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# Judicial Review in France: Access of the Individual Under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform

*Louis M. Aucoin\**

## INTRODUCTION

Many western democracies have adopted the principle of judicial review as part of their system of governance. The purpose of judicial review is usually twofold. First, it is an organ designed to act as an arbiter, resolving conflicts arising from tensions between executive and legislative powers. Second, it is a guardian of human rights, able to protect the minority from abuse by the majority. Various types of judicial review have evolved, each placing different emphasis on these purposes. The differences reflect concerns arising from the political philosophies of the particular legal system.

Three distinct models of judicial review have evolved as a result of the different emphasis nations place on the purposes of judicial review. These models can be viewed on a spectrum. On one end of the spectrum is a model which traditionally puts more emphasis on judicial review as a means of dispute resolution in cases of political conflict between the branches of government. It grants no access to individuals. On the other end of the spectrum is a model which puts more emphasis on judicial review as a means of protecting individual rights. Consequently, it grants individuals access to the process. Occupying a midpoint in the spectrum is a model which encompasses the first two models but grants the power of judicial review only to a special constitutional court.

France has traditionally followed the first model of judicial review, excluding individuals from the process. This type of judicial review reflects the underlying philosophy of legislative su-

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premacv, which has characterized the French legal system since the French Revolution. It is a philosophy common to countries of the Romano-Germanic legal tradition. In fact, prior to the 1958 Constitution of the Fifth Republic, there was no judicial review of parliamentary laws. Judges were obliged to apply written law without regard to concerns of constitutionality.<sup>1</sup> Under the philosophy of legislative supremacy, only Parliament itself could enact a law and pass on its constitutionality.<sup>2</sup>

In 1958, the new Constitution expressly provided for the *Conseil Constitutionnel* (*Conseil*). The Constitution charged this body with reviewing the constitutionality of laws referred to it by the executive or the legislature prior to their promulgation. This form of judicial review was designed to enforce constitutional supremacy and to resolve disputes concerning the separation of powers. The *Conseil's* rulings on constitutionality are binding *erga omnes*.<sup>3</sup> In addition, consistent with the French tradition of legislative supremacy, once a law is promulgated, it is sacrosanct.<sup>4</sup> In this fashion, the *Conseil* exists conceptually as an extension, albeit an independent one, of the legislature. No court or other institution has the authority to pass on the constitutionality of a law. Moreover, only the executive and legislature may refer laws to the *Conseil*; private citizens have no access to the process of judicial review.

Recently, the *Conseil* has become the champion of fundamental rights. Furthermore, in 1990, President Francois Mitterand's Government proposed a major constitutional reform of the *Conseil*. This proposed reform would have provided individuals access to the process of judicial review.<sup>5</sup> The reform also would have given the *Conseil* authority to rule on the constitutionality of laws after their promulgation. Parliament, however, rejected the proposed reform.

The model of judicial review the United States has adopted stands in sharp contrast to the French model. Occupying the other end of the spectrum, this model reflects an underlying

<sup>1</sup> RENÉ DAVID, *FRENCH LAW* 29 (Michael Kindred, trans., 1972).

<sup>2</sup> *Id.*

<sup>3</sup> See FR. CONST. art. 62.

<sup>4</sup> See *id.* at arts. 60–62. Articles 60 through 62 of the Constitution convey exclusive jurisdiction upon the *Conseil* to rule on the constitutionality of laws prior to promulgation.

<sup>5</sup> See *Rapport Fait au Nom de la Commission des Lois Constitutionnelles*, Apr. 19, 1990, National Assembly Document No. 1288, at 13 (on file with author) [hereinafter Document 1288].

philosophy of popular sovereignty, placing emphasis on the individual and on individual rights. Consequently, individuals may challenge the constitutionality of any law before any court. Additionally, all U.S. judges may nullify laws they consider unconstitutional. This power is not granted expressly in the Constitution but comes to the U.S. legal system through the U.S. Supreme Court's decision in *Marbury v. Madison*.<sup>6</sup> A judge's ruling nullifying a law is *erga omnes* in that it is binding in all cases under the jurisdiction of that court. Finally, unlike French courts, U.S. federal courts may not review the constitutionality of a law prior to its enactment.<sup>7</sup>

Between France and the United States on the spectrum lies the third model of judicial review. It has evolved recently in some European countries of the Romano-Germanic legal tradition, including Italy, Germany, Austria, Belgium, and Spain.<sup>8</sup> Under this model, these nations attempt to balance the principle of legislative supremacy with the need to protect constitutionally guaranteed individual rights. Judicial review authority is assigned to a specialized constitutional court. The jurisdiction of this constitutional court is expressly conferred by each country's constitution. Like the French *Conseil*, this court has exclusive authority to pass on the constitutionality of laws referred by other branches of government.<sup>9</sup> An actual case or controversy is not necessary for a law to be referred to the constitutional court. In addition, in individual cases, the court also has jurisdiction to rule on the constitutionality of laws after their promulgation. The issue of a law's constitutionality may also come to the constitutional court in individual cases on referral from ordinary courts.

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<sup>6</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803).

<sup>7</sup> Judicial review prior to enactment would violate the constitutional prohibition against advisory opinions. See U.S. CONST. art. III. Article III confers jurisdiction upon the courts exclusively in matters involving an actual case or controversy between two or more parties. No real case or controversy can exist until a law is applied. Therefore, a judicial ruling would constitute gratuitous advice to the legislature.

<sup>8</sup> Louis Favoreu, *L'élargissement de la saisine du Conseil constitutionnel aux juridictions administratives et judiciaires*, 4 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 581, 599–600 (1990). Some eastern European nations are also adopting the European model. See *id.* at 607.

<sup>9</sup> This form of judicial review is called "abstract review." It is a review which can be exercised before a law is actually applied. See DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 15 (1989); see generally GÉRARD CONAC & DIDIER MAUS, *L'EXCEPTION D'INCONSTITUTIONNALITÉ* (1989).

The reforms recently rejected in France would have incorporated this third model of judicial review. This Article examines these reforms and the extent to which French citizens can still protect their individual rights. Part I reviews the philosophical underpinnings of judicial review in France in light of the proposed reforms' failure. Part I also examines the history, role, and authority of the *Conseil*. In order to evaluate individual access to the process of judicial review, Part II looks beyond the jurisdiction of the *Conseil* to relevant developments in French law and European law. This Article concludes that if France is to remain in step with its European neighbors, traditional forces must be overcome and constitutional reform of the judicial review process must occur.

## I. FRENCH CONCEPTIONS OF JUDICIAL REVIEW

When the French Parliament rejected the proposed constitutional amendments giving individuals access to judicial review by the *Conseil*, it was a clear victory for the forces of tradition. That such a victory should occur when other Romano-Germanic countries have adopted a broader concept of judicial review raises the question of which of the forces of tradition will retain the strength to resist the current of change. Examining these forces and exploring their historical roots provides an answer to this question.

### A. *Historical Roots of Judicial Review in France*

Opposition to judicial review in France is a legacy of the excesses of the *ancien régime*.<sup>10</sup> These excesses stemmed in part from the local administration of laws by institutions known as *parlements*, which acted as the local monarch's right arm.<sup>11</sup> As the French comparativist René David explains in his work on French law:

The supreme courts of pre-revolutionary France, the *parlements*, made themselves very unpopular by opposing all reforms to the traditional legal system. Assiduous in their defense of an antiquated system based on the inequality of social classes and on self-serving premises, they failed in their ambition of becoming the nation's representatives. Nor did they succeed in really controlling government action or in impos-

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<sup>10</sup> DAVID, *supra* note 1, at 29.

