Judicial Review and International Law

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I. INTRODUCTION

It is well acknowledged that the constitution is the supreme norm of the legal system and that its supremacy can be guaranteed only by judicial review of legislation. This proposition is at the base of the justification given by Chief Justice John Marshall and Hans Kelsen, the major defenders of the two main types of judicial review: the American, decentralized system and the European, centralized system. Thus, for both men, the institution of judicial review is implied by the hierarchy between the constitution and ordinary legislation, and the hierarchy precedes, at least logically, the institution.

According to common doctrine, the courts, once established, apply the constitution, the principles expressed in the constitution, and also some principles not always expressed but that are thought to be inherent to any

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legal system, as for example the principle that the State is sovereign. Like the hierarchy of norms, these principles precede the institution of the courts and their jurisprudence, so that they can be used to evaluate them. True, the principles can be vague, but it is considered one of the tasks of constitutional theory to determine their substance before analyzing case law in their light.

But it often happens that what has in effect become positive law contradicts the principles, as they have been described by constitutional theory. For example, one theory states that the hierarchy of norms implies judicial review of legislation; yet, a positive constitution may prohibit judicial review. According to another theory, the principle of sovereignty makes it unconstitutional for the lawmaker to authorize the transfer of certain powers to an international organization; yet, the constitution expressly authorizes such a transfer or a statute authorizes it and the constitutional court upholds it. When this transfer of power happens, one possible attitude is to consider what the constitution or the court did as "wrong". However, this judgment has no positive legal consequence and does not make the constitution or the court's decisions less valid or less effective.

Another attitude is to consider that positive constitutional principles are not unchanging, nor universal, nor derived from a philosophical theory. They are valid only in a given country at a given moment. Therefore, they can best be interpreted not by constitutional theory but by the jurisprudence of the courts. If one takes seriously the idea that constitutional principles mean what the courts say they mean, then the task of constitutional theory is to state what, according to the courts, is the substance of the principles. There is no point in describing the principle of sovereignty or separation of powers independently of what the courts did. Rather, whenever it seems that some principle has not been applied as one thought it should have been, it ought to be the task of theory to state that the principle has changed, to describe the new principle, and to try to explain why it has changed.

The development of a new relationship between domestic law and international law in France, but also in other European countries, offers a striking example of such an influence on two principles: sovereignty and the hierarchy of norms, which have both undergone deep transformations.

It may be necessary to recall briefly the legal mechanisms of the French Constitution (Constitution) that have allowed for such transformations.

The Constitutional Council (Council) is a special court of nine members. Every three years, the President of the Republic and the two presidents of the Houses of Parliament each appoint one member for a nine year term. These decisions are entirely discretionary as there is no further examination of the appointments. Therefore, the presidents each

can select any person they think fits. There is no legal requirement that these persons be qualified lawyers or even have received legal training. In practice, the majority of the persons appointed have had some form of legal education but were not professional lawyers. A large number were former politicians or high civil servants. The consequence is that the Council must rely heavily on a small but highly competent staff of lawyers.

The functions of the Council are quite diverse. The most important function is to review treaties and statutes. For treaties, Article 54 of the Constitution provides:

> If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.[1]

This provision has been used several times; for example, it has been used for the treaties of Maastricht and Amsterdam. In both cases, the Council decided that some clauses were contrary to the Constitution, which was subsequently modified so that the treaties might be ratified.

The ratification procedure requires prior authorization by a statute. When some provisions of a treaty were declared unconstitutional, it was because they conflicted with the principle of national sovereignty stated in Article 3 of the Constitution. Such a conflict occurs, the Council stated, whenever the treaty alters the "essential conditions of the exercise of national sovereignty."[2] This can happen, for example, when powers linked to sovereignty, like defense, foreign relations or currency, are being transferred to an international organization, such as the European Union, whose governing authorities can make decisions in a mode other than by unanimous consent of the States.

