Constitutional Law, Common Market Law, and the European Human Rights Convention

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certain areas where the President can make decisions alone.\textsuperscript{28} For example, there is an article in the Constitution which allows the President to put constitutional changes to a popular vote without the assent of a minister.\textsuperscript{29}

Another article gives the President absolute power in a period of extreme urgency.\textsuperscript{30} This allows the President to govern the country by presidential orders. These orders do not require the consent of the Prime Minister nor of Parliament during the period of urgency. In addition, during this period, the President may also act without taking existing laws into account.\textsuperscript{31}

III. CONSTITUTIONAL LAW, COMMON MARKET LAW, AND THE EUROPEAN HUMAN RIGHTS CONVENTION\textsuperscript{†}

Two approaches can be made to this subject because it is very broad.

First, one may ask whether common market law and the European Human Rights Convention (Convention) are part of a European constitutional law. If they are, then they would stand above national constitutions. Interestingly enough, this is rather unlikely as there are no supremacy clauses in the community treaties or in the European Convention.\textsuperscript{32} However, in 1986, the Court of Justice of the European

\begin{footnotesize}
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\item \textsuperscript{28} See, e.g., id. arts. 15 (commander of the armed forces), 17 (right of pardon), 52 (negotiate and ratify treaties).
\item \textsuperscript{29} See id. tit. II, art. 11.
\item \textsuperscript{30} See id. tit. II, art. 16.
\item \textsuperscript{31} See id.
\item \textsuperscript{†} Professor Elizabeth Zoller received her Doctorate in Law from the University of Paris II. Her thesis \textit{La bonne foi en droit international public} (Good Faith in Public International Law) was published in 1977 with a grant from the French Ministry for National Education. In 1980 she earned her \textit{Agrégation de droit}. In France, she taught at the Universities of Angers, Nantes, and Strasbourg before joining the University of Paris II in 1995. In the United States, she visited Cornell Law School (1984-1985), Rutgers University Law School (1986-1988), Tulane University Law School in 1994, and Indiana University Law School at Bloomington (1995 and 1996).

Elizabeth Zoller has authored five books and over thirty articles addressing various issues in international and comparative law, foreign relations law, and European law and human rights. Among her publications in English are the books \textit{Peacetime Unilateral Remedies: An Analysis of Countermeasures} (1984) and \textit{Enforcing International Law Through United States Legislation} (1985).

Currently, Ms. Zoller is Professor of International and Comparative Law and the University of Paris II. She is the Director of the American Law Center (\textit{Centre de droit américain}). She teaches and researches in the field of comparative constitutional law.

\item \textsuperscript{32} See, e.g., STEPHEN WEATHERILL, CASES AND MATERIALS ON EEC LAW 45 (1992). "Nowhere in the [EEC] Treaty is it possible to find an explicit commitment to the idea that Community law shall be supreme, nor to the notion that it shall be directly effective." Id.; see also
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\end{footnotesize}
Community referred to the 1957 Rome Treaty, which created the common market, as a "basic constitutional charter."\(^{33}\)

True, in some respects, the European Community Treaty and the Convention provide norms like a Constitution does. In addition, the terms of reference used by the Court of Justice are interesting because they show the evolution of the nature of the European treaties. However, one should be cautious with this approach, whether it is the Rome Treaty or the Convention, because they are treaties and not constitutions. Despite the vocabulary used by the Court of Justice, these laws are made by the signatory states,\(^ {34}\) not by the people, and thus the treaties are not constitutional law.

The second approach is the classical approach, where one studies the impact of European law on national constitutional law and, in particular, on French constitutional law. European law is not constitutional law in the sense that one may not refer to it as the federal constitution. For example, the Convention has no effect on constitutional law in France—it has not modified or affected the French Constitution at all. However, French Constitutional law gives effect to the Convention in the domestic legal order by virtue of Article 55 of the Constitution, which provides that "treaties or agreements properly ratified or approved have from the date of their publication superior authority to law provided that the agreement or treaty in question is applied by the other party."\(^ {35}\) On the basis of this article, the Convention is part of French law and is given superior authority over national law. However, the Convention's status is below the Constitution; it does not have constitutional status in the French legal order. To illustrate this point, let us examine the case relating to law

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34. The Preamble of the Treaty Establishing the European Economic Community states:

His Majesty The King of the Belgians, the President of the Federal Republic of Germany, the President of the French Republic, the President of the Italian Republic, Her Royal Highness of Grand Duchess of Luxembourg, Her Majesty The Queen of the Netherlands ... [h]ave decided to create the European Economic Community. . . .