<sup>11</sup> *Id.* at 6-7, 23.

ing procedural rules upon it. Of their many ill-advised interferences in politics and government, people remember their opposition to those organizational reforms that the monarchy did attempt from time to time. Abolition of the *parlements* was one of the first acts of the French Revolution, on November 3, 1789.<sup>12</sup>

Consequently, since the French Revolution, French authorities have always associated a strong judiciary with the concept of "gouvernement des juges"—government by judges.<sup>13</sup>

The excesses of judicial and executive power in pre-revolutionary France led to the evolution of a new system based upon legislative supremacy after the overthrow of the *ancien régime*.<sup>14</sup> The French began to see representative democracy as the foundation for legitimate government, associated with the idea of national sovereignty.<sup>15</sup> The idea that sovereignty resides in the legislature became one of the pillars of the French Declaration of the Rights of Man and of the Citizen of 1789 (Declaration of 1789).<sup>16</sup> The distinction, however, between the legislative branch and the people appeared illegitimate to the French in principle and a threat to individual liberties in practice. To the French, only an elected Parliament could effectively guarantee these liberties.<sup>17</sup> Thus, the history of the French political system has been characterized by preeminent political power residing in the legislature. Even recently, under the constitutions of the Third and Fourth Republics, the power of the other branches of government has paled in comparison to that of the legislature.<sup>18</sup>

The traditional philosophy of legislative supremacy continues to influence the thinking of French jurists in the twentieth century. In 1921, for example, Edouard Lambert echoed this view when he criticized U.S. judicial review as "*gouvernement des juges*."<sup>19</sup> Professor Pierre-Henri Teitgen reflected a similar dis-

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *See id.* at 29.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 20.

<sup>16</sup> Article 6 of the French Declaration of the Rights of Man and of the Citizen of 1789 (Declaration of 1789) states: "The Law is the expression of the common will. All citizens have the right to participate personally or through their representatives in its formation." (author's translation).

<sup>17</sup> DAVID, *supra* note 1, at 20.

<sup>18</sup> *See generally* CHARLES DEBBASCH ET AL., *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 409–32 (2d ed. 1986).

<sup>19</sup> *See generally* EDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LEGISLATION SOCIALES AUX ETATS-UNIS* (1921).

trust of a powerful judiciary when he commented, prior to the creation of the *Conseil*: “[B]y enabling the *Conseil* to verify whether a law voted by the Parliament is in conformity with the Constitution, you fall into government by judges, each one subjectively interpreting the implied and explicit meaning of the text. You dislocate your entire system.”<sup>20</sup> Francois Luchaire, former judge of the *Conseil* and one of France’s leading constitutionalists, has posed the question for debate in his recent work on the constitutional protection of rights and liberties in the French system. Although acknowledging and analyzing the powers of the judges of the *Conseil*, he asks: “Doesn’t [the constitutional judge] risk going too far and opposing the common will which, according to Article 6 of the Declaration [of 1789] is expressed by the representatives of the people?”<sup>21</sup> For many French legal scholars, according judges the power to rule on the constitutionality of laws is a potential threat to democracy.

The French opposition to judicial review is also attributable to the fear that it could upset the functioning of a parliamentary democracy. In a pure parliamentary system, the chief executive leads the party with the majority in the parliament. This executive, usually the Prime Minister, heads the Government, exercises the state’s executive power, and has significant powers of legislative initiative.<sup>22</sup> At the same time, parliamentary systems are prone to constant dynamic tensions between the majority and the opposition minority parties. The minority party wields significant power, for it has the right, under certain circumstances, to require the resignation of the chief executive through the process of a motion of censure.<sup>23</sup> Consequently, there are constant political machinations between the majority and the opposition. Some French legal authorities have expressed a fear that the majority or opposition could use judicial review of proposed laws as a weapon to upset the sovereign legislature’s agenda, causing political instability.<sup>24</sup>

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<sup>20</sup> FRANÇOIS LUCHAIRE, LA PROTECTION CONSTITUTIONNELLE DES DROITS ET DES LIBERTÉS 15 (1987), *citing* Proceedings of the Consultative Constitutional Committee 77 (author’s translation).

<sup>21</sup> LUCHAIRE, *supra* note 20, at 2.

<sup>22</sup> See DEBBASCH ET AL., *supra* note 18, at 500. There is a similar system in the semi-presidential system of the Fifth Republic. It provides for a President, directly elected and independent of the legislature, and a Prime Minister who serves under the President and has the rights and responsibilities typical of a Prime Minister in a parliamentary system.

<sup>23</sup> DAVID, *supra* note 1, at 22.

<sup>24</sup> This fear was expressed with great alarm by a member of the Consultative

## B. *The Conseil Constitutionnel*

A review of the philosophical underpinnings of the French legal system and their historical roots reveals mistrust of judicial power, a preference for legislative supremacy, and a tendency to view judicial review as an undemocratic practice engendering chaos and imbalance in the separation of powers. In spite of these traditional fears, the constitutional review of laws adopted by the legislature became a reality when the 1958 French Constitution created the *Conseil*.<sup>25</sup> The Constitution's drafters envisaged the *Conseil* as playing a significant role as an independent arbiter in disputes arising between the executive and the legislature.<sup>26</sup>

Title VII of the Constitution addresses the *Conseil*, conferring a very specialized jurisdiction upon it.<sup>27</sup> In the original text of Article 61, the *Conseil's* jurisdiction could only be invoked by the President of the Republic, the Prime Minister, the President of the Senate, or the President of the National Assembly.<sup>28</sup> A major constitutional reform in 1974, however, resulted in an amend-

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Constitutional Committee, formed to consider the *Conseil Constitutionnel*: "[E]very time a law gives rise to an impassioned debate, the opposition will not fail to refer it to the jurisdiction of the *Conseil Constitutionnel*, and in the end the actual government will be in the hands of the retirees who will be sitting on this Council." LUCHAIRE, *supra* note 20, at 15.

<sup>25</sup> See FR. CONST. arts. 60–63. The creation of this institution constituted a real break with the past. While the constitutions of the Third and Fourth Republics had toyed with the idea of constitutional supremacy, no institution existed which could give this concept any practical application. The legislature was thus free to respect or ignore constitutional requirements. The 1958 Constitution also contains other innovations. They stem largely from the Constitution's implementation under the strong central government of Charles DeGaulle following World War II. The 1958 Constitution creates a strong president—essentially independent of the legislature—and introduces new constitutional measures aimed at insuring the separation of powers. See DAVID, *supra* note 1, at 20–22.

<sup>26</sup> See LUCHAIRE, *supra* note 20, at 48. It is indeed conceivable that disputes of this nature would arise in the French system given that the 1958 Constitution confers significant legislative powers upon the executive. Article 34 lists the areas in which the Parliament is entitled to legislate. It established Parliament as a legislature of limited powers not unlike the way in which Article I, Section 8 of the U.S. Constitution limits Congress's powers. Article 37 of the 1958 Constitution confers all of the residual legislative power on the executive. The executive, therefore, may exercise a regulatory power which is no longer limited by the written law of the legislature as it is in the United States, and as it had been under earlier French constitutions. In addition, Article 38 permits Parliament to delegate legislative authority conferred under Article 34. Articles 37 and 41 of the 1958 Constitution confer jurisdiction on the *Conseil* in those cases concerning a dispute between the "legislative" power of the President and that of Parliament.

<sup>27</sup> See FR. CONST. arts. 56–63.

<sup>28</sup> FRANCOIS LUCHAIRE & GÉRARD CONAC, *LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE* (2d ed. 1987).



ment to Article 61 expanding this exclusive list to include "sixty senators or sixty representatives of the National Assembly."<sup>29</sup> Under Article 61 procedures, the Government and legislature may refer laws which they have proposed to the *Conseil* at any time *prior* to promulgation.<sup>30</sup> Article 61 establishes that referral to the *Conseil* is obligatory in some cases and discretionary in others. All laws pertaining to the Rules of the National Assembly<sup>31</sup> or the Rules of the Senate, and all "organic" laws<sup>32</sup> must be reviewed by the *Conseil* in order to insure their conformity with the Constitution. In all other cases, referral is discretionary. Once the *Conseil* has reviewed a law, it issues its decision. If the *Conseil* finds a law unconstitutional, Article 62 prohibits its enforcement or promulgation. Decisions of the *Conseil* are universally binding.