Statutes can be challenged in a similar way, as prescribed by Article 61 of the Constitution: "Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty deputies or sixty senators. . . . [T]he Constitutional Council must rule within one month."[3] Thus, both for treaties and statutes, the control is exercised *a priori,* and only *a priori.*

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1. FR. CONST. tit. VI, art. 54.
2. CONS. CONST., May 22, 1985, Decision 85–188 [hereinafter Decision 85–188].
3. FR. CONST. tit. VII, art. 61.

Therefore, once a treaty has been ratified or a statute promulgated, the Council cannot review it, even if it had not been referred to them before ratification or promulgation. The treaty or the statute is presumed to be constitutional and no party to a legal dispute and no court may challenge its constitutionality.

The relationship between treaty and statute is defined by Article 55 of the Constitution: "[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."[4] This provision—particularly the verb "prevail"—has been interpreted by a decision of the Council of 1975. A new law making abortion legal had been passed by Parliament and deferred to the Council by sixty members of the minority in the National Assembly. One of their arguments was that the statute was contrary to Article 2 of the European Convention for Human Rights protecting the right to life of every human person. The Council decided that a statute must conform to the Constitution but that conformity to the constitution does not mean conformity to a treaty. In other words, the fact that a treaty prevails over a statute does not put the treaty on the same rank as the Constitution itself. Moreover, the Council stated that it is not within its jurisdiction to sanction the prevalence of the treaty over the statute. Therefore, the abortion act was found constitutional.[5]

What then could the prevalence of treaty over statute mean if the Council could not invalidate a statute contrary to a treaty? The answer was given by the two supreme courts—the Court of Cassation in a 1975 decision immediately following the abortion decision by the Council, then, a few years later by the Council of State in a 1989 case—that when there is a conflict between a statute and a treaty, a court, any court, has the duty to apply the treaty and not the statute. Furthermore, for the purpose of Article 55, rules made by European authorities in conformity with the treaties are considered to be treaties and thus prevail over statutes.

On the basis of this doctrine, lawyers have started to raise questions of conformity to all sorts of treaties, especially but not exclusively the treaties that formed the European Union and the European Convention on Human Rights. Thus, the courts have developed a new form of judicial review that had never been contemplated by the founders—and that De Gaulle would undoubtedly have abominated—currently called "control of conventionality."

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4. *Id.* tit. VI, art. 55.

5. *See* CONS. CONST., July, 23, 1975, Decision 75-56; *see* LOUIS FAVOREAU & LOÏC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 300 (11th ed., Dalloz 2001).

In light of these developments, it is clear that the old principles of sovereignty and hierarchy of norms cannot be understood as they were understood half a century ago. One ought to consider either that they have disappeared or that the substance of each is profoundly different.

II. SOVEREIGNTY

In the classical European tradition, derived from German 19th century legal doctrine, there are at least three different concepts of sovereignty. For Carré de Malberg, one of the most important French jurists of modern times,

> [t]he word, in its original sense, refers to the supreme character of the power of the State. In a second sense, it refers to the totality of the powers comprised within the power of the State and is therefore that power itself. Finally, it is used to characterize the position occupied in the State by the supreme holder of the State's power and sovereignty is therefore the same thing as that organ's power.[6]

In fact, Carré de Malberg remarks that the where the French language has only one term to describe this concept, German language has three terms: *Souveränität, Staatsgewalt* and *Herrschaft*.[7]

Unfortunately, even three concepts are not enough and further distinctions ought to be made. First, there is a need to clarify the third concept. The supreme holder of the state's power can be supreme in two different senses: either he has no superior or he is above all. These two senses do not coincide because it is possible to have no superior and yet not to be above all. This is the case when two authorities exercise jointly the highest function; each has no superior, but neither is above the other, so that no authority can be said to be above all. Such a distinction also allows for a clarification of the idea that sovereignty is indivisible—if the term refers to the quality of an authority without a superior, then it is not indivisible, for two can be equally sovereign in that sense; however, if it means to be above all, then it is true for if there were an attempt to make two authorities sovereign none would be sovereign. As Rousseau has shown, every attempt to divide sovereignty either fails or inevitably destroys it.[8]

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6. CARRÉ DE MALBERG, CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT 79 (CNRS 1962) (1920).
7. *Id.*
8. *See generally* JEAN JACQUES ROUSSEAU, *That Sovereignty is Indivisible, in* THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (2d ed. rev., Putnam 1989) (1893).

