrants and asylum-seekers. Historically, the French government has supported a number of policies aimed at protecting immigrants.⁷⁸ For example, even today expulsion of foreigners illegally in France is subject to legal and procedural guarantees under the supervision of the courts, which reflects a basic principle of French freedom.⁷⁹ Furthermore, foreigners legally settled in France have rights guaranteed by the Republic, especially a right to protection against all forms of racial discrimination.⁸⁰ Asylum, however, is treated in a slightly different manner. Although France traditionally has provided asylum for political refugees,⁸¹ the official view always has been that granting asylum for people leaving their countries because of economic difficulties encountered in these countries is an abuse of France's general policy of welcoming political refugees.⁸²

B. *New Legislation Geared Towards "Zero Immigration"*

Interior Minister Charles Pasqua sought to tighten the country's immigration and asylum policies through the bill he proposed to Parliament during its spring and extraordinary summer sessions of 1993.⁸³ The "Pasqua Bill" had four aims: to supplement the law on

are turned down do not return to their native countries, but rather disappear into France while their appeals are pending. *Id.* It is important to note that immigration and political asylum are different concepts. Immigration is the term for settlement outside of the country of birth of a person who for any reason left his homeland. ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS (2d ed. 1990), at 414 [hereinafter UN ENCYCLOPEDIA]. Asylum, on the other hand, is a wild card. It is the granting of refuge to aliens who are exposed to racial or political persecution in their own country. *Id.* at 64. In light of the decrease in asylum applications, the debate over political asylum seems misplaced, and is rather a debate over immigration.

⁷⁷ *France; Zero Option*, *supra* note 72, at 57. The report states that 94% of the French population believes racism to be widespread and that 71% of the French population complains that there are "too many Arabs." *Id.*

⁷⁸ Policy on Integrating Immigrants, *supra* note 68, at 1.

⁷⁹ *Id.* at 4.

⁸⁰ *Id.*

⁸¹ FR. CONST. of 1946, pmb. The Preamble to the 1946 Constitution provides: "Any person persecuted for his activities on behalf of freedom has the right of asylum in the territories of the Republic." *Id.* para. 4.

⁸² See Policy for Integrating Immigrants, *supra* note 68, at 4.

⁸³ *Immigration Questions*, *supra* note 1. Article 39 of the Constitution gives Pasqua the legal basis for the right to propose his bill. FR. CONST. art. 39. This article provides: "The right to

the rights of alien residents; to ensure the proper integration of alien families; to stop entry and residence procedures from being circumvented; and, to prevent illegal immigration.⁸⁴ To achieve its aim of supplementing the law on the rights of alien residents, the bill proposed to clarify the conditions under which persons seeking refugee status may be denied permission to enter France.⁸⁵ In particular, although persons seeking refugee status shall be allowed to stay temporarily on French territory until the French Office for the Protection of Refugees and Stateless Persons⁸⁶ has rendered a final decision on their request, the government retains both the right to revoke or the right to refuse to renew their temporary visas.⁸⁷ The law also gives the government the right not only to refuse political asylum to foreigners whose requests were refused by another EU Member State, but even more exceptionally to deny them any right to appeal that decision.⁸⁸

To achieve its aim of ensuring the proper integration of alien families, the bill places several restrictions on family reunification.⁸⁹ To achieve its aim of stopping the circumvention of entry and residence procedures, the bill gives mayors the authority to call upon public prosecutors to defer a marriage suspected of being a

propose laws belongs concurrently to the Prime Minister and to members of Parliament." *Id.* Government bills [projets de loi] are considered by the Council of Ministers after the advice of the Conseil D'Etat, and are tabled in one of the chambers. *Id.* Finance bills are submitted first to the National Assembly. *Id.*

⁸⁴ Communiqué du Conseil des Ministres [Press Release from the Council of Ministers] June 2, 1993 (on file with the B.C. INT'L & COMP. L. REV.) [hereinafter Communiqué]. The second aim will not be discussed in this Note because it is not pertinent. The bill changes certain conditions under which family reunification is allowed. *Id.*

⁸⁵ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727.

⁸⁶ *Id.*; Communiqué, *supra* note 84. The French Office for the Protection of Refugees and Stateless Persons is responsible for recognizing the status of political refugees, and for ensuring the legal and administrative protection of the persons granted asylum. Policy for Integrating Immigrants, *supra* note 68, at 9.

⁸⁷ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727.

⁸⁸ See Bréhier, *supra* note 67, at 7; Rosenberg, *supra* note 76. This provision was of particular importance to the French government as it serves to allay fears that France would become a haven for asylum-seekers whose requests were rejected by other EC member states but who would be given free movement in the EC under the Schengen Accord. Rosenberg, *supra* note 76; see also Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, Agreement June 14, 1985, Convention June 19, 1990, 30 I.L.M. 68 [hereinafter Schengen Agreement and Convention].

⁸⁹ Communiqué, *supra* note 84. Although discussion of this particular aim is beyond the scope of this Note, the bill sought to achieve proper integration by: (1) extending the required residency period for an alien wishing to be joined by his or her spouse and children from one year to two years and by, (2) refusing to allow aliens admitted to France as students to bring their families into the country under the family reunification provision since their student status should not lead to their permanent integration. *Id.*

marriage of convenience.⁹⁰ In the area of asylum, the bill provides that persons whose applications for political asylum are clearly unfounded will not be admitted.⁹¹

The aim of preventing illegal immigration responds to a failure to execute expulsion decisions because officials lack identity or travel documents for expelled persons.⁹² The bill proposes to increase the time period for administrative detention of an alien awaiting expulsion from seven to ten days in cases where the appropriate travel documents are not presented.⁹³ Furthermore, the bill provides for the implementation of a procedure for judicial detention of a period not to exceed three months for an alien who refuses to present the proper travel documents in order to avoid expulsion.⁹⁴

In addition to the aims laid out in the Pasqua Bill, the new legislation also seeks to tighten the general conditions imposed on the entry and duration of stay of foreigners.⁹⁵ One provision in particular gives police the power to perform random identity checks on people whether or not they were acting suspiciously.⁹⁶ This gives the police much greater power because the previous rule required that the police have a reasonable belief that a crime either had been or was about to be committed before demanding someone's papers.⁹⁷ The wording of the law, based on a 1946 decree, states: "[p]ersons of foreign nationality must be in a position to present

⁹⁰ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

⁹¹ Communiqué, *supra* note 84.

⁹² *Id.*

⁹³ *Id.*; Bréhier, *supra* note 67, at 7. The detention period was six days with the possibility of a 24 hour extension, and the new law seeks to increase the extension from 24 hours to 72 hours. *Id.*

⁹⁴ *Id.* The Pasqua Bill would change a previous law which authorized the courts to sentence an alien, who refused to present the proper documents in order to block the expulsion process, to a prison term. *Id.* The Pasqua Bill also purports to reduce the overcrowding in prisons by authorizing the courts to defer the prison term and to put the alien in detention for a period of up to three months. *Id.*

⁹⁵ Picy, *supra* note 65; *French Watchdog Rejects Some Clauses in Nationality Law*, REUTER NEWSWIRE, July 21, 1993, available in Westlaw, INT-News database. In addition to the Pasqua Bill, the French Government also proposed, and the French Parliament approved, a controversial change to the Civil Code laws relating to nationality. *French Watchdog Rejects Some Clauses in Nationality Law*, *supra*. Under the new law, children of immigrants that are born on French soil will have to apply for citizenship status between the ages of 16 and 21 rather than acquiring it automatically at age 18, as the previous law prescribed. *Id.* In its decision reviewing the constitutionality of this law, the Conseil Constitutionnel stated that the law did not violate the constitutional principle of equality. Decision of July 20, 1993, Con. const., 1993 J.O. 10391. This provision was adopted into the French Civil Code on July 22, 1993. Code Civil [C. Civ.] art. 44.

⁹⁶ Picy, *supra* note 65.

⁹⁷ *Id.*

documents on the basis of which they are authorized to travel or reside in France in response to any request by the police."⁹⁸ Although these new laws received widespread support from the French population,⁹⁹ it was clear, at least to sixty members of Parliament and certain Government officials, that application of certain provisions would infringe upon the individual freedoms and rights of foreigners.

III. THE CONSEIL CONSTITUTIONNEL'S DECISION STRIKING DOWN THE IMMIGRATION LEGISLATION

A. *Methods of Interpretation*

Before promulgation of the new immigration and asylum legislation, more than the required sixty members of Parliament, including Socialist senators and Socialist and Communist deputies, referred the legislation to the Conseil Constitutionnel for review of its constitutionality.¹⁰⁰ The Conseil's decision, the longest it has rendered

⁹⁸ *French Senate Drops Disputed Immigration Amendment*, REUTER NEWswire, June 30, 1993, available in Westlaw, INT-News database (quoting proposed amendment to Pasqua Bill). Recognizing that this draft law challenged provisions of the constitution prohibiting discrimination on the basis of race, one member of Parliament proposed an amendment reading that the random police identity checks would be based on "any evidence, other than race, that a person is foreign." Cohen, *supra* note 65. This amendment was rejected by the Senate on June 30, 1993, and the wording of the 1946 decree was adopted. *French Senate Drops Disputed Immigration Amendment, supra*.

⁹⁹ See *French Back Tightened Nationality Law, Says Poll*, REUTER NEWswire, May 12, 1993, available in Westlaw, INT-News database. The French newspaper, LE PARISIEN, reported poll results showing that 76% of those questioned agreed that mayors should be allowed to refuse to issue marriage licenses if they suspect that a wedding was arranged solely for a foreigner to obtain French citizenship. *Id.* It must be noted, however, that wide support for legislation on immigration and asylum comes during a period of economic crisis in France, where unemployment is high, prompting resentment against foreigners. *French Parliament Passes Tough Immigration Law*, REUTER LIBRARY REP., July 13, 1993, available in LEXIS, News Library, Curnws File. A poll by the Interior Ministry reported that 89% of those questioned favored restrictions on marriages of convenience and 57% approved of tougher regulations for asylum-seekers. *Id.*

¹⁰⁰ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11722. The Constitution provides in its Article 61 that sixty deputies or senators may refer laws, before they are promulgated, to the Conseil, which shall decide on their compatibility with the Constitution. FR. CONST. art. 61. The system of referral and subsequent review of legislation relies heavily upon the willingness of government officials or members of Parliament to submit a law to the Conseil. BELL, *supra* note 5, at 56. Bell illustrates this with the law of July 13, 1990. *Id.* The law penalized persons convicted of racism, anti-Semitism, and xenophobia, by depriving them of their civil rights. *Id.* Despite the obvious violation of constitutional principles inherent in the law, no member of Parliament or of the Government was willing to submit the matter to the Conseil for review. *Id.* Since the 1974 amendment allowing referrals to the Conseil by sixty senators or deputies, 97% of all referrals have been of Parliamentary origin. STONE, *supra* note 18, at 57-58. In an

since its creation in 1958,¹⁰¹ thoroughly examined the controversial Pasqua Bill. Although only eight out of the fifty-one Articles comprising the law were censured by the Conseil, the decision is extremely important, representing a watershed for the Conseil in its role as the protector of individual liberties. The methods of interpretation employed by the Conseil in its decision-making process provide some insight into the Conseil's achievement of this goal.