The *Conseil* is composed of nine judges, three appointed by the President of the Republic, three by the Senate, and three by the President of the National Assembly.<sup>33</sup> Appointed members serve for nine years. In addition, all former Presidents of the Republic receive life-time appointments as full-fledged members of the *Conseil*.<sup>34</sup> Mindful of the potential backlash from other branches of French government, the *Conseil* has carefully limited its own jurisdiction. An example of such judicial restraint is one of the *Conseil's* early rulings addressing a law adopted by referendum.<sup>35</sup> In this ruling, the *Conseil* reasoned that a law adopted through the referendum process had the force and effect of a constitutional provision because it directly reflected the people's views.<sup>36</sup> Given this superior status, the *Conseil* decided that it lacked juris-

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<sup>29</sup> FR. CONST. art. 61; Loi Constitutionnelle no. 74-904 of Oct. 29, 1974, Journal Officiel de la République Française [J.O.], Oct. 30, 1974, 1974 Dalloz-Sirey, *Législation* [D.S.L.] 344 (Fr.).

<sup>30</sup> In a parliamentary political system the term "Government" is analagous to the U.S. President's administration. The Prime Minister has the power of legislative initiative. A bill proposed by the "Government," therefore, is one which is introduced through the Prime Minister or one of his or her agents. Legislation, however, inevitably reflects the general program of the French President. See DAVID, *supra* note 1, at 21.

<sup>31</sup> See generally, RULES OF THE NATIONAL ASSEMBLY, (Louis M. Aucoin, trans., 1991)(on file with author).

<sup>32</sup> "Organic" laws are those laws which are classified as such by the express terms of the Constitution and which require a qualified majority for their adoption.

<sup>33</sup> See FR. CONST. art. 56.

<sup>34</sup> *Id.*

<sup>35</sup> Décision 62-20 of Nov. 6, 1962, Con. const., 1962 Dalloz, *Jurisprudence* [D. Jur.] 398 (Fr.). The referendum is entirely a creature of the French Constitution. Article 89 contains provisions for amending the Constitution by referendum. See FR. CONST. arts. 11, 89.

<sup>36</sup> Décision 62-20, *supra* note 35.

diction to rule on the referendum's compatibility with other constitutional provisions.<sup>37</sup>

The *Conseil* has also exercised judicial restraint in defining its role *vis-à-vis* Parliament.<sup>38</sup> In 1975, exercising the jurisdiction conferred by the 1974 constitutional amendment for the first time, Parliament referred France's abortion law to the *Conseil*.<sup>39</sup> The law granted a woman the right to obtain an abortion under certain, enumerated conditions. In its decision, the *Conseil* ruled not only on the law's constitutionality, it also decided for the first time the question of its own jurisdiction under Article 55 of the 1958 Constitution.<sup>40</sup>

Prior to the abortion law decision, some French constitutional authorities had assumed that Article 55 implicitly conferred authority on the *Conseil* to rule on the conformity of parliamentary laws with the terms of treaties and international agreements.<sup>41</sup> In the abortion law case, however, the *Conseil* refused to rule on the abortion law's conformity to the terms of the European Convention on Human Rights.<sup>42</sup> The *Conseil* ruled that the Constitution limited its jurisdiction to the review of parliamentary laws for their conformity with the Constitution, and not for their conformity with international treaties and agreements.<sup>43</sup> Even in deciding the main constitutional question, however, the *Conseil's* decision limited its own power. The *Conseil* held that the abortion law was constitutional, and that it was thus otherwise powerless to rule on it. The *Conseil* stated that the Constitution had not conveyed upon the *Conseil* a decision-making power identical to that of Parliament. The effect of the *Conseil's* decision was to

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<sup>37</sup> *Id.*; see also LOUIS FAVOREU & LOIC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 172 (5th ed. 1989).

<sup>38</sup> Concern about the *Conseil's* role *vis a vis* Parliament arises rather naturally for U.S. jurists studying the *Conseil's* jurisdiction, given that its jurisdiction in reviewing the constitutionality of laws is exercised only prior to a law's promulgation. The French Constitution, however, expressly grants the *Conseil* "advisory" powers. Under Article 16, the French President is required to seek the advice of the *Conseil* in connection with the exercise of the power to declare a state of emergency. In addition, under Article 60, the *Conseil* is consulted in connection with any referendum, and under Articles 58 and 59, it sits as the final arbiter of disputes concerning elections.

<sup>39</sup> Décision 74-54 of Jan. 15, 1975, Con. const., 1975 Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 529 (Fr.); see FAVOREU & PHILIP, *supra* note 37, at 281.

<sup>40</sup> See Décision 74-54, *supra* note 39; FR. CONST. art. 55. Article 55 provides that the terms of treaties and international agreements are superior to parliamentary law.

<sup>41</sup> FAVOREU & PHILIP, *supra* note 37, at 286-87.

<sup>42</sup> See Décision 74-54, *supra* note 39.

<sup>43</sup> *Id.*

affirm itself as an institution with specific jurisdiction conferred by the Constitution, but not as a political institution with the power to second-guess the legislature.<sup>44</sup>

When cases referred to it involve human rights, however, the *Conseil* has generally viewed its jurisdiction expansively. Pivotal in French constitutional history in this respect is the famous 1971 decision on freedom of association.<sup>45</sup> The *Conseil* was called upon to decide whether it should give the general rights of man guaranteed in the *Preamble* of the Constitution the same effect as its *body*. Although the question appears to be merely technical, the *Conseil's* human rights jurisdiction lay in the balance.

At issue in this case was the Preamble of the French Constitution which states: "The French people solemnly proclaim their attachment to the rights of man and to the principles of national sovereignty as they are defined by the [Declaration of 1789], confirmed and complemented by the Preamble of the Constitution of 1946."<sup>46</sup> These glorious terms in the Preamble, however, have led to much debate in French constitutional history. Under Article 92 of the Constitution of 1946, the Preamble was not to be given the same effect as the text of the Constitution. It is quite clear that the drafters of the Constitution of 1958 intended the same result for the Preamble of 1958.<sup>47</sup> The 1958 Preamble incorporates the Declaration of 1789 and the Preamble of the

<sup>44</sup> Nevertheless, the *Conseil's* identity crisis in this respect is far from completely resolved. Authorities do not agree whether the *Conseil* is a court similar to other courts in the French legal system. In French terms, the question is whether it can be considered a "jurisdiction." The *Conseil* has no relation to any courts, and does not function as a court of appeal or as a court of first instance for any real case or controversy between private parties. In these respects the *Conseil* lacks many of the jurisdictional aspects typically attributed to courts. Yet the *Conseil* is an independent institution which has the jurisdiction to resolve major issues of constitutional law, and its decisions are binding *erga omnes*.

The *Conseil's* status has taken on importance in recent Senate debates over the proposed constitutional amendments of 1990. Some Senators expressed fear that if appellate jurisdiction is given to the *Conseil* it should be considered a court. Thus, Senators feared the possibility that French citizens could have *Conseil* decisions reviewed before the European Court of Justice (ECJ)—a practice some viewed as threatening French sovereignty. Other Senators expressed the view that the *Conseil* is *sui generis*, possessing some aspects of a traditional court along with other aspects unique to its own jurisdiction. Under this view, the *Conseil* will not be considered a "court" for the purposes of the interpretation of the ECJ. See *Débats Parlementaires* of June 28, 1990, J.O., June 29, 1990, at 2214 [hereinafter *Débats Parlementaires*]. The *Conseil's* status remains unsettled, and may only be determined by resolving conflicts over sovereignty between the EC and its Member States.