On the other hand, the organ exercising the supreme power of the State, Carré de Malberg's third meaning, can sometimes exercise this power *suo jure*. This was the case for the king in the French absolute monarchy. He was not a representative of any other being and his power was his own. However, in the modern State the allocation of the supreme power is always justified by some theory of representation. According to such a theory the holder of the supreme power, for example a Parliament, only exercises a power the essence of which is owned by some other being, for instance the people or the nation. We thus have two different meanings of "sovereign": the organ exercising the supreme power and the entity owning the essence of sovereignty and in whose name that supreme power is being exercised. Only with such a distinction can one understand how in the French Third or Fourth Republics, one could say at the same time that Parliament was sovereign and that the people were sovereign.

This brings us to five different meanings of the term:

(1) Independence from every other power either exterior or interior. Sovereignty is a quality of the State itself, which does not obey another State, or any other entity like the Church or a political party.

(2) The power of the State. Sovereignty is the sum of everything that the State may do.

(3) The quality of an authority without a superior.

(4) The quality of an authority that is above every other.

(5) The quality of the being in the name of which a sovereign authority in sense (3) or (4) exercises its power.

Problems discussed in the tradition of public law of the Nineteenth and early Twentieth centuries related to the properties of "sovereignty" itself, whether it is indivisible or whether it can be limited, could only be solved by making similar distinctions. Sovereignty in sense (4) is obviously indivisible, but perfectly divisible in sense (2). It can be limited in sense (2) and several constitutions, including the French allow for limitations by international law, but the idea of a limitation of sovereignty in sense (1) is a contradiction in terms.

The question "who is the sovereign?" could be treated in the same manner and it was possible to call sovereign the State itself [sense (1) and sense (2)], a Parliament [sense (3) and sense (4)], or the people [sense (1) and sense (2)]. Therefore, in a democracy, the words "people" and "State" can be used as equivalents. This is precisely the case in Article 3 of the 1958 French Constitution: "[n]ational sovereignty shall belong to

the people, who shall exercise it through their representatives and by means of referendum."[9] This provision means first that the independence of the French State is attributed to the people, secondly that only the people itself or representatives of the people can act as sovereign organs, for example, exercise the legislative power.

That independence is a manifestation of democracy. There would be no democracy if the French people were submitted to laws made by others than itself or its representatives, for example if it were submitted to a foreign State or to an international organization.

This is the classical theory that has been used by the Council, but the consequences have been a collapse of the theory itself.

The usage of the theory by the Council when ratifying the treaties of Maastricht and Amsterdam was rather simple: the treaties were unconstitutional to the extent that they affected "the essential conditions of the exercise of national sovereignty."[10] How? The treaties were unconstitutional by first giving to an international organization some powers that are not only part of sovereignty in the second sense, but are an essential part of it, such as making decisions about currency or immigration policy, or allowing foreign citizens to participate in some domestic elections. Secondly, the treaties were unconstitutional for altering the way in which laws are made; the people do not exercise national sovereignty if laws are not adopted by referendum or by his representatives; this is what happens if they can be adopted by European authorities that are not elected representatives and are nevertheless empowered to make some decisions by a majority of the votes, for example, eventually against the consent of the delegates of the French State. Thirdly, the treaties were unconstitutional because decisions can derogate statutes adopted by the French Parliament, that is by authentic representatives of the people.

In both cases of ratification, the contradiction between the Constitution and the treaties was easily overcome by constitutional amendments. In conformity with Article 54, the Constitution was amended to permit ratification, but the amendment did not bear on Article 3. The amendment merely states that "France agrees to the transfer of powers necessary for the establishment of European economic and monetary union . . ." and similarly that "the transfer of powers necessary for the determination of

9. FR. CONST. tit. I, art. 3, cl. 1.
10. Decision 85–188, *supra* note 2.

rules concerning freedom of movement for persons and related areas may be agreed."[11] Article 88–3 regarding the right of foreign citizens to vote in local elections is somewhat similar.[12]

As these amendments were adopted, the contradiction between the Constitution and the treaties was replaced by a contradiction between Article 3 and the new Article 88.