Article 61 of the Constitution gives the Conseil the authority to declare a provision unconstitutional.¹⁰² Subsequently, that provision may be neither promulgated nor applied.¹⁰³ Apart from striking down a provision completely, the Conseil also may declare it constitutional but only under certain restrictions.¹⁰⁴ The Conseil has developed techniques of interpretation that provide guidance as to the manner in which a questionable provision can be made compatible with the Constitution.¹⁰⁵ The Conseil accomplishes this guidance through its "*réerves d'interprétation*,"¹⁰⁶ which are statements that certain provisions are only found to be constitutional, and therefore can only be promulgated, to the extent that they are read in a

attempt to increase the jurisdiction of the Conseil Constitutionnel and avoid this reliance on the willingness of politicians and officials to refer laws, the President of the Republic and the President of the Conseil recently proposed that the ordinary courts of France be permitted to refer questionable laws to the Conseil, even after the laws had been promulgated. BELL, *supra* note 5, at 55-56. This proposal was the second effort (the first occurred during the 1977 election) to give private citizens the opportunity to challenge the constitutionality of laws which they considered to violate their fundamental rights. Aucoin, *supra* note 5, at 455-456. The express terms of the reformers' proposed amendments to the Constitution would have limited the Conseil's new jurisdiction to laws challenged as violations of fundamental rights. *Id.* at 457. In 1990, however, Parliament rejected the proposal. *Id.* at 460.

In Germany, judicial referral is one way to bring the issue of the constitutionality of a statute before the German Constitutional Court. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 376 (5th ed. 1988). If another court feels that a statute relevant to its decision is unconstitutional, it must refer the constitutional issue to the Constitutional Court. *Id.* The Constitutional Court decides only that issue, and returns the record to the referring court, which decides on the other issues. *Id.*

¹⁰¹ Bréhier, *supra* note 67, at 7.

¹⁰² FR. CONST. art. 61.

¹⁰³ FR. CONST. art. 62.

¹⁰⁴ Vroom, *supra* note 6, at 288.

¹⁰⁵ BELL, *supra* note 5, at 53.

¹⁰⁶ *Réerves d'interprétation* may be translated as canons of construction. Because the reader may be unfamiliar with the concept of these *réerves*, further explanation by the author is warranted. These *réerves* are measures taken by the Conseil for dealing with legislation that has doubtful constitutionality. See Vroom, *supra* note 6, at 288. They constitute principles of judicial restraint, unlike United States Supreme Court interpretive measures that include textual and historical analysis, as well as reliance on the long-standing authority of Supreme Court decisions. *Id.*

particular way prescribed by the Conseil.¹⁰⁷ This movement of the Conseil, away from decisions providing a formal analysis of whether a provision was constitutional to a more insightful analysis involving more "affirmative control over constitutional adjudication,"¹⁰⁸ began with the *Security and Liberty* decision¹⁰⁹ of January, 1981.

The first of these *réerves d'interprétation* is the so-called *interprétation* itself, where the Conseil interprets the text of the provision so as to conform with the Constitution.¹¹⁰ In the *Security and Liberty* decision, the provision in question made it an offense to obstruct the passage of vehicles on the highway.¹¹¹ The argument against the provision was that it would interfere with the right to strike, i.e., establish pickets and demonstrations.¹¹² In its decision, the Conseil stated that: "there is no possibility that the application of these provisions will, in any manner, prevent or interfere with the lawful exercise of the right to strike or union action."¹¹³ As a result, the law was upheld as constitutional with the "reservation" that it could not be applied against strikers, because that application would be unconstitutional.¹¹⁴ With this interpretation, the Conseil managed to uphold the law while, at the same time, removing its sting.

The second interpretive technique employed by the Conseil is making an *addition* to the provision to render it constitutional.¹¹⁵ In the *Security and Liberty* decision, the challenged provision stated that a magistrate court could authorize a twenty-four hour extension of the detention period for criminal suspects in police custody.¹¹⁶ Rather than striking down the provision as unconstitutional, the Conseil responded to the opposition's argument by adding that the magistrate ordering the extension would "necessarily have to exam-

¹⁰⁷ STONE, *supra* note 18, at 88-89. It is important to note that these canons of construction are employed by the Conseil as a means for conditioning the constitutionality of a challenged law or provision. BELL, *supra* note 5, at 53-54.

¹⁰⁸ See Vroom, *supra* note 6, at 288.

¹⁰⁹ Decision of Jan. 19-20, 1981, Con. const., 1981 J.O. 308.

¹¹⁰ See Vroom, *supra* note 6, at 288.

¹¹¹ Decision of Jan. 19-20, 1981, Con. const., 1981 J.O. 309.

¹¹² *Id.* at 309-10.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ BELL, *supra* note 5, at 54.

¹¹⁶ Vroom, *supra* note 6, at 284. The provision involved a 24-hour extension of garde à vue (police custody) in certain cases. *Id.* Normally, the custody period was limited to a period of 24 hours with the option of a 24-hour extension authorized by the *Procureur* (public prosecutor). *Id.* The new provision called for an additional 24-hour extension that could be authorized by a judge for those suspected of certain crimes. *Id.*

ine the file in order to authorize the twenty-four hour extension of detention."¹¹⁷ Presumably, this provision was added to prevent any arbitrary decision by the magistrate. The decision also included another example of the addition technique. A provision relating to police identity checks provided the possibility of a hearing before the *Procureur de la République*,¹¹⁸ but the Conseil, in upholding the provision, read the language to mean that there was a constitutional right to the hearing.¹¹⁹

The last technique, or *réserve d'interprétation*, is the *injunction*, a type of directive given by the Conseil specifying how a certain provision is to be applied.¹²⁰ This directive is designed to guard against subsequent abuses in the application of a particular law.¹²¹ In the *Security and Liberty* decision, the Conseil issued special instructions to administrative and judicial authorities relating to identity checks.¹²² The Conseil directed the judicial and administrative authorities to ensure respect for the rules created by the legislature regarding identity checks, and admonished the competent courts to censure and punish any abuses of the law.¹²³

Employing these techniques allows the Conseil to uphold otherwise unconstitutional legislation, thus avoiding the need for Parliament to reconvene and draft a new law in conformity with the Conseil's decision.¹²⁴ The development of these techniques was of crucial importance in the *Security and Liberty* decision, where the Conseil managed to uphold a politically controversial piece of legislation but at the same time establish constitutional norms to which the legislature was forced to submit.¹²⁵ Yet the Conseil's mode of interpretation may be met with skepticism because it involves the Conseil dictating, often word-for-word, the terms of new laws.¹²⁶ Critics argue that by creating binding interpretations of law, the Conseil is assuming the role of a policymaker making new law.¹²⁷

¹¹⁷ Decision of Jan. 19–20, 1981, Con. const., 1981 J.O. 310.

¹¹⁸ Vroom, *supra* note 6, at 284. The *Procureur de la République* is a public prosecutor. *Id.*

¹¹⁹ Decision of Jan. 19–20, 1981, Con. const., 1981 J.O. 312.

¹²⁰ BELL, *supra* note 5, at 54.

¹²¹ Vroom, *supra* note 6, at 289.

¹²² Decision of Jan. 19–20, 1981, 1981 J.O. 44312.

¹²³ *Id.*

¹²⁴ BELL, *supra* note 5, at 55. The inconvenience to Parliament is great because the Conseil's decision is rendered at the end of Parliament's session, so Parliament may have to meet in an extraordinary session in order to get the bill passed. *Id.*

¹²⁵ Vroom, *supra* note 6, at 289.

¹²⁶ STONE, *supra* note 18, at 241.

¹²⁷ *Id.*

B. *Constitutional Principles and Sources*

On August 13, 1993, the Conseil was again placed in the position of having to rule on the constitutionality of the highly controversial piece of legislation known as the Pasqua Bill relating to the control of immigration and the conditions on the entry and stay of foreigners in France.¹²⁸ In this decision relating to the rights and freedoms of foreigners, the Conseil relied upon the *bloc de constitutionnalité*,¹²⁹ and the constitutional principles, specifically equality and individual liberty, laid out in those texts.¹³⁰ This reliance upon textual sources of constitutional principles demonstrates the restraint with which the Conseil exercises constitutional control.¹³¹ The Conseil does not consider itself the authority on constitutional law, and its decisions always refer to the constitutional principles and the sources from which they are derived.¹³²

Yet it could be argued that the Conseil is forced to go through the exercise of interpretation, and in practice it is really creating new law. The Conseil's method of addressing provisions of the law point-by-point with respect to the status and meaning of the constitutional principles invoked has been criticized as formalistic.¹³³ The expansion of constitutional jurisprudence might be seen as a self-defense mechanism for the Conseil, reducing the uncertainty of lawmakers and establishing better doctrinal standards for the judging of jurisprudential coherence.¹³⁴ It may also attract the support of legal specialists "in efforts to fend off criticism of its expanded role as a policymaker."¹³⁵ There is less protest of the Conseil's references to constitutional texts, however, over decisions based on penal law, where provisions are annulled on grounds that they violated the principle of equality or elements of due process.¹³⁶ This is perhaps because these principles are enshrined in the 1789 Declaration and have been extended into code law.¹³⁷ This longstanding authority

¹²⁸ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11722.

¹²⁹ BELL, *supra* note 5, at 65-71.

¹³⁰ *Id.* at 65-66.

¹³¹ Vroom, *supra* note 6, at 303. In its early decisions, the Conseil cited to "fundamental principles recognized by the laws of the Republic," but in recent years has abandoned this vague reference and adopted more concrete textual sources. *Id.*

¹³² *Id.*

¹³³ See STONE, *supra* note 18, at 18, 133-34.

¹³⁴ *Id.* at 134.

¹³⁵ *Id.*

¹³⁶ *Id.* at 211.

¹³⁷ *Id.*

represents a government consensus as to their validity.¹³⁸ The *Immigration and Asylum* decision was not based on penal law, but it did center upon issues of equality and due process. Furthermore, the Conseil's rulings on the Pasqua Bill provisions are the result of careful interpretation of these constitutional principles.

The first principle is that of equality under the law.¹³⁹ This principle receives somewhat limited treatment in Article 2 of the 1958 Constitution, which proclaims that the Republic "ensures equality before the law for all citizens, without distinction as to origin, race, or religion."¹⁴⁰ To evoke this principle, the Conseil relies more heavily on Article 6 of the 1789 Declaration of the Rights of Man, which proclaims that: "the law must be the same for all, whether it punishes or protects."¹⁴¹ Moreover, the entire Preamble to the 1946 Constitution devotes itself to equality.¹⁴² Violation of these principles of equality results in the invalidation of a law.¹⁴³ Therefore, the legislature is obliged to justify any provision of law that is facially discriminatory.¹⁴⁴ But the principle of equality does not prevent the legislature from passing laws that treat people differently from others because of their particular situation.¹⁴⁵ A difference in treatment is justified if it depends upon the particular situation a person is found in, rather than the birth or social status of that person.¹⁴⁶ In its *Social Measures* decision of January 22, 1990, the Conseil affirmed that with respect to foreigners, the legislature may make specific provisions on the condition that it respect: (1) the international agreements to which France is a party and, (2) the fundamental rights and freedoms provided for in the Constitution.¹⁴⁷ Only where the Conseil is persuaded that the difference in treatment is the result of arbi-

¹³⁸ STONE, *supra* note 18, at 211.

¹³⁹ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11722. This list of principles only points out those that are discussed in the Conseil's decision. There are many other principles that the Conseil relies upon but that are not discussed in this Note (such as the freedom of association or the freedom of education). BELL, *supra* note 5, at 149-51.

¹⁴⁰ FR. CONST. art. 2.

¹⁴¹ The Declaration of the Rights of Man and of the Citizen, art. 6 (Fr. 1789) [hereinafter Declaration of 1789].

¹⁴² FR. CONST. of 1946, pmb. The preamble proclaims racial and religious equality (¶ 1), equality between the sexes (¶ 2), equality as to public burdens (¶ 12), and equal access to education (¶ 13). *Id.*

¹⁴³ BELL, *supra* note 5, at 202.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 202-03, 223. As long as Parliament can justify discrimination in a particular law, the Conseil will almost always defer to its assessment. *Id.* at 223.

¹⁴⁶ *Id.* at 203.