35. CONST. art. 55.
on the voluntary termination of pregnancy.\[^{36}\] This case was decided by the Constitutional Council of the European Community in 1975. Here, the Council declared that treaties, no matter how important they were with regard to their substance and human rights, were not part of a nation’s constitutional law.\[^{37}\] The Council reasoned that Article 55 of the French Constitution,\[^{38}\] which gives superior authority of treaties over laws, “is limited to the field of application of the treaty and dependent on a condition of reciprocity which vary according to the conduct of the signatory state to the treaty and the moment when respect of this condition is to be determined.”\[^{39}\] So the Convention is not really a part of constitutional law with respect to the issue of abortion.

Let us address the effect of Common Market law on French constitutional law. In community law and, in particular, in the Rome Treaty, we do not have a supremacy clause as in the United States Constitution.\[^{40}\] From the very beginning, the question of the authority of the Rome Treaty over domestic law has been subject to great controversy in France. However, in *Costa v. E.N.E.L.*,\[^{41}\] the Court of Justice clearly asserted the supremacy of European law over national law.\[^{42}\] Of course this decision caused great difficulties because national courts and states were not ready to accept the superiority of European law over national statutes. In this landmark case, the Court of Justice held that European law, i.e., the Treaty law, plus the regulations made in pursuance of the treaty, were to be given a superior effect to domestic laws and would prevail over national statutes. The Court decided that “community law cannot, because of its special original nature be overruled by domestic legal provisions, however framed, without being deprived of its character as community law.”\[^{43}\]

That reasoning in *Costa v. E.N.E.L.* is interesting because the Court of Justice of the European Communities found the superior effect

\[^{36}\] Judgment of May 24, 1975, Cass. ch. mixte, [1975] D.S. 497. The Cour de Cassation held that all judges of France must refuse application of a regularly promulgated French law which conflicts with the law of the EEC. *Id.*

\[^{37}\] *See id.*

\[^{38}\] *See CONST. art. 55.*

\[^{39}\] *See id.*

\[^{40}\] U.S. CONST. art. VI, § 2.


\[^{42}\] *See, e.g.,* STEINER, supra note 32, at 45-46. “[A]s far as the Court of Justice is concerned all EEC law, whatever its nature, must take priority over all conflicting domestic law, whether it be prior or subsequent to Community law.” *Id.* at 45.

\[^{43}\] *See Costa,* 1964 E.C.R. at 585.
of community law in community law itself. The Court thus gave the impression that, because of the special and original nature of community law it prevails over domestic statutes and domestic law.

The supremacy problem arose in the French national context in the 1970s. In 1975, the court held in the Cafe Jacques Vabre case that community law was superior to national statutes. Procureur General Touffait argued that community law should be superior in effect to domestic law in France by virtue of the special and original nature of community law. But the Cour de Cassation refused to follow him as to the legal basis of the authority of community law in the French legal system, and decided that community law was to be given superior effect over national state law by virtue of Article 55. So this gave a French constitutional basis, not a European community law basis, for the superior authority of community law over French law.

Another interesting factor relating to the integration of community law in French national law and the resulting impact on French constitutional law is the Maastricht Treaty. The Rome Treaty was adopted in 1967 and the Maastricht Treaty in 1992. The Maastricht Treaty enlarged considerably the competence of the European Community and actually transformed it into a European Union. It also added to the Common Market (now called the internal market) the ambitious goals of the Economic and Monetary Union (the EMU) and political union of the member states. So the powers of the European Union became greater, and of course, this involved more transfers of sovereignty from the national states to the union. All member states in the European Union encountered constitutional nightmares regarding the compatibility of the Maastricht Treaty with their national constitutions.

In Germany, for instance, there was great concern about democracy, especially whether democracy would be practiced by the European Union. In Great Britain, the predominant concern was the effect of the Treaty on parliamentary sovereignty. In Denmark, where the

44. See id. (referring to art. 189 of the EC Treaty).
46. See id.
Maastricht Treaty was first voted upon, the concern was about the rights of the citizens. In France, because of its constitutional traditions, because of what the French people have been fighting for since the French Revolution in 1789, the concern was national sovereignty.

I do not wish to enter into a complicated explanation about national sovereignty because it is one of the most complex, one of the most obscure, and one of the most controversial constitutional concepts in French law. Initially, national sovereignty concerns made it impossible for France to enter the European Union and to accept a common foreign and security policy. The political debate became very acute among politicians; eventually, the President of the Republic, at that time François Mitterand, submitted to the Constitutional Council the question of the constitutionality of the Maastricht Treaty.