First, the constitutional amendment was adopted in the case of the treaty of Amsterdam by Parliament alone, without a referendum—not by representatives of the people and not by the people itself. According to Article 3 representatives can only exercise national sovereignty, but never dispose of it.[13] But this is precisely what they did, because some conditions deemed by the Council to be essential to the exercise of sovereignty have been changed. Changing the conditions of the exercise is obviously very different from exercising it.

Secondly, if Article 88 can authorize an exception to Article 3, this means that some conditions thought by the Council to be essential to the exercise of national sovereignty are no more essential. Thus, it is not essential that sovereignty be exercised by the people or by its representatives.

Thirdly, one of those conditions considered essential is that only the people or its representatives should exercise sovereignty. Article 3 here replicates Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, which is part of the present Constitution: "[t]he Law is the expression of the general will. All citizens have the right to participate to its formation personally or through their representatives."[14] The general will being the will of the sovereign, for example, the will of the people. But, if European authorities can make laws, these laws are not the expression of the general will. Furthermore, if they prevail over statutes, it means that decisions made by authorities, which are not representatives of the people prevail over decisions made by representatives; the people cannot be said to be sovereign.

If one gives then to the words of the Constitution their traditional meanings, it can no longer be said that the French people exercises national sovereignty through its representatives. Though, on the other hand one cannot say either that Article 3 has become false, because it expresses a legal norm that is not capable of being true or false, but only valid or invalid. Furthermore, the constitutional amendments have not deleted Article 3. They may be inconsistent with Article 3 and the old theory of sovereignty but inconsistencies do not make the amendments themselves unconstitutional.

11. FR. CONST. of 1958 tit. XV, art. 88–2.
12. *Id.* at 88–3.
13. FR. CONST. tit. I, art. 3.
14. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 6 (Fr. 1789).

One might be tempted to conclude simply that the old theory of sovereignty and the very concept of sovereignty have become completely obsolete and ought to be dispensed with altogether. But such a conclusion would not do because Article 3 is still there and, with the rest of the Constitution, it is still the only legal basis and justification for the activity of government, especially the Council, which is presumed to apply a text that includes the word sovereignty. The task of constitutional theory is therefore to make some sense of this, for example, not to imagine some kind of new theory of sovereignty, but only to find if there is some new theory presupposed by these new developments.

Such a theory would have to include two dimensions corresponding to two of the meanings of "sovereignty".

The first dimension relates to the nature of the supreme function. A function can be called supreme when the authority that exercises it is sovereign in sense (3). In the classical tradition since Bodin, that function is the legislative. It is in this tradition we say that the law is the expression of the general will. If laws made by European authorities prevail over laws made by the French Parliament, we are faced with an alternative. We could consider that the representatives of the French people mentioned in Article 3 are not only those representatives elected by the people, but also include the European authorities. Alternatively, we could pretend that the supreme function is not the legislative function but only the constituent power and that sovereignty is exercised only at the level of constitutional laws.

Both of these theories regarding the nature of the supreme function are consistent with some fundamental principles of French public law, but inconsistent with others. The first theory is consistent with the principle of representation as it was framed in the Eighteenth century. This principle did not demand a specific link between the representative and the represented. In particular, a representative was not necessarily elected. Thus, according to the 1791 Constitution, there were two representatives—the two legislative authorities: the assembly (which was elected but by a fraction of the citizens only) and the King. Both jointly represented the nation. In the same manner, it has sometimes been claimed that the Council takes part in the legislative function and should be called a representative of the people. The trouble with this theory is that the democratic principle demands power to be exercised only by elected representatives. True, the Council is not elected, but its decisions can be overturned by the constituent power, that is by the people itself or at

least the elected representatives. The same cannot be said of European authorities, whose decisions can be overturned only by the European court or by a new treaty.