¹⁴⁷ BELL, *supra* note 5, at 203 (quoting Conseil Decision of Jan. 22, 1990).

trary legislation, rather than the furtherance of a legitimate policy objective, will it declare a violation of the principle of equality.¹⁴⁸

The second principle is individual liberty. This principle has been greatly developed by the Conseil but is based primarily on Article 2 of the 1789 Declaration which proclaims that: “[the] ultimate purpose of every political institution is the preservation of the natural and imprescriptible rights of man. These rights are to liberty, property, security, and resistance to oppression.”¹⁴⁹ Article 2 of the 1789 Declaration was drafted in response to the concern of government’s arbitrary restraint on the freedom of action.¹⁵⁰ Article 7 addresses this concern where it states that: “[n]o individual may be accused, arrested, or detained except where the law so prescribes, and in accordance with the procedures it has laid down.”¹⁵¹ Yet Article 7 also recognizes the importance of maintaining public order against freedom of action.¹⁵² Due to the general nature of this fundamental principle of liberty, the Conseil sought to construct clearer constitutional principles to establish a framework in which the legislature could act.¹⁵³

This tension between individual freedom and the limits imposed on it by public order required the Conseil to refine the principle of liberty, based on Article 2 of the Declaration.¹⁵⁴ The principle of individual liberty was invoked by the Conseil in the *Vehicle Searches* decision of January 1977 as a justification for restricting actions of the State in relation to individuals,¹⁵⁵ a principle protected by judicial authorities under Article 66 of the Constitution.¹⁵⁶ The *Vehicle Searches* decision is significant in that it did not limit the concept of individual liberty to vehicle searches by police, but instead interpreted it broadly by finding a right to privacy in the right to be free from arbitrary detention, as well as the right to freedom of move-

¹⁴⁸ *Id.* at 223–24.

¹⁴⁹ Declaration of 1789, *supra* note 141, art. 2; *see also* BELL, *supra* note 5, at 140.

¹⁵⁰ *See* BELL, *supra* note 5, at 139.

¹⁵¹ Declaration of 1789, *supra* note 141, art. 7.

¹⁵² *Id.* at art. 7. Article 7 provides: “[any] citizen charged or detained by virtue of a law must obey it immediately; resistance renders him culpable.” *Id.*

¹⁵³ BELL, *supra* note 5, at 139.

¹⁵⁴ *Id.* at 140.

¹⁵⁵ Decision of Jan. 12, 1977, Con. const., 1977 J.O. 344. In this decision, the government proposed a law giving police broad powers to search vehicles. *Id.* The Conseil rejected the law, saying that it violated the constitutional principle of individual freedom that is protected by judicial authorities under article 66 of the Constitution. *Id.*

¹⁵⁶ FR. CONST. art. 66. Article 66 of the Constitution provides: “No one may be detained arbitrarily. The judiciary, the guardian of individual liberty, ensures respect for this principle in circumstances provided for by law.” *Id.*

ment.¹⁵⁷ Although this broad concept is not expressly mentioned in any of the texts of the *bloc de constitutionnalité*, the Conseil found it in Article 66 of the Constitution and in the “fundamental principles recognized by the laws of the Republic.”¹⁵⁸

C. *The Basis for the Conseil’s Decision of August 13, 1993,
Regarding the Pasqua Bill*

At the beginning of its unanimous decision, the Conseil announced the constitutional principles which applied to the proposed legislation. It stated that:

no principle nor any rule of constitutional value assures foreigners of general and absolute rights of entry and stay on the national territory: the conditions of their entry and stay can be restricted by administrative policy measures, deriving from specific rules, which confer extended powers upon the public authority; that the legislator can then pursue those general policy objectives which it sets itself: that in the legal realm, foreigners are situated differently from French nationals; that the assessment of the constitutionality of measures the legislator believes should be taken can neither be made by comparing provisions of successive laws, nor from a law’s conformity with the stipulations of international conventions, but emerges only from testing the law against requirements of a constitutional order.¹⁵⁹

The Conseil added, however, that:

if the legislator takes specific measures with regard to foreigners, it must respect the fundamental liberties and rights of constitutional value recognized for all who reside on the territory of the Republic: that if these liberties and rights must be reconciled with the safeguarding of public order, which constitutes an objective of constitutional value, included among those rights and liberties is the principle of individual liberty and safety, notably the freedom to come and go, the freedom to marry, the right to lead a normal family life[.]¹⁶⁰

Finally, the Conseil recalled that:

¹⁵⁷ Vroom, *supra* note 6, at 280.

¹⁵⁸ *Id.*

¹⁵⁹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

¹⁶⁰ *Id.*

foreigners can insist upon the right, which is exclusive to certain among them, recognized by the fourth paragraph of the Preamble to the 1946 Constitution, in which the French people solemnly declared their adherence to the principle that: “[any] person persecuted for his activities on behalf of freedom has the right of asylum in the territories of the Republic.”¹⁶¹

The Conseil made it clear that foreigners could not benefit from all of the rights enjoyed by French nationals, but that some constitutional values clearly do apply to them. This statement affirmed an earlier decision by the Conseil which held that principles of individual liberty apply to citizens and foreigners alike.¹⁶² That decision, handed down on January 9, 1980, marked the first time that the Conseil relied directly on Article 66 of the Constitution to declare a provision unconstitutional because it violated a foreigner’s individual liberty.¹⁶³

The January 9, 1980 decision quoted above is an example of the Conseil’s willingness to allow discriminatory legislation if the discrimination is not arbitrary, because the Conseil recognizes that foreigners may be situated differently than French nationals.¹⁶⁴ The Conseil specifically stated that foreigners find themselves in a situation different from that of French nationals and are subject to different treatment by the laws passed in the legislature.¹⁶⁵ The Conseil distinguished between the rights of the citizen, i.e., rights that apply exclusively to French nationals, and human rights, i.e., rights that apply to all persons, not only the French.¹⁶⁶ For example, only French citizens have equal rights to settle in France.¹⁶⁷

¹⁶¹ *Id.*

¹⁶² See Decision of Jan. 9, 1980, Con. const., 1980 J.O. 84; see also Vroom, *supra* note 6, at 280–81.

¹⁶³ See Decision of Jan. 9, 1980, Con. const., 1980 J.O. 85. The Conseil rejected a provision that called for a seven-day period of administrative detention of an alien before intervention of a judicial officer because “individual liberty can only be said to be protected if the judge intervenes in the shortest period possible.” *Id.*

¹⁶⁴ BELL, *supra* note 5, at 204.

¹⁶⁵ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

¹⁶⁶ Thierry Bréhier, *Le Conseil Constitutionnel Atténue la Rigueur de la Loi Sur L’Immigration*, LE MONDE, Aug. 15–16, 1993, at 1; see also BELL, *supra* note 5, at 203. The 1988 electoral campaign in France involved a debate as to whether immigrants should be given the right to vote. *Id.* It was presumed that this right would require an amendment to the Constitution. *Id.*

¹⁶⁷ BELL, *supra* note 5, at 203.

This doctrine surfaced in another decision rendered by the Conseil on July 20, 1993.¹⁶⁸ In the *Citizenship Rights* decision, the Conseil upheld legislation that treated foreigners differently regarding citizenship rights.¹⁶⁹ The Conseil held that a foreigner who marries a French national must wait for a period of two years in order to acquire French citizenship; a foreigner is exempt from the two year waiting period, however, if the couple has a baby before or after the marriage.¹⁷⁰ The Conseil pointed out that the principle of equality does not hinder the establishment of different rules for citizens and aliens as long as the different treatment prescribed by the law is consistent with the law's underlying policies and objectives.¹⁷¹

In its *Social Measures* decision of January 22, 1990, the Conseil presaged this reasoning by stating that "with regard to foreigners, the legislature may make specific provisions on condition that it respects international agreements to which France is a party and the fundamental rights and freedoms of constitutional value recognized for all who reside in the territory of the Republic."¹⁷² This decision imposed a general constraint on the legislature to respect equality in the realm of human rights.¹⁷³ The Conseil also stated, however, that the legislature is limited by protection of other rights as well, in that it must have an objective reason for discriminating against foreigners.¹⁷⁴ Therefore, a reference to the "principle of equality" by the Conseil applies both to citizens and foreigners.¹⁷⁵

The *Social Measures* decision illustrates this point because the Conseil declared that the French principle of equality gave resident foreigners the same rights of access to government benefits as French citizens.¹⁷⁶ The Conseil reasoned that the law's policy of helping elderly persons with inadequate funds applied equally to foreigners and citizens.¹⁷⁷ Nevertheless, it must be reiterated that the equality required by the Constitution does not mean providing the same treatment to everyone under all circumstances, because simply

¹⁶⁸ See Decision of July 20, 1993, Con. const., 1993 J.O. 10391.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Decision of Jan. 22, 1990, quoted in BELL, *supra* note 5, at 203.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Guendelsberger, *supra* note 11, at 686.

¹⁷⁷ BELL, *supra* note 5, at 204.

being a foreigner does justify different treatment in some cases.¹⁷⁸ The Conseil expressed this idea by stating that laws providing different treatments and procedures in the context of entry into, and expulsion from France, were constitutional because of the different positions of foreigners and French nationals.¹⁷⁹

The Conseil's latest decision regarding the rights of foreigners in France comes in the midst of increased political debate over the status of immigrants and asylum-seekers.¹⁸⁰ In its decision, the Conseil was forced to examine the constitutionality of the Pasqua Bill provisions restricting the rights of foreigners, specifically provisions relating to police identity checks, extension of administrative detention periods, control of marriages of convenience, and limitations on political asylum.¹⁸¹

D. *General Conditions of Entry and Stay of Foreigners: Police Identity Checks*

The Conseil's interpretative approach is exemplified by its treatment of police identity checks. As promulgated, the provision of the new law regarding police identity checks required that persons of a foreign nationality always carry the documents authorizing their presence in France, and produce them upon request by the police.¹⁸² The authors of the referral to the Conseil argued that this provision deprives foreigners of the legal guarantees prescribed by the Constitution.¹⁸³ Specifically, the opposing deputies and senators pointed to violations of the principles of individual liberty and equality.¹⁸⁴ The argument claimed that the law imposed an obligation on foreigners which did not apply to French nationals.¹⁸⁵

The Conseil noted, however, that the legislature is in a position to require the detention of foreigners, as well as the carrying and production of documents attesting to the conditions of foreigners'

¹⁷⁸ See Decision of January 9, 1990, Con. const., 1990 J.O. 464, 465.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* text accompanying notes 68-77.

¹⁸¹ Decision of Aug. 13, 1993, Con. const. 1993 J.O. 11722. Other issues discussed in this decision, such as expulsion from the French territory or visa requirements, are beyond the scope of this discussion.

¹⁸² *Id.* at 11723. The decision quotes article 5 of the bill as follows: "[persons] of foreign nationality must be in a position to present documents on the basis of which they are authorized to travel or reside in response to any request by the police." *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

entry and stay in France.¹⁸⁶ The Conseil went on to say that in these situations the legislature may also impose additional requirements, except: (1) where the foreigner has committed an offense or, (2) there is an absence of particular circumstances relating to the prevention of the disruption of the public order.¹⁸⁷

The Conseil reiterated that foreigners and French nationals are placed in different situations and thus there was no violation of the principle of equality.¹⁸⁸ This statement affirmed the Conseil's reasoning in the decision of January 9, 1990, where the Conseil stated that simply being a foreigner places a person in a different legal situation and thus warrants different treatment under the laws.¹⁸⁹ Although the Conseil's present decision did not criticize or condemn the practice of random police identity checks, it did specify that their implementation must be based exclusively on objective criteria, leaving the determination of that criteria to the police.¹⁹⁰ The Conseil noted that discriminatory implementation of identity checks would be contrary to constitutional rules and principles and therefore not permitted.¹⁹¹ It added that it was the duty of the judicial and administrative authorities to ensure this aspect of the Constitution and to punish any conduct in violation of the Conseil's dictate.¹⁹²

The Conseil emphasized that only under this *r serve d'interpr tation* would these particular provisions of the law be compatible with the Constitution.¹⁹³ The Conseil upheld the constitutionality of the law but then used a *r serve d'interpr tation* (specifically an injunction or directive), to tell the administrative authorities how the law must be applied. The Conseil applied the same injunction to the law on identity checks reviewed in the *Security and Liberty* decision.¹⁹⁴ But in that decision, the proposed law called for identity checks only in situations where there was a threat to the public order, and, more specifically, to the security of persons or property.¹⁹⁵ A law passed in June, 1983 imposed an immediacy requirement on the threat to public order and safety required for the execution of preventive

¹⁸⁶ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See Decision of Jan. 9, 1990, Con. const., 1990 J.O. 465.