<sup>45</sup> Décision 71-44 of July 16, 1971, Con. const., 1972 D.S. Jur. 685 (Fr.).

<sup>46</sup> FR. CONST. pmb. (author's translation).

<sup>47</sup> LUCHAIRE, *supra* note 20, at 16.

Constitution of 1946, both of which discuss human rights. If the *Conseil* were to give those texts and preambles the effect of constitutional law, it would confer human rights jurisdiction upon itself. Legislative history, however, shows that the drafters conceived of the *Conseil* as the final arbiter in separation of powers disputes,<sup>48</sup> and not as the champion of human rights.

The *Conseil* resolved the issue by affirming a principle referred to in previous decisions. The *Conseil* held that the Preamble of the Constitution of 1958 and, through incorporation, the Preamble of the Constitution of 1946 and the Declaration of 1789, are sources of constitutional law to be given the same effect as the body of the Constitution.<sup>49</sup> The affirmation and incorporation by reference are also important because the Preamble of the Constitution of 1946 refers to "fundamental principles recognized by the laws of the Republic." Therefore, written law must also be a source of fundamental rights with constitutional value. In its 1971 decision, the *Conseil* noted that freedom of association is a fundamental right guaranteed by a statute enacted on July 1, 1901.<sup>50</sup> Written law's guarantee of freedom of association as a "fundamental right" formed the basis of the *Conseil's* ruling.

Several conclusions of great import in French constitutional law flow from the *Conseil's* 1971 decision on freedom of association and later decisions elaborating upon it.<sup>51</sup> First, there are rights guaranteed by the Preambles to the Constitutions of 1946 and 1958, together with those of the Declaration of 1789, which must be considered fundamental rights. Therefore, these rights must be given constitutional protection by the *Conseil*. Second, there are rights arising out of other written laws of the Republic which are fundamental and must be given constitutional protection. Finally, the *Conseil* is the final arbiter of which rights are "fundamental" and protected.<sup>52</sup> The *Conseil* thus defined the various sources of fundamental rights which are now frequently referred to as "*le bloc de constitutionnalité*" in French constitutional law.<sup>53</sup>

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<sup>48</sup> See *supra* note 26 and accompanying text.

<sup>49</sup> Décision 71-44, *supra* note 45; see FAVOREU & PHILIP, *supra* note 37, at 239.

<sup>50</sup> Décision 71-44, *supra* note 45.

<sup>51</sup> See LUCHAIRE, *supra* note 20, at 11-43.

<sup>52</sup> *Id.* at 26-27, 35.

<sup>53</sup> Translated, this means "the block of constitutionality." It refers to the "block" of texts consisting of the Preamble of the 1958 Constitution, the Preamble of the 1946

The *Conseil* has gone even further in a development which is somewhat at odds with the philosophical underpinnings of the French legal system.<sup>54</sup> The French legal system is characterized by legislative supremacy. That supremacy, together with the mistrust of judges, historically relegated the judge to a rule of mechanical application of the terms of written law.<sup>55</sup> In contrast, in the area of human rights, the *Conseil* has elaborated principles not found in the express terms of written law. For example, it has derived a universal right to a defense in non-criminal cases from written criminal procedure laws. The result is a guarantee of a U.S.-style due process in non-criminal cases.<sup>56</sup>

Furthermore, the *Conseil* enunciated new principles obligating legislators to protect the freedom of the press in the future without relying on constitutional text.<sup>57</sup> One French constitutionalist has reasoned that such a right could only be implied from the concept of "security" mentioned in connection with the guarantee of certain "natural and inalienable" rights contained in Article 2 of the Declaration of 1789.<sup>58</sup> In addition, similar to the U.S. Supreme Court's enunciation of various fundamental rights, the *Conseil* has "constitutionalized" certain areas of human rights. These rights include the right to privacy,<sup>59</sup> freedom of association,<sup>60</sup> the right to asylum,<sup>61</sup> and freedom of education.<sup>62</sup> The list is far from exhaustive.<sup>63</sup>

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Constitution, the Declaration of 1789, and the laws of the Republic granting rights, as the source of principles from which fundamental rights are determined.

<sup>54</sup> See, e.g., Décision 77-82 of July 20, 1977, Con. const., 1978 D.S. Jur. 701 (Fr.); Décision 77-92 of Jan. 18, 1978, Con. const., 1978 Recueil des Décisions [Rec. des Décisions] 21 (Fr.).

<sup>55</sup> See DAVID, *supra* note 1, at 27.

<sup>56</sup> Décision 77-82, *supra* note 54; Décision 77-92, *supra* note 54; see also LUCHAIRE, *supra* note 20, at 38.

<sup>57</sup> Décision 84-181 of Oct. 10-11, 1984, Con. const., 1984 Rec. des Décisions 78-92 (Fr.).

<sup>58</sup> See LUCHAIRE, *supra* note 20, at 42.

<sup>59</sup> Décision 76-75 of Jan. 12, 1977, Con. const., 1978 D.S. Jur. 173 (Fr.).

<sup>60</sup> See Décision 71-44, *supra* note 45.

<sup>61</sup> Décision 79-112 of Jan. 9, 1979, Con. const., 1980 D.S. Jur. 249 (Fr.).

<sup>62</sup> Décision 77-87 of Nov. 23, 1977, Con. const., 1977 Rec. des Décisions 42 (Fr.).

<sup>63</sup> See FAVOREU & PHILIP, *supra* note 37, at 364. While the manner in which fundamental rights are enunciated may be similar, the rights themselves are not named or conceived in the same way. In the case of "freedom of education" (*la liberté d'enseignement*), for example, the *Conseil* has elaborated principles designed to guarantee the plurality of both public and private education. The end result is to uphold the constitutionality of public funding of parochial schools. Conversely, there is no "freedom of education" *per se* under the U.S. Constitution. Thus, the French conception of this "right" underscores obvious differences in reasoning in the two systems.

One trend toward expansive jurisdiction directly contradicts the past. In a series of decisions, the *Conseil* has made pronouncements concerning the constitutionality of laws *subsequent* to their promulgation.<sup>64</sup> Its most dramatic ruling of this type is a 1985 decision on the constitutionality of a state of emergency in New Caledonia declared under the authority of a law adopted in 1984.<sup>65</sup> In 1985, legislators proposed amending the 1984 law, and extending the state of emergency. Members of Parliament referred the proposed amendment to the *Conseil*. The *Conseil* declared that because it could exercise jurisdiction in connection with a proposed law tending to modify, complement, or expand the scope of a law already promulgated, it could also rule on the constitutionality of the promulgated law.<sup>66</sup>

Thus, by the eve of the bicentennial of the French Revolution and of the Declaration of 1789, the *Conseil* had emerged as an institution with expansive powers. It had implemented the concept of constitutional supremacy in a manner unprecedented in French history. It had given meaningful enforcement to sources of human rights law which had been regarded as lofty statements of principle not having the force of constitutional law. Parliament had adopted a constitutional amendment, which appeared to recognize the *Conseil's* role in the human rights area. Finally, in a significant break with tradition, it had claimed authority to rule on the constitutionality of laws both before and after their promulgation. The French constitutional law of the Fifth Republic had evolved in such a way as to leave the door open to the same concept of judicial review which was gaining favor in other parts of the world—a concept which would give private citizens the opportunity to challenge the constitutionality of laws in effect which they considered to violate their fundamental rights.

### C. *The Proposed Constitutional Reform*

Indeed, this concept was precisely the goal of the constitutional reform which President Mitterand proposed in a televised speech on July 14, 1989. On this dramatic occasion, the President said:

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<sup>64</sup> Décision 78–96 of July 27, 1978, Con. const., 1978 Rec. des Décisions 29 (Fr.); Décision 75–57 of July 23, 1975, Con. const., 1975 Rec. des Décisions 79 (Fr.).

<sup>65</sup> Décision 85–187 of Jan. 25, 1985, Con. const., 1985 D.S. Jur. 361 (Fr.). The *Conseil* found the law constitutional.