The second theory is a variety of Hans Kelsen's justification for judicial review. According to Hans Kelsen a constitutional court decides not on the merits of a statute but only on the validity of the procedure used to produce a certain rule.[15] When the court decides that the statute is unconstitutional this merely means that the rule should have been adopted following not the legislative but the constitution-amending procedure. Kelsen's justification does not fit very well with French constitutional doctrine that considers a statute the expression of the general will. It does not explain how the amending procedure can be superior to the legislative procedure, if the statute is already the expression of the will of the sovereign.

Another version of that theory was devised some years ago, with the Maastricht decision in mind, by Georges Vedel, a prominent law professor and former member of the Council. To justify the practice of amending the Constitution to overrule a decision by the court, Vedel used a metaphor derived from an institution of the Ancien Regime, the *lit de justice*.[16] The laws enacted by the King had to be written in the records or registers of the Parliaments, which were supreme courts of appeal. When a Parliament objected to the law and refused to register it, the King came in person to the court, sat on a ceremonial bed, the *lit de justice*, ordered the law to be registered and that order was final. According to Vedel the amending power is in the same position as the King. Whenever the Council refuses a statute on the ground that it is unconstitutional, the sovereign appears in full majesty and makes a final decision. Thus, the legislative power does express the general will but at a lower level and this means that because European law prevails over statutes but not over the constitution, it does not prevail over the true will of the sovereign. This theory is far superior to the former because it does not require making representatives of the French people out of the European authorities.

Nevertheless, it also leads to a difficulty. According to the classical theory, sovereignty is an absolute power so that there cannot be different degrees of sovereignty. However, the metaphor of the *lit de justice*, as used by Vedel, precisely suggests that the constituent power is a superior

15. *See generally* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1925).

16. GEORGES VEDEL, *Schengen et Maastricht: À Propos de la Décision n°91-294 DC du Conseil Constitutionnel du 25 juillet 1991*, 8 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 173 (1992). For an analysis of the institution of the *lit de justice see* SARAH HANLEY, THE *LIT DE JUSTICE* OF THE KINGS OF FRANCE: CONSTITUTIONAL IDEOLOGY IN LEGEND, RITUAL, AND DISCOURSE (Princeton University Press 1983).

kind of sovereign. In the *Ancien Regime*, there was one and only one sovereign, acting first as a law maker and then performing the ceremony of the *lit de justice*, but now we have two different authorities, one legislative power and one constituent power. Thus, we are faced with a dilemma. We can consider that the constituent power is the true sovereign; yet, this means that, in spite of Article 6 of the Declaration of the Rights of Man, ordinary legislation does not express the will of the sovereign. Alternatively, we can continue to accept Article 6. However, this means that ordinary legislation, as well as the Constitution, is the will of the sovereign, so that we have two degrees of sovereignty, which is absurd.

The second dimension of sovereignty is the substance of that power. This is related to sovereignty in sense (2), the sum of the powers that the State may exercise. The classical answer is that the State may exercise every power and make any kind of decisions. Another entity can exercise these powers only by delegation or authorization given by the State, but according to the Council some powers cannot be delegated because such a delegation would affect the essential conditions of the exercise of sovereignty. Some powers are considered essential so that if they were delegated the State would cease to be sovereign. The Council has listed those powers, but because they have been ratified after a constitutional amendment they should not be considered essential anymore. Therefore, we must accept the idea that a State that delegates to an international organization the power to make, by majority decisions, rules prevailing on its own legislation, must still be called sovereign under the French Constitution. A State or a people could be subject to rules made without its consent or even against its will and still be called sovereign. What is left then that can be said to be truly essential to sovereignty? Can the power to make rules in the form of constitutional amendments be essential to sovereignty because European rules do not prevail over them? Unlike the Council, some other constitutional courts and the European court itself seem to agree that European law also prevails on constitutional law, except if they affect fundamental rights or the power to denounce the treaties unilaterally. The final result then is that sovereignty has been reduced to independence. Thus, all we have left is sovereignty in the first sense.