¹⁹⁰ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Decision of Jan. 19-20, 1981, Con. const., 1981 J.O. 312.

¹⁹⁵ *Id.*

police identity checks.¹⁹⁶ In 1986, however, a law proposing to remove the immediacy requirement¹⁹⁷ from the text of the law was referred to the Conseil for review.¹⁹⁸ The Conseil found the proposed law to be compatible with the Constitution because it was still subject to the procedural safeguards set out in the previous *Security and Liberty* decision.¹⁹⁹

As in the *Security and Liberty* decision and the recent *Immigration and Asylum* decision, the Conseil used the injunction technique by directing the judicial authorities to ensure respect for legislative rules and guarantees as well as for the competent courts to censure and punish.²⁰⁰ In both the *Security and Liberty* decision and the August 26, 1986 decision, the Conseil balanced the interests of the individual in his or her freedom to act against the interests of law enforcement in preserving public safety and order.²⁰¹ In both instances, the Conseil concluded that the interest in individual liberty was outweighed by the need to curb threats to public order.²⁰² In the *Immigration and Asylum* decision, however, the law proposes that the police may perform random identity checks²⁰³ regardless of whether there is a threat to public order. The Conseil rejected the argument that the provision violated the principle of equality, stating that foreigners and French nationals are placed in different situations, and therefore, may be treated differently under the law.²⁰⁴ By upholding this law, the Conseil increased the powers of the police in relation to individuals without providing additional justification for that increase. It simply upheld the new law using the same *réserve d'interprétation* that it had directed in both prior decisions.²⁰⁵

¹⁹⁶ Vroom, *supra* note 6, at 294 n.154.

¹⁹⁷ *Id.* at 294.

¹⁹⁸ Decision of Aug. 26, 1986, Con. const., 1986 J.O. 10438, 10439.

¹⁹⁹ *Id.* Vroom notes that the modified provision was criticized as being overly vague, giving police unrestricted authority to perform identity checks and offering inadequate protection of the constitutional right of freedom of movement. Vroom, *supra* note 6, at 295.

²⁰⁰ Decision of Aug. 26, 1986, Con. const., 1986 J.O. 10439.

²⁰¹ Vroom, *supra* note 6, at 294–95.

²⁰² *Id.*

²⁰³ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

²⁰⁴ *Id.*; see also *supra* text accompanying notes 145–46.

²⁰⁵ Vroom, *supra* note 6, at 294. A commentator's perspective on the earlier decisions is perhaps even more poignant in regard to the *Immigration and Asylum* decision: "the bill might as well have said that identity checks are permitted in all circumstances." *Id.* at 295 n.160. Since the 1993 decision, Charles Pasqua has used the law permitting identity checks to combat the Algerian crisis of August 1994 (five French nationals were killed at a diplomatic compound in Algeria) by calling for French police forces to check the identities of those suspected of

E. *Individual Liberties*

1. Administrative Detention

The Pasqua Bill included several provisions that infringed upon individual liberties, including the duration of administrative detention.²⁰⁶ During the time necessary for arranging their departure, foreigners who are awaiting expulsion from French territory can be detained in a nonpenal institution prior to judicial approval.²⁰⁷ This detention lasts for a period of six days, but can be extended for a period of twenty-four hours if the foreigner does not have the proper documents necessary for expulsion and if so ordered by a magistrate.²⁰⁸ The new law proposed that this detention period be extended by seventy-two hours upon the order of the president of the *tribunal de grande instance* (court of first instance) or a magistrate designated by the tribunal's president.²⁰⁹

The authors of the referral argued that this provision deprived the foreigner of constitutional guarantees of individual liberty.²¹⁰ The Conseil responded that the legislature is at liberty to modify detention measures on the condition that it does not deprive the foreigner of any constitutional guarantees.²¹¹ The Conseil found that in the absence of an absolute emergency or serious threat to the public order, the extension, although subject to judicial scrutiny, violated the principle of individual liberty guaranteed by the Constitution.²¹² It is important to point out that the Conseil had already ruled on this issue in its *Entry and Stay of Foreigners* decision of

being linked to Islamic terrorists. Suzanne Lowry, *Focus Purge on Islam: Pasqua Rides a Wave of Fear*, SUNDAY TELEGRAPH 20, Aug. 14, 1994, available in LEXIS, News Library, Curnws File.

²⁰⁶ Communiqué, *supra* note 84.

²⁰⁷ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11728; Bréhier, *supra* note 67, at 7.

²⁰⁸ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11728; Bréhier, *supra* note 67, at 7.

²⁰⁹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. Under the present law, a foreigner who has not produced the proper travel documents is let free after the maximum seven-day detention period (six days and the additional 24-hour extension). Philippe Bernard, *Après la "censure" du Conseil constitutionnel le nouveau projet de loi Pasqua maintient les possibilités de contrôle des mariages mixtes (After the Conseil Constitutionnel's censure, the Pasqua Bill project maintains the possibility of stopping mixed marriages)*, LE MONDE, Sept. 24, 1993, available in LEXIS, World Library, Monde File. Because the foreigner purposely makes the documents disappear, his identity must be verified by the consulate of his native country. *Id.* In 15% of the cases this process takes more than the permitted seven days. *Id.*

²¹⁰ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11728.

²¹¹ *Id.*

²¹² *Id.*

September 3, 1986.²¹³ In that decision, the Conseil upheld an amendment to the law which would allow the expulsion of a foreigner who was considered a threat to the public order.²¹⁴ The Conseil reasoned that application of the provision constituted proper use of legislative prerogative.²¹⁵ But the Conseil struck down the part of the amendment which called for a three-day extension of the detention period.²¹⁶ In doing so, the Conseil declared (using similar language to that used in the instant decision) that such an extension, even if under judicial control, could not be prolonged absent an extreme emergency, or a particularly serious threat to the public order, without infringing upon the constitutional principle of individual liberty.²¹⁷ The *Immigration and Asylum* decision represents the second time the Conseil has annulled a provision seeking to extend the period of detention from twenty-four hours to seventy-two hours.

2. Judicial Detention

In addition to the provision regarding administrative detention, a second provision relating to judicial detention was also annulled by the Conseil.²¹⁸ The judicial detention provision sought to create a three month period of detention for those foreigners who refused to present the appropriate travel documents in order to prevent their expulsion from France.²¹⁹ According to an *ordonnance* (French law) dated November 2, 1945, a foreigner who attempts to block expulsion by refusing to present the necessary documents is guilty of an offense and can be convicted and sentenced to a prison term.²²⁰ The proposed law would allow the tribunal to postpone the prison term and place the foreigner in administrative detention for up to three months.²²¹

The authors of the referral argued that the provisions allow the judiciary to act in furtherance of police conduct to deprive individu-

²¹³ Decision of Sept. 3, 1986, Con. const., 1986 J.O. 10790, 10792.

²¹⁴ *Id.* at 10791.

²¹⁵ *Id.* at 10792.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729. Administrative detention occurs where time is needed to gather the appropriate documents for an alien's departure. *See generally id.* Judicial detention, on the other hand, occurs where the detainee has committed some sort of offense and is awaiting expulsion. *See generally id.*

²¹⁹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

²²⁰ *Id.*

²²¹ *Id.*

als of the constitutional guarantee of individual liberty, as well as the principles found in Article 8 of the 1789 Declaration.²²² As the Declaration states: "The law may only create penalties that are strictly and evidently necessary. No one may be punished except according to a law passed and promulgated prior to the offense, and lawfully applied."²²³

The Conseil responded that judicial detention is not a criminal sentence and that the proposed measure would result in depriving a person completely of liberty during a determined period.²²⁴ The Conseil referred to Article 66 of the Constitution, quoting: "No one may be detained arbitrarily. The judiciary, the guardian of individual liberty, ensures respect for this principle in circumstances provided for by law."²²⁵ The Conseil concluded that the provision did not satisfy the guarantees of individual liberty and was therefore contrary to the Constitution.²²⁶

Here, as with the provision relating to administrative detention, the Conseil again did not attempt to uphold the law and impose conditions through a *r serve d'interpr tation*, but instead annulled the law. Because detention is such an extreme restraint on personal freedom, it requires a higher degree of justification in order to uphold its validity.²²⁷ Although the Conseil increased detention powers in the *Security and Liberty* decision of 1981, it resisted doing so in its August, 1993 decision.²²⁸ In the 1981 decision, the Conseil allowed increased detention powers by requiring sufficient inquiry before detention or before the authorization of its extension.²²⁹ This directive or injunction imposed by the Conseil required a judge to authorize any extension of the twenty-four hour detention period.²³⁰

The Conseil imposed greater safeguards for the protection of individual liberty²³¹ in the *Immigration Law* decision of January 9,

²²² *Id.*

²²³ Declaration of 1789, *supra* note 141, art. 8.

²²⁴ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ BELL, *supra* note 5, at 143.

²²⁸ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11722.

²²⁹ See Decision of January 19–20, 1981, Con. const., 1981 J.O. 310.

²³⁰ *Id.* In this case a 24-hour detention period could only be extended to 72 hours where the detainee was under investigation for committing an offense involving an attack on a person or a robbery. See BELL, *supra* note 5, at 143. The Conseil said the decision had to be made by a judge because article 66 of the Constitution makes the judiciary the guardian of civil liberties. *Id.*

²³¹ BELL, *supra* note 5, at 143.

1980.²³² In that decision, the Conseil reviewed a law designed to prevent illegal immigration and control the entry and stay of foreigners.²³³ The Conseil upheld the provisions of the law that gave the authorities the power to detain illegal immigrants who were refused entry into France.²³⁴ This restriction on individual liberty was justifiable because the detention was for a limited period and its extension could be authorized only by the President of the *tribunal de grande instance*.²³⁵ Further justification for the provision was provided by the Conseil in the form of an addition (method of *r serve d'interpr tation*) providing that the detainee was entitled to seek the assistance of an interpreter, a doctor, and counsel.²³⁶ The Conseil did, however, strike down one provision whereby a foreigner could be detained for seven days before a judge intervened.²³⁷ The Conseil held that individual liberty could not be considered to be protected unless a judge intervened within the shortest possible period of time.²³⁸ This decision marks the first time the Conseil relied directly on Article 66 of the Constitution.²³⁹

It is clear from these decisions that the Constitution applies to aliens awaiting expulsion. The Conseil recognized the need to limit the legislature's right to balance individual liberties against the need for public order.²⁴⁰ The Conseil determined that detention is a severe restriction on individual liberty that infringes upon basic human rights to which both French nationals and foreigners are entitled.²⁴¹ Yet, despite its insistence that the legislature respect the

²³² Decision of Jan. 9, 1980, Con. const., 1980 J.O. 85.

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Decision of Jan. 9, 1980, Con. const., 1980 J.O. 85.

²³⁸ *Id.*

²³⁹ Vroom, *supra* note 6, at 281.

²⁴⁰ *See* Guendelsberger, *supra* note 11, at 684. It is interesting to note that the United States Supreme Court has found that the United States Constitution is inapplicable to aliens who are detained at the border. *See* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). United States immigration law allows a foreigner awaiting expulsion to be detained up to six months. 8 U.S.C. § 1252(c). After 1981 and the flood of Cuban and Haitian refugees, the U.S. began detaining foreigners for indefinite periods of time. Guendelsberger, *supra* note 11, at 683. The American courts defer to the legislature in its role as protector of national sovereignty, while the Conseil has not hesitated to ensure that the legislature properly balances the needs of government against the Constitutional right to individual liberty. *See id.* at 683-84.