<sup>66</sup> See FAVOREU & PHILIP, *supra* note 37, at 623.

There are good citizens, there are fine citizens, who are found on the right and who are found on the left, who are as concerned as I am about human rights and who understand very well that it would be great progress in democracy, returning to basics, to permit each Frenchman not to turn to intermediaries, but to say himself: 'My fundamental right—to liberty, to equality, to everything which has been recognized in the great principles inscribed in the Constitution—has been misunderstood, transgressed. And so, I demand justice myself.'<sup>67</sup>

The President was presaging the constitutional reform which the Government would propose for the Second Ordinary Session of Parliament for 1989–1990,<sup>68</sup> the second proposal in the history of the Fifth Republic at such a reform.<sup>69</sup> The 1990 reform proposed amending Articles 61, 62, and 63 of the 1958 Constitution to allow individuals access to the process of judicial review through an appeal—referred to in French as *contrôle de constitutionnalité des lois par voie d'exception*<sup>70</sup>—to the *Conseil*.

Proponents of the reform were cognizant of the developments in judicial review on the international level. They estimated, based on the history of the *Conseil*, that the traditional animosity toward judicial power had abated and the time for reform had arrived.<sup>71</sup> Furthermore, the *Conseil* had evolved to a point where it was exercising some of the same powers exercised by other courts of western democracies, where individuals had access to judicial review.<sup>72</sup>

Drafters of the proposed reforms designed them to overcome traditional fears of excessive judicial power. They did so even as they transformed the *Conseil* into a kind of specialized constitutional court in the area of human rights, similar to the constitutional courts of Germany and Italy.<sup>73</sup> Basically, the reform pro-

<sup>67</sup> Document 1288, *supra* note 5, at 13.

<sup>68</sup> See generally *Projet de Loi Constitutionnelle*, Apr. 2, 1990, National Assembly Document No. 1203 (on file with author); Document 1288, *supra* note 5; *Projet de Loi Constitutionnelle*, Apr. 25, 1990, National Assembly *Texte Adopté* No. 274 (on file with author).

<sup>69</sup> DEBBASCH ET AL., *supra* note 18, at 514. The first attempt occurred in 1977 as part of the Government's election platform.

<sup>70</sup> At least one authority has pointed out that the use of the term "exception" in French law is confusing. An "exception" is usually a procedural remedy which has application only in individual cases, whereas it is clear that the *Conseil's* rulings under this remedy would be binding. See Thierry S. Renoux, *L'exception, telle est la question*, 4 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 651, 652 (1990).

<sup>71</sup> See Document 1288, *supra* note 5, at 11.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 18.

posed granting individuals the right to appeal civil and criminal cases to the *Conseil*. The *Conseil* would then exercise its jurisdiction *erga omnes*, ruling on laws which had already been promulgated.

The reformers proposed amending Article 61 of the 1958 Constitution to include a last paragraph, stating: "On the occasion of any action in progress before a court, provisions of law concerning fundamental rights may be submitted to the *Conseil* which shall make a pronouncement on their conformity to the Constitution."<sup>74</sup> The reformers also proposed inserting a paragraph into Article 62 making the rulings of the *Conseil* binding *erga omnes*. Finally, the reformers proposed amending Article 63 to require the organic law mandated under the Article to be modified so as to implement procedurally the terms of the new amendment.<sup>75</sup>

The proposed amendments demonstrate that the reformers' major goal was to afford greater protection of fundamental rights to private parties in individual cases. Significantly, the express terms of the proposed amendments would have limited the new jurisdiction of the *Conseil* to "provisions of law concerning fundamental rights."<sup>76</sup> This limitation would have distinguished the *Conseil's* jurisdiction from that of courts in other countries which had already adopted the European model of judicial review.<sup>77</sup>

The modifications of organic law, on the other hand, reflected procedural concerns and attempted to allay some of the traditional concerns discussed in Part I of this Article.<sup>78</sup> The reformers proposed establishing a system where the highest French courts, and courts coming under their jurisdiction, would exercise a system of triage. Under this system, a party could, at any time and in any court, raise an objection concerning the constitutionality of a law relating to human rights. The court of first instance would first exercise triage, determining whether to hear the case. If it decides to hear the case, the court would then make an initial determination. Criminal courts would decide whether the constitutional issue raised "constitutes the basis of the prosecution."<sup>79</sup>

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<sup>74</sup> *Id.* at 75.

<sup>75</sup> *Id.* at 76.

<sup>76</sup> *Id.* at 13.

<sup>77</sup> See Alessandro Pizzorusso, *Un point de vue comparatiste sur la réforme de la justice constitutionnelle française*, 4 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 659, 668 (1990).

<sup>78</sup> See *supra* notes 10–24 and accompanying text.

<sup>79</sup> See *Rapport Fait au Nom de la Commission des Lois Constitutionnelles*, Apr. 19, 1990, National Assembly Document No. 1289, at 45 [hereinafter Document 1289] (on file with author).



In all other cases, courts would decide whether the issue “controls the outcome of the litigation.”<sup>80</sup> Parties would not be permitted to appeal lower court decisions refusing to transmit the appeal to the *Conseil*, except as part of an appeal of the outcome. The *Conseil d'Etat*<sup>81</sup> would provide further triage for all cases emanating from administrative courts, where those courts have transmitted the case to it, following an initial determination. The *Cour de cassation*<sup>82</sup> would generally fulfill that same role in cases transmitted from other courts.

The reforms proposed limiting the triage function to certain courts. Cases not falling under the jurisdiction of either the *Conseil d'Etat* or the *Cour de cassation*—such as those in the *Tribunal de Conflits*<sup>83</sup> or the *Haute Cour de Justice*—could be appealed to the *Conseil*.<sup>84</sup> In addition, the *Cour d'assise* would not exercise the triage function.<sup>85</sup> The reformers believed that the special composition of the *Cour d'assise* justified denying it the triage function.<sup>86</sup> The *Cour d'assise* is composed of judges and juries who decide both issues of fact and law. Allowing it to exercise the triage function would place the responsibility for constitutional decisions in the hands of laymen. Thus, denying the *Cour d'assise* the triage function represents the reformers' intent to avoid lay review of constitutional matters.

The reformers' proposals thus reflected concerns of avoiding frivolous appeals and procedural delays while providing an opportunity for the vindication of individual rights. In addition, the proposals would have accomplished these goals while respecting the tradition of legislative supremacy reflected in the exclusivity of the jurisdiction of the *Conseil*. In keeping with French consti-

<sup>80</sup> *Id.*

<sup>81</sup> See *infra* note 110.

<sup>82</sup> Document 1289, *supra* note 79, at 44. The *Cour de cassation* acts as a supreme court for individual cases outside the realm of administrative law. It is thus the final arbiter in appeals from ordinary courts in criminal and civil cases.

<sup>83</sup> *Id.* at 46; see also Favoreu, *supra* note 8, at 591.

<sup>84</sup> Document 1289, *supra* note 79, at 45; see also Pizzorusso, *supra* note 77, at 605.

<sup>85</sup> Document 1289, *supra* note 79, at 44. The *Cour d'assise* is a trial court for criminal matters involving serious offenses similar to felonies in common law countries. DAVID, *supra* note 1, at 41.