If the classical conceptions of sovereignty have been so completely upset by the development of European Law and its interaction with domestic law, it should not be surprising that conceptions of the hierarchy of norms have been upset in the same manner because of the

close link between the two theories. They can be understood as two interpretations of the same phenomenon. Thus, according to Carré de Malberg the supremacy of statutes over all other legal norms is but the expression of national sovereignty, whereas according to Hans Kelsen sovereignty is the quality of a legal order whose highest norm is based on international law. For Carré de Malberg there is no hierarchy without sovereignty, for Kelsen no sovereignty without a hierarchy.

III. THE HIERARCHY OF NORMS

The classical conception of the hierarchy of norms was rather simple: the constitution, the statute, decrees, and other legal acts. The hierarchy meant that a norm enacted on the basis of a superior norm derived its validity from that norm.

International treaties were only subspecies of statutes. This is the reason why, according to the constitutions of the revolutionary era, treaties had to be ratified by way of statutes and also why, according to later constitutions, if they could be ratified by the executive, the ratification had to be authorized by a statute. This also explains why until the 1975 abortion decision a treaty prevailed over an earlier statute but a later statute prevailed over a treaty, a mere application of the principle *lex posterior priori derogat.*

In every country, the development of European law has upset that vision and brought enormous theoretical difficulties. The most important regards the relation between treaty and statutes and the relation between treaty and constitution.

Between treaty and statutes, a difficulty and a paradox come from the abandonment of the principle *lex posterior.* A treaty now prevails over a statute independently of their respective dates of enactment. If the treaty has been authorized by a statute, this means that a later law cannot derogate an earlier law. But the difficulty is even greater when one considers not the treaty but decisions made by the European authorities on the basis of the treaties and usually called "derived law". They are inferior to the treaty and thus to the statute that authorized its ratification, but nevertheless have the same value as the treaty and prevail over the statute. The authorization statute has a value inferior to the decisions that it authorizes.

There is a second paradox regarding the Constitution. In case of a conflict between statute and treaty or European legislation arising before a court, the court has the obligation to apply the treaty, but in case of a similar conflict between constitution and statute, the court has the obligation to apply the statute. Thus, European legislation enacted on the basis of a treaty that has been adopted on the basis of the constitution

is much better protected than the constitution itself. It follows that the hierarchy between constitution and statute does not have the same meaning as the hierarchy between constitution and treaty.

A third paradox arises if the Council declares a statute to be constitutional and if that statute conflicts with derived legislation contrary to the French Constitution, because in that case, the derived legislation will nevertheless prevail.

There is a further paradox regarding the relation between constitution and treaty. In Italy, a statute enacted to execute a treaty may derogate the constitution. The Council has not gone as far as that but it seems that there is an internal debate on that matter and a few members are in favor of placing treaties on the same level as the constitution itself. According to that doctrine, the Council ought to change its 1975 abortion decision and decide that a statute contrary to a treaty is *ipso facto* contrary to the Constitution.

This has not happened for several reasons. Some of them are clearly political. It would be an important step towards the construction of a federal system in Europe. Any treaty would have the same force as a constitutional amendment, the Constitution could be amended by way of treaty and such changes would be irreversible for a treaty could not be revised by way of a constitutional amendment, but only with the consent of the other parties. Other reasons are of a logical nature: how could one understand that a treaty created on the basis of the Constitution, in the form of a statute, not only prevails over other statutes but is not amendable as other provisions of the constitutional text?

One could be tempted to resolve the paradox by reference to the problem of the "fundamental principles recognized by the laws of the Republic."[17] When statutes are referred to the Council according to Article 61 the Council must "rule on their conformity to the constitution."[18] In 1958, because the Framers were clearly opposed to judicial review of legislation, the word "constitution" was interpreted very strictly to mean the numbered articles of the Constitution only and not the preamble so that a statute could not be reviewed for a possible violation of fundamental rights. Nevertheless, after De Gaulle's departure, the Council ruled in 1971 that the Constitution included the preamble. This interpretation was the real birth of judicial review of legislation. A

17. FR. CONST. of 1946, pmbl.
18. FR. CONST. tit. VII, art. 61, cl. 1.

statute restricting the freedom of association had been referred to the Council. There is no provision in the Constitution itself about freedom of association and the Council turned to the preamble. But the preamble of the 1958 Constitution was very concise and consisted in substance of one sentence: "[t]he French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946."[19]