²⁴¹ BELL, *supra* note 5, at 144. Bell suggests that this basic human right extends to terrorists as well. *Id.* In its decision of September 3, 1986 relating to terrorism law, the Conseil relied on article 66 of the Constitution when it considered the extension of the detention period in terrorist cases. *Id.*

constitutional principle of individual liberty, the Conseil has also allowed Parliament broad discretion to regulate the right to individual liberty.²⁴² In the September 1986 *Entry and Stay of Foreigners* decision, the Conseil stated that it was "up to the legislature to determine, in the public interest, the conditions on the exercise of liberty."²⁴³

3. Control of Marriages of Convenience

Like detention, marriages of convenience are fertile ground for interpretive doctrine. To counteract these *mariages blancs*, or marriages of convenience, the Pasqua Bill proposed a modification²⁴⁴ to the French Civil Code.²⁴⁵ This modification provided that a mayor, in response to serious indications raising suspicion that a marriage was arranged solely for a foreigner to obtain citizenship, could refer the matter to the *Procureur de la République* who could then postpone the wedding for a period of three months.²⁴⁶ The authors of the referral opposing this modification argued that this Article created a sanction manifestly disproportionate in relation to its implications.²⁴⁷ In addition, the opposition criticized the absence of a provision giving the right to appeal a decision to postpone the marriage.²⁴⁸ The opposition also asserted that the provision represented an attack on the freedom and liberty of marriage and the right to lead a private life.²⁴⁹

The Conseil responded to these arguments by annulling the provision on the grounds that it was contrary to the Constitution.²⁵⁰ The Conseil declared that the terms of the provision violated the principle of the liberty of marriage, which is a component of individual liberty.²⁵¹ The provisions stating that the mayor was obligated to refer a suspected marriage of convenience to the *Procureur*, that the marriage could be postponed up to three months, and that there

²⁴² Decision of Sept. 3, 1986, Con. const., 1986 J.O. 10791.

²⁴³ *Id.*

²⁴⁴ Communiqué, *supra* note 84.

²⁴⁵ CODE CIVIL [C. CIV.] art. 175.

²⁴⁶ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

was no right to appeal the decision of the *Procureur*, were particularly problematic in the opinion of the Conseil.²⁵²

F. *Political Asylum*

Another area in which the Conseil displayed strict adherence to constitutional principles relates to the highly controversial issue of political asylum. In the beginning of its opinion regarding the proposed restriction on political asylum in France, the Conseil presented the principles that should guide French asylum policy.²⁵³ First, the Conseil referred to the fourth paragraph of the Preamble to the 1946 Constitution.²⁵⁴ The Preamble states: "Any person persecuted for his activities on behalf of freedom has the right of asylum in the territories of the Republic."²⁵⁵ After citing the Preamble, the Conseil added that if certain guarantees attached to the right to asylum were anticipated by international conventions adopted by French national law, it was the legislature's responsibility to carry out these guarantees of constitutional value.²⁵⁶ The Conseil went on to say that asylum is a fundamental right and the exercise of that right by foreigners must be recognized.²⁵⁷ The Conseil concluded that the law can only regulate the conditions on asylum by making it more effective or by reconciling it with other constitutional rules or principles.²⁵⁸ The Conseil focused on several provisions of the proposed legislation, such as residence permits and the refusal to examine an application for asylum.²⁵⁹

1. *Titre de Séjour* (Residence Permit)

The provision introduced by the Pasqua Bill clarifies the conditions under which an asylum-seeker may be refused admission into France.²⁶⁰ The law proposes that if a refusal is not opposed by the applicant, a *titre de séjour* will be delivered to the applicant, but if necessary, may be taken away or not be renewed.²⁶¹ The authors of

²⁵² *Id.*

²⁵³ *Id.* at 11727.

²⁵⁴ *Id.*

²⁵⁵ FR. CONST. of 1946, pmb., para. 4.

²⁵⁶ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727. (Note that the circumstances are not defined in the decision.)

the referral argue that the provision infringes upon the legal guarantees provided for by the constitutional right to asylum.²⁶²

The Conseil responded that respect for the right to asylum means that authorization to stay temporarily on French territory, during the time necessary to make a decision regarding the individual's asylum status, must be given to any foreigner claiming the right to asylum.²⁶³ During this time, the foreigner may effectively exercise his *droits de la défense*,²⁶⁴ or defensive rights, provided for in Article 66 of the Constitution.²⁶⁵ The Conseil's decision effectively reads the new provisions introduced by the Pasqua Bill as infringements upon the allocation of power to the judiciary as the guardian of individual liberty against executive interference.

2. Compatibility with International Conventions

Another even more controversial provision of the law proposes that, in accordance with the stipulations of international conventions, France may refuse to examine the asylum application of a foreigner whose case has already been determined by another EU Member State.²⁶⁶ The opposition argues that by permitting the refusal of asylum in accordance with the stipulations of the Schengen and Dublin Conventions, the provision violates the fourth paragraph of the Preamble to the 1946 Constitution, which does not authorize such a severe restriction.²⁶⁷

The Schengen Agreement and Convention and the Dublin Convention are the most recent and the most important multilateral measures regarding asylum.²⁶⁸ On June 14, 1985, Germany, France, and the Benelux countries concluded the Schengen Agreement, and since then have been joined by Italy, Portugal, Spain, and Greece.²⁶⁹ The Dublin Convention prescribes the procedure for examination of asylum claims and has been signed by all of the mem-

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ FR. CONST. art. 66. Note that Article 66 of the Constitution provides that "[n]o one may be detained arbitrarily, and that [t]he judiciary, the guardian of individual liberty, ensures respect for this principle in circumstances provided for by law." *Id.*

²⁶⁵ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727.

²⁶⁶ *Id.* (referring to the Schengen Agreement).

²⁶⁷ *Id.*

²⁶⁸ See Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the "Euro-solution" to the German Immigration Dilemma*, 16 B.C. INT'L & COMP. L. REV. 201, 214 (1993).

²⁶⁹ *Id.* Italy joined in December 1990, and Portugal and Spain in 1991. *Id.* Greece was granted observer status in June 1991. *Id.* Thus, to date, there are nine members making up the Schengen Group. *Id.*

bers of the Schengen Group.²⁷⁰ The aims of the Schengen Agreement and the Dublin Convention²⁷¹ are to eliminate all border controls among EU Member States in order to ensure the free movement of goods and EU nationals, and most importantly, to control non-EU immigration.²⁷² Although immigration policy under the Schengen Agreement remains under the control of the Member States themselves,²⁷³ asylum policy is not exclusively a matter of national sovereignty, and may be qualified by agreement among the group members.²⁷⁴ The Convention makes clear that no Member State is required to authorize every applicant for asylum to enter or to remain within the national territory.²⁷⁵ Furthermore, despite its general commitment to the Geneva Convention²⁷⁶ and New York Protocol,²⁷⁷ the Schengen Agreement gives Member States the authority to “refuse entry or expel any applicant for asylum to a third State on the basis of its national provisions and in accordance with its international commitments.”²⁷⁸

²⁷⁰ Kanstroom, *supra* note 268, at 218.

²⁷¹ The European Community Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 [hereinafter Dublin Convention].

²⁷² See Kanstroom, *supra* note 268, at 214–15.

²⁷³ See *id.* at 216.

²⁷⁴ *Id.* at 217.

²⁷⁵ Schengen Agreement, *supra* note 88, tit. II, ch. 7, art. 29(2).

²⁷⁶ Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Geneva Convention]. Title II, chapter 7, article 28 of the Schengen Agreement reaffirms the commitment of the Member States to the Geneva Convention. See Kanstroom, *supra* note 268, at 216.

²⁷⁷ New York Protocol, Jan. 31, 1967, 606 U.N.T.S. 267, 6 I.L.M. 78 (1967). The Geneva Convention defined a refugee as a person who: “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted . . . is outside his country of nationality . . .” Geneva Convention, *supra* note 276. The New York Protocol responded to the emergence of new refugee situations by making the Convention applicable to refugees regardless of the dateline. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS at 4, U.N. Doc. (1979).

²⁷⁸ Schengen Agreement, *supra* note 88, tit. II, ch. 7, art. 29(2). This provision seems to cast doubt on the *nonrefoulement* provisions of article 33 of the Geneva Convention, which provides that no state shall expel an asylum-seeker to the country where he or she has a fear of persecution, unless there is a reasonable belief that the individual presents a danger to the state in which he or she is seeking asylum. Geneva Convention, *supra* note 276, art. 33. Article 33 provides:

- (1) No contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Dublin Convention contains provisions ensuring that only one Member State will make an asylum decision.²⁷⁹ The main factors determining which government should be responsible for a decision include which Member State has granted the applicant a visa and whether the applicant resides in the territory of a particular Member State.²⁸⁰ Both the Schengen Agreement and the Dublin Convention proclaim that Member States may rely upon each other's asylum decisions in order to achieve the important goal of avoiding multiple asylum applications.²⁸¹ The EU Commission reported that this reliance on another Member State's decision means that no Member State could fall back upon a reservation to its own national law in this regard.²⁸² Thus, for example, an asylum applicant whose application was denied by Germany could not then make a constitutional claim under French law for a reconsideration of his asylum application.²⁸³

The Conseil, in its examination of the new provisions, first noted that the proposed national law could not be compatible with the Constitution unless it was consistent with the provisions of the Geneva Convention.²⁸⁴ The superior authority of the Geneva Convention over national law is derived from Article 55 of the Constitution.²⁸⁵ This conflict called into question the tension between the new law, which provides that France can refuse to consider an application for asylum that has been rejected by another Member State, and Article 33 of the Geneva Convention, as well as France's own liberal asylum policy enshrined in the Preamble to the 1946

(2) The benefit of the present provision may not, however, be claimed by a refugee when there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Id.

²⁷⁹ Dublin Convention, *supra* note 271, art. 3(2).

²⁸⁰ See Kanstroom, *supra* note 268, at 218 (citing Convention arts. 4-8).

²⁸¹ *Id.* at 218, 221.

²⁸² *Id.* at 221 (citing Report of the European Commission on Immigration Law, PARL. EUR. Doc. (SEC 1857) 5 (1991)).

²⁸³ *Id.* at 221. The principle that States can legitimately rely upon each other's asylum decisions forces each State to question the asylum procedures of the other States. *See id.* at 219. The problem arises when one State's asylum policy is extremely liberal in comparison to the other States' policies, because refugees will certainly seek asylum where it is most easily granted. *See id.*

²⁸⁴ Decision of Aug. 13, 1994, Con. const., 1993 J.O. 11727.

²⁸⁵ *Id.* Article 55 of the Constitution provides: "From their publication, duly ratified or approved treaties or agreements have a higher authority than laws, subject, for each treaty or agreement, to its implementation by the other party." FR. CONST. art. 55.

Constitution.²⁸⁶ The Conseil settled this problem by stating that the determination of another Member State responsible for deciding an asylum case in accordance with an international convention is acceptable in France only if the convention reserves the right of France to also review the case in light of the Preamble.²⁸⁷ The Conseil emphasized in the form of an injunction that this obligation had to be assured by the legislature, and that only under this strict *réserve d'interprétation* would the provision be deemed compatible with the Constitution.²⁸⁸ The Conseil chose not to refer to Article 54 of the Constitution,²⁸⁹ which states that if, upon proper referral, the Conseil determines that the terms of an international treaty are contrary to the Constitution, then there must be an amendment to the Constitution in order for the treaty to be ratified.