<sup>86</sup> See Document 1289, *supra* note 79, at 30. The reformers also justified denying the *Cour d'assise* the triage function by establishing direct appeal to the *Conseil* during the pre-trial phase of cases destined for the *Cour d'assise*. Issues of criminal procedure are normally decided at this phase. *Id.*

tutional tradition, neither the courts of first instance, the *Cour de cassation*, nor the *Conseil d'Etat* would have the authority to rule on the constitutionality of laws.<sup>87</sup>

The debates on the proposed reforms in both houses of Parliament took on a character which reflected current political realities as well. The socialists were the champions of the reform and hoped to gain politically by receiving credit from constituents for promoting democracy.<sup>88</sup> Championing the cause of individual access to judicial review represented a shift in position for the socialists. They had traditionally opposed the jurisdiction of the *Conseil*, regarding it as an institution which upset legislative supremacy.<sup>89</sup> The communists also maintained this traditional view.<sup>90</sup> The reforms took the *Union pour la Démocratie Française* and the *Rassemblement Pour la République*—two opposition parties—by surprise.<sup>91</sup> At least one authority has attributed the defeat of the reforms to the failure of the socialists to involve the opposition in the reforms' early stages.<sup>92</sup> Consequently, the opposition's reluctance to approve the reforms appeared more political than substantive.

In response to the proposed reforms, the opposition proposed an amendment which would have brought executive acts not otherwise subject to review by the *Conseil d'Etat* under the jurisdiction of the *Conseil*.<sup>93</sup> While such a reform would serve to strengthen the rule of law in France, the opposition's proposed amendment further politicized the debate.

The Senate was the scene of the greatest opposition. Opponents of the reforms raised many of the fears and concerns expressed throughout the history of French constitutional law. Some opponents saw the reform as undemocratic, threatening the concept of legislative supremacy.<sup>94</sup> Other opponents voiced concerns that

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<sup>87</sup> See *infra* notes 116–132 and accompanying text.

<sup>88</sup> Favoreu, *supra* note 8, at 611.

<sup>89</sup> *Id.* at 607.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 582.

<sup>92</sup> *Id.* at 611.

<sup>93</sup> *Débats Parlementaires* of Apr. 19, 1990, J.O., Apr. 20, 1990 at 676. Certain executive acts, such as a decree organizing a referendum or an executive refusal to convoke Parliament in a special session, are not reviewable by either the *Conseil* or the *Conseil d'Etat*. See Favoreu, *supra* note 8, at 609.

<sup>94</sup> *Débats Parlementaires*, *supra* note 44, at 2210.

the reforms would violate the principle of separation of powers, and that they would upset the political balance between the minority and the majority parties.<sup>95</sup> In addition, opponents feared that the interplay between French and European Community (EC or Community) law which would result from the reform would create a threat to French sovereignty. They feared that allowing a French citizen to appeal to the *Conseil* would give that citizen access to an appeal from the *Conseil* to the European Court of Justice (ECJ) through the terms of Article 177 of the Treaty of Rome (EEC Treaty).<sup>96</sup> Accordingly, opponents argued, the reforms would expose French constitutional law to review by the ECJ.<sup>97</sup>

Consequently, despite the reformers' attempts to address procedural concerns and to overcome traditional fears, the proposed reforms failed. While the National Assembly voted to adopt the proposed amendments, the Senate initially proposed amendments which would have emasculated the reform—amendments which the National Assembly subsequently rejected. In particular, the Senate added an amendment which would have limited the application of the proposed reforms to those laws adopted prior to the 1974 constitutional amendment. The 1974 amendment permitted sixty senators or sixty representatives of the National Assembly to invoke the jurisdiction of the *Conseil* prior to adoption of a law.<sup>98</sup> The proponents of this amendment reasoned that the power the 1974 amendment gave to the senators and representatives rendered review following adoption unnecessary.<sup>99</sup> Finally, on the second reading before the Senate, the senators killed the reform by voting a second time on June 28, 1990 to adopt verbatim the amendments which the National Assembly had rejected.<sup>100</sup> Under French parliamentary procedure, identical versions of the same legislation must be adopted by both houses during the same legislative session.<sup>101</sup> Thus, the Senate vote at the end of the 1989–1990 legislative session sealed the fate of the proposed reforms for that year. The victory for the forces of

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<sup>95</sup> *Id.* at 2214.

<sup>96</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 177.

<sup>97</sup> *Débats Parlementaires*, *supra* note 44, at 2214.

<sup>98</sup> *Id.* at 2224; *see supra* note 29.

<sup>99</sup> *Débats Parlementaires*, *supra* note 44, at 2224.

<sup>100</sup> *Id.* at 2231.

<sup>101</sup> *See* FR. CONST. art. 45.

tradition has left France at odds with the recent trends in judicial review of its neighbors and of western democracies.<sup>102</sup>

## II. JUDICIAL REVIEW BEFORE OTHER FRENCH AND EUROPEAN TRIBUNALS

The failure of the proposed reforms might lead one to believe that the private citizen in France is entirely without access to judicial review. Such a conclusion, however, must be qualified by an analysis of other developments in French and European law. No study of judicial review in France could overlook the jurisdiction of the administrative courts.

### A. *French Administrative Courts*

In France, disputes in which the government is a party are considered matters of administrative law.<sup>103</sup> Consequently, a private citizen cannot sue the government in ordinary courts. The determination of the legality of government actions is relegated almost exclusively to the jurisdiction of administrative courts.<sup>104</sup> These courts have developed a series of general principles of law—*principes généraux du droit*—which justify overturning executive acts.<sup>105</sup> Generally, administrative courts can overturn executive acts if they are considered to be an “excess of power.”<sup>106</sup> Although there is no strict rule of precedent or *stare decisis*, the stability of these principles of administrative law, elaborated by judges, is at present unquestionable.<sup>107</sup>

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<sup>102</sup> The development, however, has not gone without criticism in France. Following the Senate's rejection of the proposed reforms, a columnist for *Le Monde* expressed his view:

Little by little, Governments and parliamentarians have had to become accustomed to constructing the law under the strict control of the *Conseil Constitutionnel*. The rule of law thus progressively replaces the rule of the majority of the moment. Unfortunately, the Senate has refused its constituents the possibility of accessing the *Conseil* themselves. If all those who are responsible politically act together so as to violate the fundamental texts of our republican tradition, the ordinary citizen, even if he is the victim of that violation, can do nothing about it. France has progressed but has not yet attained the summit of the “rule of law.”

Thierry Bréhier, *Le Conseil constitutionnel, gardien vigilant*, *Le Monde*, May 13, 1991, at 8.

<sup>103</sup> DAVID, *supra* note 1, at 128.

<sup>104</sup> *See id.*

<sup>105</sup> FRANÇOISE DREYFUS & FRANÇOIS D'ARCY, *LES INSTITUTIONS POLITIQUES ET ADMINISTRATIVES DE LA FRANCE* 387 (2d ed., 1987).

<sup>106</sup> *Id.*

<sup>107</sup> DAVID, *supra* note 1, at 24–25.

Given that the role of French administrative courts is to guard against executive excesses, a foreign jurist may be surprised that they are placed under the authority of the executive. This organization of the administrative courts reflects the historical French mistrust of judicial power.<sup>108</sup> Traditionally, the French have been unwilling to entrust judges of ordinary courts with the power to determine the legality of executive actions.<sup>109</sup> Initially, this power was entrusted to a single institution—the *Conseil d'Etat*.<sup>110</sup> More recently, however, a series of local administrative courts under the jurisdiction of the *Conseil d'Etat* has been established.<sup>111</sup> Despite the apparent conflict of interest,<sup>112</sup> the courts have used their jurisdiction to act as a meaningful check against executive excesses. The administrative judges are empowered to rule on the legality of executive acts. Therefore, individuals have a remedy in administrative courts for illegal government action. Before the administrative courts, many of the fundamental constitutional rights derived from the *bloc de constitutionnalité*<sup>113</sup> are considered *principes généraux du droit*.<sup>114</sup> Thus, an administrative judge can overturn executive acts that violate fundamental rights.<sup>115</sup>

In addition, with the advent of the 1958 Constitution, the *Conseil d'Etat's* power has developed considerably. Article 37 of the 1958 Constitution confers significant legislative authority upon the executive.<sup>116</sup> Under Article 37, the residual powers not conferred specifically upon the legislature in Article 34 remain with the executive.<sup>117</sup> This grant of legislative powers is significant as it gives the executive autonomous regulatory power.<sup>118</sup> Thus, the executive has the authority to “legislate” in areas where authority has not been specifically conferred upon Parliament.