It is this reference to the preamble of 1946 that provided the means for a formidable enlargement of the powers of the Council because it referred again to the Declaration of the Rights of Man and the citizen of 1789, added a number of new rights (particularly social and economic rights) and reaffirmed the "fundamental principles recognized by the laws of the Republic."[20] In 1946, the phrase had been written in the preamble to accommodate Catholics, who were anxious to preserve freedom of education and the right to operate private schools. However, no mention was made of the nature of these principles, nor was there any precision about the laws of the Republic that could have recognized them. At that time it did not really matter because the 1946 Constitution did not establish judicial review of legislation. Therefore, it was clear for everyone that the preamble was a mere proclamation of philosophical and political principles lacking legal character so that no court could ever use it to decide any type of legal issue.

But in 1971, a statute restricting freedom of association was referred to the Council. The Council could not find a reference to freedom of association, which is not mentioned in the 1958 Constitution, nor was it mentioned in the preamble, the preamble of 1946, or the Declaration of the Rights of Man and of the Citizen. The only solution was therefore for the Council to state that this freedom had been recognized as one of the fundamental principles by an act of Parliament of 1901 on associations. Thus, this principle was part of the Constitution and any new statute that violated it was therefore unconstitutional. This interpretation clearly gave the Council enormous powers because it is in a position to decide alone what principles count as fundamental and what laws have recognized them. It departs from the principle *lex posterior* because a new statute must conform to an earlier one. It leads to a paradox because a statute created on the basis of the Constitution has the same force as the Constitution itself.

One could then argue that the relation between treaty and constitution resembles the relation between fundamental principles recognized by the

19. *Id.* pmbl.
20. FR. CONST. of 1946, pmbl.

laws of the Republic and constitution, because the fundamental principles like the treaties have been created on the basis of the Constitution and in the form of ordinary statutes and yet have a constitutional character. But this would be misleading. In theory an act of Parliament cannot create a constitutional principle but only recognize a preexisting principle. Indeed, the constitutional character of the "fundamental principles recognized by the laws of the Republic" derives, according to an implicit justification, from the fact that the laws of the Republic have "recognized" and not created them. They are supposed to preexist to these statutes and the unconstitutionality of later acts of Parliament does not mean that these acts have violated earlier statutes but that they have violated principles of constitutional value. Thus, the paradox of the constitutional value of the principles can be explained only if they are understood as natural law principles. The same can hardly be said of treaties, except if one endorses the metaphysical idea that they have not only decided the construction of the European Union but merely recognized a set of institutions already inscribed in the movement of history.

Therefore, recognizing that treaties have constitutional value would be logically impossible; but, their prevalence over statutes before courts other than the Council also leads to a strange hierarchy. As it is now presented, the hierarchy runs: constitution, treaty, statute; but, it is not the case that every norm should conform to a superior norm. The treaty must conform to the Constitution only before ratification and only if it is referred to the Council. If it is not referred and if a contradiction with the Constitution is revealed after ratification nothing can be done. The same is true of derived law that must conform to the treaty but not to the Constitution. On the other hand, a statute before promulgation must conform to the Constitution but not to treaties. After promulgation it must conform to treaties and derived law but not to the Constitution.

Obviously, the fact that the hierarchy presented by French law is different from the hierarchy described by legal theorists does not authorize those theorists to make value judgments. One should not conclude, for example, that the French legal system is wrongly structured or that European integration has bad consequences. But it can help reveal the type of games that French courts can play, the new notion of hierarchy and the change of ideology that has taken place in Europe in recent years.

First, French courts can be engaged in a competition to create and interpret principles that other courts will have to accept and apply. One must remember that they are not organized in one, but rather in two

systems. One is composed of the civil, criminal, commercial, and social courts with the Court of Cassation at the top. The other is the system of administrative courts headed by the Council of State. The creation of the Council and the development of its powers have created a rivalry between the Council and the two supreme courts. These courts have benefited from the possibility of refusing to apply a statute contrary to a treaty but, on the other hand, they have sometimes resented the obligation to let the treaty prevail. The latter position has been mostly that of the Council of State because it has always been closer to the ideology of the sovereignty of the State, which is contradicted by the prevalence of the treaties. In this situation, the Council of State has used the notion of "fundamental principles recognized by the laws of the Republic"[21] to fight the prevalence.