IV. REACTION TO THE DECISION OF AUGUST 13, 1993

A. *Correction of the Censured Provisions*

Despite the apparent supreme authority of the Conseil, a new Government project to convert the censured provisions has succeeded in evading the Conseil's intent. The mechanism for this evasion is the point-by-point responses to the censured provisions, which superficially address the problems and thus allow the legislation to move forward without addressing the larger concerns regarding human rights implicit in the Conseil's opinion. Contrary to François Léotard's (past Minister of Culture) criticism that "[t]he legislator legislates in the shadow cast by the Constitutional Council,"²⁹⁰ it seems more accurate to say that the legislature dances around the shadow cast by the Conseil. In its August 1993 decision, the Conseil annulled certain provisions of the Pasqua Bill as con-

²⁸⁶ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

²⁸⁷ *Id.* at 11728.

²⁸⁸ *Id.*

²⁸⁹ Article 54 of the Constitution provides:

If, on a reference from the President of the Republic, the Prime Minister, or the President of either chamber, or 60 deputies or senators, the Conseil Constitutionnel declares that an international agreement includes a clause contrary to the Constitution, authorization to ratify or approve it may only be given after a revision of the Constitution.

FR. CONST. art. 54.

²⁹⁰ STONE, *supra* note 18, at 119 (quoting François Léotard, Minister of Culture).

trary to the Constitution.²⁹¹ Yet, by employing its technique of *réserve d'interprétation* to particular provisions of the Pasqua Bill, the Conseil explicitly identified those sections of the provisions that necessitated such a ruling.²⁹² Interior Minister Charles Pasqua, the author of the laws, noted the express observations and reworked the problematic provisions in accordance with the formulations presented by the Conseil.²⁹³ Thus, the Minister viewed the Conseil's decision as a *réserve d'interprétation*, and the new versions of the provisions are written so as to apply the law according to that interpretation. The text revisions only applied to those provisions deemed to violate such principles of individual liberty as administrative detention, judicial detention, and marriages of convenience.²⁹⁴ These revisions were adopted into law in early 1994 without being referred to the Conseil for a second review.²⁹⁵

1. Administrative Detention

The censured law relating to administrative detention called for an extension of the detention period from seven to ten days.²⁹⁶ In its ruling the Conseil declared that, absent an absolute urgency and serious threat to the public order, such an extension infringed upon a foreigner's individual rights.²⁹⁷ The newly revised law reintroduces the possibility of a seventy-two hour extension when the foreigner has not presented the proper documents to the administrative authorities, and when the circumstances show that the supplementary time period is for the sole purpose of obtaining that document.²⁹⁸ The new text does not abandon the essential seventy-two hour extension of the original Pasqua law. Rather, it retains the extension but mandates that such extension be for the sole purpose of obtaining the appropriate documents.²⁹⁹ In summary, the new law extends a seventy-two hour extension to two situations, where there is an absolute emergency or threat to public order, and where the necessary travel documents are unavailable.³⁰⁰ The latter situation

²⁹¹ See generally Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11722.

²⁹² See *id.*

²⁹³ Bernard, *supra* note 209.

²⁹⁴ *Id.*

²⁹⁵ J.C.P. No.4, Jan. 26, 1994 (Actualités sec.).

²⁹⁶ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11728.

²⁹⁷ *Id.*

²⁹⁸ J.C.P., Jan. 26, 1994, *supra* note 295.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

does not seem to warrant the high degree of intrusion constituted by a seventy-two hour extension. Although in theory the revised law conforms to the Conseil's prescriptions, in practice it presents a serious threat to a detainee's individual liberty.

2. Judicial Detention

In the case of judicial detention, the Conseil annulled the provision of the Pasqua Bill requiring a three-month period of detention for a foreigner who refused to present the proper travel documents in order to prevent his expulsion from the Republic.³⁰¹ The Conseil reasoned that judicial detention was not a criminal sentence, but rather a complete deprivation of the foreigner's individual liberty.³⁰² According to the revised text, the foreigner cannot be placed in judicial detention unless he is more than sixteen years of age.³⁰³ In addition, the detainee can request the assistance of an interpreter, a doctor, or an attorney.³⁰⁴ The detainee may communicate with the outside world, receive visits, and even obtain the authorization to leave the nonpenal institution without an escort.³⁰⁵ Finally, the detainee may appeal detention within ten days of the decision to detain.³⁰⁶ The revised provision maintains the essential element of the length of the period, but at the same time creates additional guarantees for the detainee in order to address the Conseil's concerns for the preservation of individual liberty. It is important to recall that this method of imposing greater safeguards for the protection of individual liberty, in an effort to justify greater intrusions on that liberty, was criticized by the Conseil itself, through a strict *r serve d'interpr tation*, in the *Immigration Law* decision. In that decision, the Conseil upheld a law calling for the detention of illegal immigrants, but only under the strict reservation that the detainee be entitled to seek the assistance of an interpreter, a doctor, or legal counsel.³⁰⁷ Here, the legislative revision of the law, rather than the Conseil by its decision, provides the addition to the provision in order to make it constitutional.³⁰⁸ Once again the revision does not

³⁰¹ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

³⁰² *Id.*

³⁰³ Bernard, *supra* note 209; J.C.P., Jan. 26, 1994, *supra* note 295.

³⁰⁴ J.C.P., Jan. 26, 1994, *supra* note 295.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Decision of Jan. 9, 1980, Con. const., 1980 J.O. 85.

³⁰⁸ Stone refers to this concept as a technique employed by the legislator to approve the

address the issue of the actual length of detention, which in an earlier case was considered to infringe upon such individual liberties as the right to privacy and the right to freedom of movement.³⁰⁹

3. Marriages of Convenience

With regard to marriages of convenience, the Conseil censured the provision mandating a mayor who suspects a marriage of convenience to refer the matter to the *Procureur* of the Republic to postpone the marriage for a period of up to three months.³¹⁰ The Conseil struck down the provision, pointing out that the length of the postponement and the absence of a right to appeal the *Procureur's* decision infringed upon the liberty of marriage, a component of individual liberty.³¹¹ The revision in the new law refines the text by modifying those provisions specifically identified by the Conseil in its decision.³¹² First, the mayor's decision to refer a matter to the *Procureur* is optional, not obligatory.³¹³ Secondly, the postponement period is reduced from three months to one month.³¹⁴ Finally, the *Procureur* must inform the concerned parties of the decision, and the parties, even if they are minors, are entitled to contest the decision before the President of the *tribunal de grande instance*, as well as appeal that decision.³¹⁵ In this area, the new law again manages to hold on to the essential portion of the proposed law, the power of the mayor and *Procureur* to stop marriages of convenience, but justifies this intrusion upon individual liberty by providing certain additional rights to those whose rights are being infringed.³¹⁶

B. *The Need to Amend the Constitution*

The Conseil's decision to strike down the Pasqua Bill provisions restricting France's asylum policy in accordance with the Schengen Agreement sparked the Interior Minister's resolution to seek an

constitutionality of a censured law, by remarking that "[g]overnments eschew imaginative reworkings of once-censured legislation in corrective revision processes, often choosing instead to mechanically copy the exact terms of Council decisions into beleaguered legislation." STONE, *supra* note 18, at 135.

³⁰⁹ See Vroom, *supra* note 6, at 280.

³¹⁰ Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11729.

³¹¹ *Id.*

³¹² J.C.P., Jan. 26, 1994, *supra* note 295.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See *id.*

amendment to the conflicting portion of the Constitution.³¹⁷ The Interior Minister demanded the advice of the Conseil d'Etat, France's highest administrative court, about whether the Pasqua Bill provision removing France's obligation to examine an asylum request previously submitted to another member of the Schengen Group was constitutional.³¹⁸ On September 23, 1993, the Conseil d'Etat responded by advising that a constitutional amendment would be necessary to remove the obligation for France to examine a request for asylum that was previously turned down by another Member State.³¹⁹ According to the Conseil d'Etat, such a revision was essential for France's ratification of the Schengen Agreement.³²⁰

³¹⁷ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11727; John Ridding, *France May Alter Asylum Controls*, FIN. TIMES, Sept. 2, 1993, available in LEXIS, News Library, Curnws File. The Interior Minister warned that without the measure, France would be flooded with asylum-seekers who were refused entry into other Member States. Ridding, *supra*. The majority of the EU Member States participating in the Schengen Agreement agreed to delay its implementation for two months, pushing back the date to February 1, 1994, in order to give France time to amend its Constitution. Paul Taylor, *EC Ministers Agree Feb. 1 Deadline for Open Borders*, REUTER EUR. COMMUNITY REP., Oct. 18, 1993, available in LEXIS, News Library, Curnws File; Nelson Graves, *Balladur Wants Harmony with Mitterand on Immigration*, REUTERS, SEPT. 2, 1993, available in Westlaw, INT-News Database.

³¹⁸ J.C.P., No. 40, Oct. 6, 1993 (Actualités sec.). The Conseil d'Etat acts as an advisor to the government, deciding whether provisions, as drafted, are constitutional or not. BELL, *supra* note 5, at 53.

³¹⁹ Yves Gautier, *Les Accords de Schengen et le droit d'asile à l'épreuve du débat constitutionnel* (The Schengen Agreement and the right to asylum put to the test of constitutional debate), ED. TECHNIQUES, EUROPE 1, Dec. 1993 (on file with the B.C. INT'L & COMP. L. REV.). The Conseil d'Etat is France's highest administrative court and sits within the executive branch of the government. MERRYMAN, *supra* note 28, at 88. It acts as advisor to the government with regard to the constitutionality of bills. BELL, *supra* note 5, at 53.

³²⁰ *Balladur Seeks to Allay Asylum Fears*, AGENCE FRANCE PRESSE, Oct. 7, 1993, available in LEXIS, News Library, Curnws File. Article 89 of the Constitution describes the amendment process that the Conseil d'Etat would follow and reads as follows:

The initiative for revision of the Constitution belongs concurrently to the President of the Republic on the proposal of the Prime Minister and to members of Parliament.

The bill for revision must be passed by the two chambers in identical terms. The revision becomes definitive after it has been approved by referendum.

Nevertheless, the revision bill is not submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the revision bill is only approved if it obtains a majority of three-fifths of the votes cast. The office of the Congress is that of the National Assembly.

No procedure for revision may be undertaken or pursued when it would infringe the integrity of [national] territory.

The republican form of government may not be the subject of the revision.

FR. CONST. tit. 15, art. 89.

In its response to Pasqua's demand, the Conseil d'Etat expressly stated that the provisions

In light of the Conseil d'Etat's opinion, Socialist President Mitterand and Conservative Prime Minister Balladur agreed to a proposed amendment to the Constitution.³²¹ This proposed amendment was adopted by the National Assembly and the Senate on November 19, 1993.³²² The amendment declares that France may, but is not obligated to, consider asylum requests from foreigners who have already been turned down by the signatory countries of the Schengen Agreement.³²³ The amendment does not, however, make clear what authority will determine if an asylum case will be reviewed, what criteria will be required, or the procedure that will be followed.³²⁴ Any new legislation passed after approval of the constitutional amendment and designed for its implementation, however, risks being subject to the scrutiny of the Conseil via a second referral.³²⁵

This is not the first time that the Conseil ruled on the constitutionality of an international treaty. The Conseil's decision regarding the Maastricht Treaty resulted in an amendment to the Constitution in order to allow implementation of the Treaty.³²⁶ When the Maastricht agreements were being signed in December 1991 and Febru-

of the Pasqua Bill would not allow France to apply article 29, paragraph 4 of the Schengen Agreement. J.C.P., Oct. 6, 1993, *supra* note 318. Paragraph 4 provides:

Notwithstanding paragraph 3 [that regardless of the Contracting Party who receives an asylum application, only one Contracting Party is responsible for assessing the application] every Contracting Party shall retain the right, for special reasons concerning national law in particular, to process an application for asylum even if under this Convention the responsibility for doing so is that of another Contracting Party.

Schengen Agreement and Convention, *supra* note 88, art. 29(4).