Early in the history of the Fifth Republic, the *Conseil d'Etat* issued a decision in which it claimed jurisdiction to nullify exec-

<sup>108</sup> See *supra* notes 10–24 and accompanying text.

<sup>109</sup> DAVID, *supra* note 1, at 27.

<sup>110</sup> The *Conseil d'Etat* is composed of well-respected experts in French administrative law who collectively act as an independent watchdog for the executive branch.

<sup>111</sup> DAVID, *supra* note 1, at 38.

<sup>112</sup> See *id.* at 24.

<sup>113</sup> See *supra* note 53.

<sup>114</sup> See *supra* note 105.

<sup>115</sup> DREYFUS & D'ARCY, *supra* note 105, at 155.

<sup>116</sup> See *supra* note 26.

<sup>117</sup> See *supra* note 26.

<sup>118</sup> DEBBASCH ET AL., *supra* note 18, at 652.

utive acts taken under this new authority if it considered them unconstitutional.<sup>119</sup> This decision allows administrative courts to exercise judicial review power in individual cases over these “legislative” acts of the executive. The *Conseil d’Etat*, however, must bow to the authority of Parliament’s written law in specific cases. In addition, because the authority to rule upon the constitutionality of laws rests exclusively with the *Conseil Constitutionnel*, the *Conseil d’Etat* may not pass upon the constitutionality of the law.

Although it is not permitted to rule on the constitutionality of statutes, the *Conseil d’Etat* has held that it can strike down statutes which are inconsistent with treaty obligations.<sup>120</sup> Article 55 of the French constitution states that treaties and international agreements have superior authority over statutes. Thus, in the case of *In Re Nicolo*,<sup>121</sup> the *Conseil d’Etat* decided that it possessed the authority to overturn a law of Parliament adopted prior to the enactment of a treaty containing an inconsistent provision.<sup>122</sup> Thus, under Article 55, the *Conseil d’Etat* overturned a provision of French electoral law as inconsistent with the EEC Treaty.<sup>123</sup> The subsequent ratification of the treaty is thus considered an expression of legislative intent with respect to the inconsistent provision.<sup>124</sup>

In 1975, the *Cour de cassation* went a step further in applying the terms of Article 55 in the *société “Cafés Jacques Vabre”* case.<sup>125</sup> It ruled that it has the authority to overturn even those written laws adopted following ratification of a treaty, if the law contains a provision inconsistent with the treaty.<sup>126</sup> The reasoning of the court in the *société “Cafés Jacques Vabre”* case is not only based upon the terms of Article 55, it is also grounded in EC law. In 1964, in the seminal ECJ case of *Costa v. ENEL*, the ECJ ruled that EC law takes precedence over national law, even national constitutional law.<sup>127</sup> The *société “Cafés Jacques Vabre”* case consti-

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<sup>119</sup> Judgment of June 26, 1959, Conseil d’Etat, 1959 D. Jur. 561 (Fr.).

<sup>120</sup> See Judgment of Oct. 20, 1989, Conseil d’Etat, 1990 D.S. Jur. 135 (Fr.).

<sup>121</sup> *Id.*

<sup>122</sup> See Stefan Reisenfeld, Note, *Decisions of Foreign Courts*, 84 AM. J. INT’L L. 765, 765 (1990).

<sup>123</sup> *Id.* at 766.

<sup>124</sup> LUCHAIRE, *supra* note 20, at 69.

<sup>125</sup> Judgment of May 24, 1975, Cour de cassation, 1975 D.S. Jur. 497 (Fr.).

<sup>126</sup> *Id.*

<sup>127</sup> Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 593–94 (1964); see *infra* text accompanying notes 150–152.

tutes the acceptance of the supremacy of EC law by ordinary French courts.<sup>128</sup>

Despite the fact that the *Cour de cassation* has claimed broader authority than the *Conseil d'Etat* in establishing the supremacy of EC law, the rulings of both these courts have significant ramifications in the area of human rights. They confer upon both administrative and ordinary courts the power to enforce the human rights provisions of the International Covenant on Civil and Political Rights,<sup>129</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>130</sup> and the European Convention on Human Rights,<sup>131</sup> through a kind of judicial review to be exercised by these French courts.<sup>132</sup> In addition, because the courts can exercise such power in cases brought by individuals, these decisions provide individual access to this judicial review process in French courts.

## B. *European Law and Judicial Review*

European law affords individuals in France the potential for judicial review of French laws before European tribunals. The European Convention on Human Rights (ECHR) provides human rights protections to citizens of those states which have ratified it.<sup>133</sup> In addition, EC law may also provide individuals with legal remedies.<sup>134</sup>

### 1. The European Convention on Human Rights

The ECHR enumerates fundamental rights which its contracting parties guarantee. Since its enactment, a series of protocols

<sup>128</sup> P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* 311 n.24 (5th ed., 1990).

<sup>129</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>130</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>131</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950.

<sup>132</sup> See LUCHAIRE, *supra* note 20, at 70.

<sup>133</sup> MATHIJSEN, *supra* note 128, at 317. Twenty-one of the 23 states which are members of the Council of Europe have ratified the ECHR.

<sup>134</sup> The EC comprises twelve Member States—Belgium, the Netherlands, Luxembourg, France, Germany, Italy, Denmark, Greece, Ireland, Portugal, Spain, and the United Kingdom. See *infra* notes 146–149 and accompanying text.

has broadened the list of rights enumerated in the ECHR.<sup>135</sup> Furthermore, Article 19 of the ECHR established the European Commission on Human Rights (Human Rights Commission) and the European Court of Human Rights (Court of Human Rights) as institutions designed to guarantee enforcement of the human rights recognized in the convention and protocols.<sup>136</sup> The jurisdiction of the Court of Human Rights and the Human Rights Commission depends upon the acceptance by the contracting parties of that jurisdiction as compulsory. France has accepted this compulsory jurisdiction.<sup>137</sup>

According to the procedure set out in the Convention, an individual may bring a complaint against his state before an international tribunal.<sup>138</sup> The Convention provides for a two-tiered procedure.<sup>139</sup> On the first level, the individual can bring a complaint against his state before the Human Rights Commission.<sup>140</sup> The Commission has a dual role. It first acts as an agent of triage, insuring that domestic remedies have been exhausted and that the claim raised is not frivolous. It then engages in fact-finding and attempts to facilitate a settlement between the parties. The results of the proceedings are then reduced to a report.<sup>141</sup>

The second level of the procedure, review by the Court of Human Rights, is invoked when the Human Rights Commission

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<sup>135</sup> See, e.g., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9; Protocol No.2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring Upon the European Court of Human Rights Competence to Give Advisory Opinions, May 6, 1963, Europ. T.S. No. 44; Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto, Sept. 16, 1963, Europ. T.S. No. 46; Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114; Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117; Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 19, 1985, Europ. T.S. No. 118.

<sup>136</sup> See Janette Amer, *Survey of the European Convention on Human Rights and Its Impact on National and International Institutions*, 12 ILSA J. INT'L L. 1, 1-25 (1988).

<sup>137</sup> Note, *European Court of Human Rights: Organization and Working*, 130 NEW L.J. 164, 164 (1980).

<sup>138</sup> Brian Walsh, *Protecting Citizens From Their Own Countries: How the European Court of Human Rights Affects Domestic Laws and Personal Liberties*, 15 HUM. RTS. 20, 22 (Summer 1988).

<sup>139</sup> Note, *supra* note 137, at 164-65.

<sup>140</sup> Amer, *supra* note 136, at 3.