Article 54 of the Constitution provides that “if the Constitutional Council shall declare that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve this commitment may be given only after amendment of the Constitution.”

The Constitutional Council decided that there were some clauses in the Maastricht Treaty that were unconstitutional. Therefore, France revised and amended the Constitution in order to be able to ratify the Treaty in 1992. Subsequently, the Treaty was ratified and came into force. Meanwhile, the Constitution was also amended to add a new title, Title XIV: “The European Communities and the European Union,” in which Article 88 was inserted to provide that “France agrees to the transfer of powers necessary for the establishment of the European economic and monetary union as well as for the fixing of rules concerning the crossing of external frontiers of the member states of the European Community.”

The Constitutional Council found that there were three provisions in the Maastricht Treaty that were unconstitutional: The first was the

49. CONS. art. 54.
52. See Decision of Apr. 9, 1992, supra note 50, at 779, art. 1.
54. See id.
provision relating to the monetary union because it was a transfer of monetary sovereignty.\textsuperscript{55}

The second was the provisions enabling non-French citizens to participate in local European elections.\textsuperscript{56} In France there is not yet dual citizenship as it exists in the United States.\textsuperscript{57} Community citizenship exists under community law. This is a rather empty concept at the moment, but it means that community citizens may vote in the European and local elections, but not in the national elections. For example, a German citizen living in France may exercise voting privileges as a community citizen. As a community citizen, this German citizen may vote for the European Parliament, and may also vote for the district; however, this German citizen may not vote for the French national constitutional body. The Constitutional Council found this provision unconstitutional.\textsuperscript{58}

Third, the Council found unconstitutional the provisions regarding common policy on visas because the abandonment of the rule of unanimity from January 1996, with the introduction of qualified majority voting, could affect national sovereignty.\textsuperscript{59} In order to avoid conflict with community law, France revised its Constitution on these three points.\textsuperscript{60}

Now that the French Constitution has been revised, the major question is whether these provisions of the Maastricht Treaty form a part of French constitutional law. The question for the moment is not completely solved in the eyes of many constitutional scholars. I think that this will certainly give rise to litigation and constitutional debates in the forthcoming years.

To conclude, I would like to emphasize the rather awkward situation of French constitution law. France is in an ongoing process of constitutional transition. Obviously, France is increasingly moving towards more European integration. There are still some very nationalistic trends in France that want to keep this process under control and not give full effect to the Maastricht Treaty. The continuing

\textsuperscript{55} See Decision of Apr. 9, 1992, \textit{supra} note 50, at 779, paras. 43, 45.
\textsuperscript{56} See id. at 778, paras. 26-27.
\textsuperscript{57} In the United States an individual is both a citizen of a state and a citizen of the Federal Union.
\textsuperscript{58} See Decision of Apr. 9, 1992, \textit{supra} note 50, at 778, para. 27.
\textsuperscript{59} See id. at 779, paras. 49-50.
\textsuperscript{60} See Decision No. 92-30, 93 I.L.R. 337, 352 (CONS. CONST. 1993) (implementing the text of the new Article 88 to the Constitution).
evolution towards a unified Europe will require further adjustments and other elements will need to be taken into consideration.

IV. OUTLINE, STRUCTURE, AND FUNCTIONING OF THE FRENCH COURT SYSTEM AND COMPARISON OF THE FRENCH AND UNITED STATES CRIMINAL PROCEDURES**

One of the main differences between the U.S. legal system and the French legal system, whether it be the federal or state courts, is that France has two kinds of courts. One court is reserved for litigation where one party is the State, a region (province), or a district (department). In such a case, the ordinary judge is not competent. He has no jurisdiction. These cases are sent to a judicial hierarchy of administrative judges which in the lowest court is called the Tribunal Administratif (Administrative Court); the middle, or the Court of Appeals (Cour Administrative d’Appel); and then the Administrative Supreme Court (Conseil d’État or the Council of State).

The second type of court is made up of judges of the judicial order who make decisions in civil and criminal matters where the government is not a party. In addition, in France there is a third type of jurisdiction. The Constitutional Council is not composed of judges of the “judicial order.” It has nine members; three of them appointed by the President of the Republic, three by the President of the Senate, and three by the President of the National Assembly.

Judges in the judicial order in France are divided in two groups. After law school, one may decide not to become a lawyer but a judge.

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62. See, e.g., RENE DAVID, ENGLISH LAW AND FRENCH LAW 96-98 (1980).
63. See, e.g., DAMOLO & FARRAN, supra note 61, at 49.
64. See, e.g., DAVID, supra note 62, at 75.
65. See id.
66. See id. at 50.