³²¹ *French Cabinet Approves Compromise on Asylum*, REUTER EUR. COMMUNITY REP., Oct. 20, 1993, available in LEXIS, News Library, Curnws File.

³²² *French Congress votes constitutional change on political asylum*, UNITED PRESS INT'L, Nov. 19, 1993, available in LEXIS, News Library, Curnws File.

³²³ D.S.L., 1993, No.44, at 552. This amendment is added to the Constitution under Title VI: Treaties and International Agreements, as article 53-1. *Id.* The amendment represents a compromise between the right-wing of the government led by Prime Minister Balladur, and Interior Minister Charles Pasqua, and the Socialist President Mitterand, who opposed limiting the asylum prerogative. *Government to reform constitution on political asylum*, AGENCE FRANCE PRESSE, Oct. 20, 1993, available in LEXIS, News Library, Curnws File.

³²⁴ Olivier Biffaud & Thierry Bréhier, *Ne d'un Compromis Entre l'Elysée et Matignon le Texte sur le Droit d'Asile est une Victoire pour M. Pasqua (A Compromise Reached on the Asylum Laws is a Victory for Mr. Pasqua)*, LE MONDE, Oct. 11, 1993, available in LEXIS, World Library, Monde File. The authors note that Pasqua announced that he will introduce new legislation after the approval of the constitutional amendment. *Id.* They warn that this may lead to draconian restrictions subsequent to the implementation of the amendment. *Id.*

³²⁵ STONE, *supra* note 18, at 120.

³²⁶ Sophie Boyron, *The Conseil Constitutionnel and the European Union*, 1993 PUB. L. 30, 31 (Spring).

ary 1992, the President of the Republic, under Article 54 of the Constitution,³²⁷ sent the Treaty to the Conseil for review.³²⁸ In its decision of April 9, 1992, the Conseil ruled that three provisions of the treaty violated the concept of national sovereignty enshrined in the French Constitution, and thus an amendment to the Constitution was necessary in order to ratify the treaty.³²⁹ The resulting amendment created Title XIV of the Constitution, entitled "European Communities and European Union."³³⁰

France is not the first Member State that needed to amend its Constitution in order to ratify the Schengen Agreement.³³¹ For example, Germany's ratification of the Schengen Agreement posed similar challenges to its Basic Law (Constitution), which contains an extremely liberal asylum policy vis à vis the other Member States.³³² The provision of the Schengen Agreement stating that a Member State is not bound to authorize every applicant for asylum to enter or remain within its territory³³³ directly contradicts Germany's *constitutionally* required right of entry and right to judicial review.³³⁴ The German government argued that a constitutional amendment was necessary in order to prevent a flood of asylum-seekers who had been denied entry elsewhere.³³⁵ Professor Daniel Kanstroom asserts, in his discussion of these developments in German asylum policy, that: "[o]n the functional level, the immediate impact of Schengen and Maastricht on the German immigration and asylum dilemma is unlikely to be as dramatic as that of the amendment to the Basic Law."³³⁶ This result is due to the fact that Germany's constitutional

³²⁷ FR. CONST. art. 54.

³²⁸ Boyron, *supra* note 326, at 31.

³²⁹ *Id.* at 32.

³³⁰ FR. CONST. tit. 14; *see also* Boyron, *supra* note 326, at 36. It is interesting to note that the Conseil d'Etat suggested that the new amendment relating to the Schengen Agreement be included in Title 14 of the Constitution, but the government did not accept this proposal, instead placing the amendment in Title VI, "Treaties and International Agreements." Thierry Bréhier, *La réforme du droit d'asile: M. Balladur souhaite l'adoption rapide de la révision constitutionnelle*, LE MONDE, Oct. 22, 1993, available in LEXIS, World Library, Monde File.

³³¹ *See* Kanstroom, *supra* note 268, at 219-20 n.137 (describing Germany's constitutional amendment relating to Schengen).

³³² *Id.* at 219-20 & n.137.

³³³ Schengen Agreement and Convention, *supra* note 88, tit. II, ch. 7, art. 29(2).

³³⁴ Kanstroom, *supra* note 268, at 216-17 (Note that such rights are not constitutionally protected in France).

³³⁵ *Id.* at 219-21. The author notes that the government's fears are questionable in light of the fact that only 10-15% of the asylum-seekers in other Schengen countries travel to Germany. *Id.* at 221 n.138. This statistic casts doubt on the fears of the French government as well.

³³⁶ *Id.* at 241.

amendment has been passed and its effects are forthcoming, whereas the Schengen Agreement has not yet come into effect as law. It is ironic that countries such as Germany, and now France, are scrambling to avoid the ramifications of an agreement that has not yet become binding.

V. IMPLICATIONS OF THE IMMIGRATION AND ASYLUM DECISION

A. *Significance of the Revisions and the Gouvernement des Juges*

The significance of the revisions discussed in Part IV, Section A³³⁷ is the immediate impact of the Conseil's decision on the legislature.³³⁸ One commentator noted that "referrals to [the Conseil] are extraordinarily efficacious weapons in the hands of the opposition."³³⁹ He attributes this to the fact that referral of a bill to the Conseil automatically suspends its promulgation until the Conseil reaches its decision.³⁴⁰ Furthermore, a law that is deemed unconstitutional cannot be promulgated.³⁴¹ This result forces the legislature to begin the legislative process again, keeping in mind the possibility of a second referral.³⁴² Stone refers to this process as "corrective revision," and argues that it implicates the Conseil as a policy-maker, telling the legislature how it should legislate in order to avoid the invalidation of laws,³⁴³ rather than as a constitutional court, insisting that both the legislature and the Government honor constitutional principles. But without this check on the branches of government, laws would be "the expression of the Government's will as approved by a political majority."³⁴⁴ For constitutional review to be effective, the Conseil must be able to impose its will on the other institutions.³⁴⁵

³³⁷ See *supra* text accompanying notes 291–316.

³³⁸ It is important to note that Interior Minister Pasqua criticized the Conseil for "preventing the government from applying its politics" and referred to the revised texts as "corrections" made in consideration of the Conseil's "observations." See Thomas Ferenczi, *Un nouveau projet corrigeant certaines des dispositions censurées sera présenté au Parlement (A new project correcting certain censured provisions will be presented to Parliament)*, LE MONDE, Sept. 19–20, 1993, at 11. The reporter here refers to the newly revised measures as "slightly modified to appease the council." *France Planning to Jail Illegal Immigrants*, N.Y. TIMES, Sept. 23, 1993, at A3.

³³⁹ STONE, *supra* note 18, at 120.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 129.

³⁴⁴ Vroom, *supra* note 6, at 276.

³⁴⁵ See STONE, *supra* note 18, at 216.

Although it is true that politicians and lawmakers must consider the possibility that their policies will come under the scrutiny of the Conseil, this does not mean that the Conseil itself engages in direct policy-making. It would be wrong, however, to say that the Conseil is detached from the political process. It is appointed by politicians and convened only by politicians, most often by the opposition.³⁴⁶ Its jurisprudence only binds politicians because the Conseil rules on the constitutionality of legislation after it has been adopted by Parliament but before it may be promulgated.³⁴⁷ Yet the Conseil should not be characterized as a partisan body serving a particular political interest.³⁴⁸ It is more appropriately characterized as a nonpartisan body serving a national political tradition.³⁴⁹ Since only controversial legislation leads to referral, the Conseil's decisions inevitably deal with political issues. The more important question is whether the Conseil itself is politically motivated. Despite the Conseil members' diverse career backgrounds and past political affiliations, the *Immigration and Asylum* decision was, like most Conseil decisions, unanimous.³⁵⁰

Regardless of the inherently political nature of matters before the Conseil, it has managed to establish and develop constitutional jurisprudence that is recognized in French law today, especially in the area of individual rights.³⁵¹ The Conseil has achieved this task by acting as a constitutional court, rather than as a strict policy-making body. It should be noted, however, that the Conseil necessarily enforces policy when it modifies laws according to *réserves d'interprétation*. The importance of modification is that it brings a proposed law (and the policies behind it) in line with constitutional principles. It is difficult, however, to ensure the legitimacy of decisions that are justified by interpretations of constitutional texts not settled in legal doctrine.³⁵²

Since 1971,³⁵³ the Conseil has attempted to create a constitutional jurisprudence and to establish constitutional principles in order to develop legal doctrine. The Conseil has established constitutional

³⁴⁶ *Id.* at 4, 220.

³⁴⁷ *Id.* at 220.

³⁴⁸ BELL, *supra* note 5, at 237.

³⁴⁹ *Id.*

³⁵⁰ See BELL, *supra* note 5, at 47.

³⁵¹ See Vroom, *supra* note 6, at 334.

³⁵² Stone notes that American constitutional law can be more easily defended due to the longevity of the constitutional regime and the historical tradition of judge-made law. STONE, *supra* note 18, at 11. The Conseil is only a recent institution with no historical tradition to fall back upon.

³⁵³ Decision of July 16, 1971, Con. const., 1971 J.O. 7114. The Conseil used the phrase: "In

jurisprudence by taking a legalistic approach to decision-making.³⁵⁴ It relies on the legally binding texts which comprise the *bloc de constitutionnalité*, as well as the principles derived from those texts as the sole authority on constitutional law, and applies them to the challenged legislation.³⁵⁵ These constitutional considerations are often stumbling blocks for the government in getting its policies passed in the form of legislation.³⁵⁶ Therefore, the result of a decision may be that some policy cannot be implemented. But the basis for that decision lies in legal reasoning, rather than in political argument and motive.³⁵⁷ This result is exactly what occurred in the *Immigration and Asylum* decision. The Conseil employed legal reasoning to formulate its conclusion that the means proposed for achieving the goals of the Pasqua Bill infringed on individual rights and principles of equality, and therefore could not be implemented.

Despite the legalistic approach it has taken, the Conseil has been criticized as being a *gouvernement des juges*³⁵⁸ that is usurping the executive and legislative branches of their roles in government because it makes significant political decisions.³⁵⁹ The primary purpose for the creation of the Conseil was to maintain a balance between the executive and legislative branches of government, and it appears to be fulfilling that purpose by acting as a check on the legislature and the Government.³⁶⁰ But, in light of the broad discretion it gives to these branches in their law making, the Conseil does *not* appear to be usurping any of their power. It assures that the legislature's power does not exceed constitutional limits.

Although the Conseil has succeeded in having the legislature respect constitutional principles of individual rights and freedoms in the laws it passes, it has repeatedly maintained that it does not possess a general power of discretion and decision identical to that of Parliament.³⁶¹ Politics is still politics, and has not been overrun by

light of the Constitution, and especially of its Preamble," giving the incorporated texts legally binding force. *Id.*

³⁵⁴ BELL, *supra* note 5, at 229.

³⁵⁵ See *supra* text accompanying notes 129–32. The Conseil was forced to develop these principles because they were derived from various fragments of the different constitutional texts and needed to be pieced together. See BELL, *supra* note 5, at 57.

³⁵⁶ *Id.* at 234.

³⁵⁷ See *id.* at 229. The Conseil's decisions transform political arguments into legal ones. *Id.*

³⁵⁸ *Id.* at 227. The phrase means a government of judges, signifying that the Conseil is more political than judicial. See *id.*

³⁵⁹ BELL, *supra* note 5, at 227.

³⁶⁰ See *infra* text accompanying notes 379–81.