This is what happened in 1996 in the case of Mr. Koné.[22] Mr. Koné was a citizen from Mali, where he had been a political opponent. He was a resident of France. The Malian government required his extradition on the basis of a treaty between France and Mali and Mr. Koné fought the extradition. There was an act of Parliament from 1924 prohibiting extradition when required for political reasons, which was clearly the case. But the treaty did not mention any exception to the duty of each State to extradite at the request of the other party. This meant that if the treaty prevailed over the statute, Mr. Koné had to be extradited.

The Council of State then decided that whereas a treaty prevails over a statute it does not prevail over the Constitution. Furthermore, the 1924 Act forbidding political extradition should not be considered a mere statute, but having recognized one of the fundamental principles, it is part of the Constitution. Therefore, in this case the statute should be allowed to prevail over the treaty. The Council of State was thus able to overturn the decision to extradite Mr. Koné. With this reasoning the Council of State has raised the level of the statute, by two degrees. Instead of being below the treaty, it is now above the treaty, and at the same rank as the Constitution. At the same time, it has broken the monopoly of the Constitutional Council in deciding what counts as a "fundamental principle recognized by the laws of the Republic."[23]

Secondly, we see that the notion of hierarchy has changed. One usually speaks of a "hierarchy" between two norms x and y or of a supremacy between x and y when one of the following situations obtains:

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21. *Id.*
22. Conseil d'État, July 3, 1996, Koné.
23. FR. CONST. of 1946, pmbl.

(A) x has prescribed the conditions of enactment of y.

(B) x has prescribed that y should have some specific content.

(C) x has forbidden to give y some specific content.

(D) a norm of the type of x can derogate y, while a norm of the type y cannot derogate x.

(E) if y has violated one of the three first prescriptions, then a third norm z orders the judge to invalidate y.

(F) if y has violated one of the three first prescriptions, then a third norm z forbids the judge to apply y.

(G) in case of a conflict between the content of x and the content of y, a third norm z orders the judge to apply x.

These concepts of supremacy do not always coincide. For example, in French constitutional law, statutes are superior to decrees in the sense that decrees may not have a content contrary to what statutes prescribe, yet, it is not a statute but the Constitution that prescribes the conditions of enactment of decrees. Conversely, in constitutional systems without judicial review of legislation, the Constitution is superior to statutes in the sense that it prescribes the mode of enactment of statutes or their content, but not in the sense that a statute contrary to the Constitution could be invalidated.

In the traditional conception of the hierarchy, there is a logical connection between the various senses of supremacy, so that if (A), (B), or (C) obtains, then (E), (F), or (G) should obtain. This is basically the argument that justifies judicial review of legislation. These identifications reveal a change in the ideology behind the legal system.

In the traditional conception, the hierarchy reflected the democratic ideology. The Constitution organized the hierarchy in such a manner that, next to the Constitution itself, statutes were supreme. Their supremacy came from the fact that they were the expression of the will of the sovereign people. In turn, the sovereignty of the people meant that it could not be bound by anything but the Constitution. A treaty was also the expression of the general will but, just as the people could always abolish a statute and replace it by a new one, it could consent to a treaty but also unilaterally repeal it. This could well have been a violation of international law; it was valid under domestic law.

But, if the hierarchy is organized in another manner, if a treaty and derived legislation made by authorities who are not elected representatives prevail over statutes, then the people as lawmaker is no more sovereign. As the Council of State has shown, the only mode of avoiding the application of a treaty is by finding a fundamental principle at the constitutional level or by amending the Constitution. Sovereignty and therefore democracy now exist only at the constitutional level. The normal road in Ackerman's dual democracy does not exist any more.[24]

24. *See generally* BRUCE ACKERMAN, *Dual Democracy*, *in* WE THE PEOPLE 3–33 (Harvard University Press 1991).