<sup>141</sup> Note, *supra* note 137, at 164.



fails to reach a settlement.<sup>142</sup> Either the Commission or any interested state may bring the case before the Court of Human Rights.<sup>143</sup> Private parties, however, have no right of appeal to the Court of Human Rights.<sup>144</sup>

## 2. European Community Law

EC law is the second source of European law relevant to supranational judicial review. EC law comprises the treaties establishing the EC, together with the regulations, directives, decisions, and agreements of its institutions.<sup>145</sup> The EC was formed with treaties establishing the European Coal and Steel Community,<sup>146</sup> the European Atomic Energy Community,<sup>147</sup> as well as the EEC Treaty. Subsequently, the Merger Treaty of 1965 brought implementation of these treaties under the control of the same institutions—the European Parliament, the Council, the Commission, and the ECJ.<sup>148</sup> Later treaties, the most significant being the Single European Act,<sup>149</sup> have served to enlarge the scope of authority of the EC, its institutions, and its law.

In *Costa v. ENEL*, the ECJ established the supremacy of EC law. The court stated:

[B]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves.<sup>150</sup>

Since this landmark case, it has become clear from the rulings in other ECJ cases that EC law which is “directly applicable”<sup>151</sup> to a

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 165.

<sup>144</sup> *Id.* In practice, however, individuals are granted deference by the Court of Human Rights.

<sup>145</sup> *See* MATHIJSEN, *supra* note 128, at 316.

<sup>146</sup> TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY.

<sup>147</sup> TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY.

<sup>148</sup> *See generally* Treaty Establishing a Single Council and a Single Commission of the European Communities of Apr. 8, 1965, 1967 O.J. (L 152) 2.

<sup>149</sup> Single European Act, 1987 O.J. (L 169) 1.

<sup>150</sup> Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 593–94 (1964).

<sup>151</sup> There is a distinction in EC law between those legal norms which are “directly

particular case takes precedence over national law, even national constitutional law. This supremacy has been accepted by Member States.<sup>152</sup>

It is not clear exactly which human rights principles the ECJ will protect. In *Stauder v. City of Ulm*,<sup>153</sup> the ECJ stated generally that fundamental rights constitute general principles of EC law.<sup>154</sup> The ruling did not specify which rights the ECJ would recognize as worthy of protection or indicate how that determination would be made. In the 1970 case *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle und Futtermittel*, the court stated "the protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured in the framework . . . and objectives of the Community."<sup>155</sup> In a subsequent line of cases, the ECJ has referred to the ECHR in affording protection to particular human rights.<sup>156</sup> Thus far, however, the ECJ has not clarified the effect to be given to the ECHR's provisions.

Authorities have suggested two approaches for deciding the effect given to the ECHR's provisions. Under one approach—the "guidelines" approach—the ECJ would use the ECHR's provisions merely to guide it in its selection of which rights to give protection.<sup>157</sup> Under the second approach—the "substitution" approach—the Court would incorporate the provisions of the ECHR.<sup>158</sup> This incorporation would result from the principle of Article 234 of the EEC Treaty which establishes that the Community is bound by all prior commitments of Member States, particularly where, as in the case of the ECHR, they are all signatories.<sup>159</sup> In addition, the Joint Declaration by the European Parliament, the Council, and the Commission of April 5, 1977 is

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applicable" to Member States and those that are not. The test is whether the rule or principle in question leaves any discretion to the Member State in its implementation. *See, e.g., Case 10/71, Ministère Public of Luxembourg v. Muller*, 1971 E.C.R. 723, 730 (1971).

<sup>152</sup> *See* MATHIJSEN, *supra* note 128, at 305–16.

<sup>153</sup> *Case 29/69, Stauder v. City of Ulm*, 1969 E.C.R. 419, 425 (1969); *see also* Nigel Foster, *European Court of Justice and the European Convention for the Protection of Human Rights*, 8 HUM. RTS. L.J. 245, 246 (1987).

<sup>154</sup> Foster, *supra* note 153, at 246.

<sup>155</sup> *Case 31/70*, 1970 E.C.R. 1125, 1134 (1970).

<sup>156</sup> *See, e.g., Case 4/73, Nold v. Commission*, 1974 E.C.R. 491 (1974); *Case 44/79, Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727 (1979); *see also* MATHIJSEN, *supra* note 128, at 317.

<sup>157</sup> *See* Foster, *supra* note 153, at 267.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

another potential source of law to aid the ECJ in its determination of which rights it shall afford protection.<sup>160</sup> In any event, for individuals seeking judicial review against their own state, the lack of clarity with respect to Community norms in the area of human rights is daunting.

In addition, Article 177 of the EEC Treaty seriously restricts the Community's jurisdiction. It provides that when a question of EC law is raised in a case pending before a court or tribunal of a Member State, and no judicial review of the decision exists under national law, the national court must refer the matter to the ECJ.<sup>161</sup> The potential obstacle for the individual in this process is succinctly captured in the comments of Professor Mathijsen:

[T]he obligation to refer a question only exists when the national judge considers that a decision on the question is necessary to enable him to give judgment; in other words, it is his decision. Furthermore, it is also within the discretionary power of the national judge whether a question is raised in good faith or whether it is a purely procedural move initiated by a party, for instance, to delay judgment. There is therefore nothing automatic in the procedure of the preliminary ruling: as was said, it lies entirely within the discretionary powers of the national judge and neither the Court, nor national law, nor a Community rule can deprive him of this right.<sup>162</sup>

Whether the national body reviewing the individual's claim constitutes a "court or tribunal" is another issue which can make the availability of an appeal to the ECJ questionable.<sup>163</sup>

Consequently, while there is the potential for a kind of supranational judicial review arising under EC law, the obstacles to the pursuit of such a review by an individual are considerable. It is not clear which human rights principles the Community will safeguard. In addition, there are significant procedural obstacles for individuals seeking a hearing before the ECJ.

## CONCLUSION

There is no doubt that from the point of view of a French citizen, the recent rejection of the proposed constitutional amend-

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<sup>160</sup> MATHIJSSEN, *supra* note 128, at 317.

<sup>161</sup> *See id.* at 83.

<sup>162</sup> *Id.* at 84 (footnotes omitted).

<sup>163</sup> *See id.* at 83 n.20.

ments constitutes a significant loss. As a result, there is currently no mechanism in the French legal system which provides access by an individual to any process allowing for judicial review of Parliamentary statutes. This is so despite the *Conseil's* jurisdictional expansion beyond an independent arbiter in separation of powers disputes to a champion of the cause of human rights. The philosophy of legislative supremacy still holds sway. French law remains essentially unassailable following its promulgation, even though some recent rulings of the *Conseil* have chipped away at the edifice of legislative supremacy.

Although the *Conseil* is the only tribunal with the power to review the constitutionality of the laws of Parliament, the *Conseil d'Etat* and the *Cour de cassation* may provide individuals remedies in the area of human rights. The *Conseil d'Etat* has traditionally exercised judicial review of executive acts, and this authority has become increasingly significant in light of the legislative powers conferred upon the executive by the 1958 Constitution. In addition, both the *Conseil d'Etat* and the *Cour de cassation* will strike down statutes inconsistent with treaty obligations. This development offers tremendous potential for individuals in the area of human rights as France is a signatory to several international treaties, including the European Convention on Human Rights. The *Cour de cassation* offers the greatest hope in this respect, as it recognizes the supremacy of EC law even in light of parliamentary laws subsequently adopted. This development provides the potential for ordinary French courts to exercise judicial review using the European Convention on Human Rights and other international human rights conventions as supra-national constitutions of human rights.

The future otherwise remains hard to predict. For the immediate future, the French legal system will remain markedly out of step with that of neighboring states. In light of this position and the failure of judicial review reform proposals in 1990, there remains a need for change. Consequently, one can expect that similar proposals will be made in the future. If proposals are made, proponents of reforms must address the procedural concerns raised in connection with the 1990 reforms. Despite the evolution in France and other civil law countries, proponents of reform must be prepared to face the traditional bulwarks—legislative supremacy and mistrust of judicial power.