³⁶¹ Decision of Jan. 19–20, 1981, Con. const., 1981 J.O. 309; see also Vroom, *supra* note 6, at 315–16.

constitutional review. For example, only eight of the Pasqua Bill's fifty-one Articles were struck down in the *Immigration and Asylum* decision.³⁶² The decision also offers an example of the large degree of discretion the Conseil gives to Parliament in its authority to regulate the exercise of individual liberties.³⁶³

At the beginning of its decision, the Conseil explicitly stated that the legislature (or Government as lawmaker) was free to implement general policies of immigration and asylum law, treating foreigners differently than French nationals, so long as those policies respected the liberties and rights set out in the Constitution.³⁶⁴ Legislation that mandates different treatment of persons in situations distinct from those of French nationals does not violate the principle of equality unless it is completely arbitrary.³⁶⁵ Additionally, use of *réserves d'interprétation* allows otherwise unconstitutional legislation to be deemed constitutional by the Conseil.³⁶⁶ The *Immigration and Asylum* decision makes it clear that even very questionable legislation can pass constitutional muster. The Conseil declared constitutional the proposed law on random police identity checks even absent a threat to public order (the previous standard).³⁶⁷ It conditioned the constitutionality of the law upon the implementation of proper procedural safeguards by the judicial authorities under a *réserve d'interprétation*.³⁶⁸ Reform is difficult to achieve only when the Conseil finds that application of the proposed legislation violates a fundamental right.³⁶⁹ For example, in the *Immigration and Asylum* decision, the Conseil struck down the proposed legislation increasing periods of administrative and judicial detention because it deprived the detainee of his or her fundamental right to liberty.³⁷⁰ A possible justification for the Conseil's deference to the police in the area of identity checks is that identity is easily verifiable, and not overly intrusive to the individual.³⁷¹ Detention, on the other hand,

³⁶² Bréhier, *supra* note 67, at 7.

³⁶³ See Vroom, *supra* note 6, at 316.

³⁶⁴ See *supra* text accompanying notes 145–47.

³⁶⁵ BELL, *supra* note 5, at 223–24.

³⁶⁶ STONE, *supra* note 18, at 88–89.

³⁶⁷ See Decision of Aug. 13, 1993, Con. const., 1993 J.O. 11723.

³⁶⁸ See *id.*

³⁶⁹ BELL, *supra* note 5, at 235–36.

³⁷⁰ See *supra* text accompanying notes 210–12.

³⁷¹ Vroom, *supra* note 6, at 287. Critics of anti-immigration policies argue that the identity checks are highly intrusive and are aimed primarily at Arab and black immigrants. Webster, *supra* note 65.

involves a greater infringement upon an individual's right to privacy and freedom of movement.³⁷²

It seems that the only obligation the Conseil imposes upon Parliament is to respect constitutional principles when it makes laws.³⁷³ Unfortunately, however, the Parliamentary majority may not fulfill this obligation and instead, may approve laws that infringe upon individual constitutional rights. It is in this situation that the referral system becomes instrumental, because it provides the only means for a political minority to challenge the constitutionality of laws proposed by the political majority. Although constitutional review is a strategic tool for the political opposition, it is also an effective guarantee that rights and liberties will be important elements of legislative debate.³⁷⁴ By basing its decisions on the notions of equality, individual liberty, and the fundamental right to asylum, the Conseil ensures its own stability and legitimacy as the guardian of the Constitution and the principles it invokes.

The Government also questions the legitimacy of the Conseil when implementations of its policies are blocked by a Conseil decision. Although the Government policies may seek to further valid goals, the means to achieving these aims may infringe upon the constitutional rights of individuals.³⁷⁵ Oftentimes, the pressures of society and law enforcement become strong enough to incite Government action which directly limits individual liberties.³⁷⁶ Under such circumstances, it has become the role of the Conseil to step in and balance the Government's need for order against the need to protect individual rights.³⁷⁷

The Conseil was faced with such a situation in its *Immigration and Asylum* decision because the Government-proposed Pasqua Bill was approved by a majority in Parliament and received widespread support from public opinion. If the Conseil had blindly agreed to the restrictions on immigration and asylum introduced by the Pasqua Bill, it would have had difficulty because it would still have had to provide the appropriate reasoning for its decision. On the other hand, by questioning the validity of particular provisions of the law and declaring some of them unconstitutional, the Conseil invited

³⁷² See Vroom, *supra* note 6, at 280.

³⁷³ See BELL, *supra* note 5, at 236 (citing one decision).

³⁷⁴ STONE, *supra* note 18, at 220.

³⁷⁵ See BELL, *supra* note 5, at 238.

³⁷⁶ Vroom, *supra* note 6, at 321.

³⁷⁷ See *id.*

strong opposition from members of the government and from the public. As one commentator notes: “[l]aws are referred to the Conseil by political factions opposed to the text, and the Conseil hands down its decision while the debate is still current; as a result, decisions risk being unfairly politicized despite their careful legal reasoning.”³⁷⁸

It is crucial to remember that the purpose of the Constitution is to set out the methods and principles by which the government is to conduct itself.³⁷⁹ These guiding principles constitute the values of the society that accepts the Constitution as a supralegislative text. It follows that the legislature, as the governmental representative of the people, may conduct itself according to the will of the people, but “[t]he law expresses the general will only when it respects the Constitution.”³⁸⁰ When the legislature (or the executive branch when making laws) exceeds its authority under the Constitution, it is violating those principles which it has a duty to uphold. The Conseil, then, acts as a safeguard against such violations, reminding the branches of government that ultimately there is a *legal* sanction for failure to comply with the Constitution.³⁸¹

B. *Recognition of the Conseil's Constitutional Jurisprudence*

This constitutional jurisprudence, especially in the area of individual rights, is recognized today not only by the Government and the legislature, but also by the highest French courts. In part, this recognition is due to the growing familiarity with constitutional principles that results from a greater number of Conseil decisions.³⁸² In the first ten years after the 1974 amendment modifying the referral system³⁸³ the number of referrals increased from one to thirteen each year, and more than half of the referrals related to the protection of individual rights.³⁸⁴ This significant increase in decisions, especially in the area of individual rights and liberties, demonstrates the importance of constitutional review of the legislative process. Awareness of the Conseil Constitutionnel's jurisprudence and the desire to minimize the chance of its censure are also indicated by the legislature's (or the Government's) use of the Conseil

³⁷⁸ Vroom, *supra* note 6, at 330.

³⁷⁹ See BELL, *supra* note 5, at 2.

³⁸⁰ Decision of Aug. 23, 1985, *quoted in* Vroom, *supra* note 6, at 305.

³⁸¹ See BELL, *supra* note 5, at 234.

³⁸² Vroom, *supra* note 6, at 309–10.

³⁸³ See *supra* text accompanying notes 33–34.

³⁸⁴ Vroom, *supra* note 6, at 276.

d'Etat's advisory opinions under Article 39 of the Constitution.³⁸⁵ Under this scheme, the Conseil d'Etat formulates an opinion on a bill's constitutionality in light of the jurisprudence of the Conseil Constitutionnel.³⁸⁶

The Conseil d'Etat's recognition of the Conseil Constitutionnel's jurisprudence is not limited to the formulation of advisory opinions. It has explicitly followed the Conseil's interpretations relating to individual liberties.³⁸⁷ The Conseil's interpretations of the protection of liberty have also been cited at the Cour de Cassation, France's highest ordinary court.³⁸⁸ It is important to note that neither of these courts were bound to follow the jurisprudence of the Conseil, but did so voluntarily.

The Conseil has become instrumental as a protector of individual rights and freedoms. Yet although it has succeeded in establishing constitutional jurisprudence in French law, it is severely limited in the application of that jurisprudence. Not only do the Government and legislature have the option of referring proposed laws to the Conseil for review, but they also have the opportunity to revise laws judged unconstitutional to achieve conformity with the Conseil's decision.³⁸⁹

In the case of the *Immigration and Asylum* decision, Interior Minister Pasqua took advantage of this opportunity and revised the annulled laws enough for them to pass constitutional muster. For example, the new judicial detention law still permits a three-month detention period, arguably an infringement of individual liberty.³⁹⁰ But the revised law, in accordance with the Conseil's *réserve d'interprétation*, justifies this intrusion upon individual liberty by imposing such safeguards as a minimum age for the detainee and the availability of medical and legal assistance.³⁹¹ It is unfortunate that politicians and legislators in France may draft legislation with language that does not overtly violate the Constitution but has the effect of

³⁸⁵ FR. CONST. art. 39; see also Vroom, *supra* note 6, at 317-18.

³⁸⁶ See Vroom, *supra* note 6, at 317-18.

³⁸⁷ *Id.* at 313-14.

³⁸⁸ *Id.* at 310-11. It should be noted that the Cour de Cassation's deference to the Conseil's interpretation of constitutional sources is a recent development. See BELL, *supra* note 5, at 49-50. Two years after the Conseil's *Vehicle Searches* decision (striking down law conferring on police unlimited power to search vehicles on highway where there was no crime or threat to public order), the Cour de Cassation issued a decision undermining the effect of the earlier Conseil decision. *Id.* (holding that the police could search vehicles belonging to any person under the general provisions relating to the investigation of "flagrant offenses").

³⁸⁹ See e.g., J.C.P. No. 41, Oct. 13, 1993 (Actualités sec.).

³⁹⁰ See *id.*

³⁹¹ *Id.*

weakening constitutional rights when it is applied. This problem is especially dangerous in immigration and asylum legislation, which builds on an inherently discriminatory basis and involves notions of equality and due process.

C. *Consequences of the Constitutional Amendment*

Another stumbling block for the Conseil in its role as protector of rights and liberties is the ability of the Government or the legislature to override a Conseil decision by changing the Constitution to make *it* conform to new legislation. The recent adoption of the amendment modifying France's historically liberal asylum policy illustrates exactly the reality of this danger. The Conseil's efforts to put a check on the government by opposing legislation infringing upon the rights of asylum-seekers failed. The government's desire to comply with the Schengen Agreement simply trumped the constitutionally-mandated asylum policy set out in the Preamble to the 1946 Constitution.³⁹² While it is clear that the goals of the Schengen Agreement could not be achieved without France's cooperation regarding asylum policy, the measures taken for harmonization must not ignore fundamental constitutional rights. Ironically, implementation of Schengen has been delayed indefinitely,³⁹³ casting doubt on the necessity of the constitutional amendment and the resulting compromise of France's tradition asylum policy.

CONCLUSION

There is no doubt that the Conseil Constitutionnel has made considerable progress in establishing itself as a legitimate authority

³⁹² See *supra* text accompanying notes 322-25. The necessity of this amendment is questionable. One commentator asserts that article 29(4) provides France with a way to retain the language of the Preamble and still comply with the Schengen Agreement. See Yves Gautier, *CHRONIQUE*, Dec. 1993 (on file with the B.C. INT'L & COMP. L. REV.). It is questionable whether asylum is as serious a problem as the government is portraying it to be. Kerry, *supra* note 76.

³⁹³ Philippe Bernard, *Au nom de Schengen, L'ajournement de la mise en oeuvre de la convention rend inopérantes plusieurs lois contre l'immigration clandestine* [In the name of Schengen, Postponement of the convention's implementation makes several anti-immigration laws ineffective], *LE MONDE*, Feb. 15, 1994, available in LEXIS, World Library, Monde File. The newest deadline, predicted as October of 1994, is almost two years after the original deadline. *Denmark Applies for Observer Status with Schengen Group*, REUTER EUR. COMMUNITY REP., MAY 27, 1994, available in LEXIS, News Library, Curnws File. The uncertainty surrounding France's commitment to Schengen is in large part due to Pasqua's hard-line stance on immigration, and is viewed as an obstacle to implementation of the agreement. *Id.*

on constitutional jurisprudence and as a protector of individual rights and freedoms. There is certainly a need for even greater constitutional control in the areas of immigration and asylum, where rights and freedoms are on shaky ground. The 1974 constitutional amendment expanding the referral system has significantly increased the number of constitutional challenges brought before the Conseil. The Conseil, however, is still confined to reviewing legislation that has not been promulgated. Perhaps the government should reconsider the proposal to allow ordinary courts the option of referring promulgated laws to the Conseil. This would provide the legal system with a mechanism for individual access to judicial review of laws. Furthermore, it would create a formal link to the judiciary system and to individual litigants, both diminishing skepticism of the Conseil's nonpolitical nature and strengthening the Conseil's status as the protector of rights and liberties.

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