



REINFORCING ENVIRONMENTAL RIGHTS: THE FRENCH CHARTER FOR THE ENVIRONMENT

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Keywords

Charter for the environment; Environmental human rights; French Fifth Republic Constitution; Constitutional rights.

Abstract

The Charter for the Environment was integrated in the French Fifth Republic Constitution in 2005. It became an important legal instrument that has in my opinion transformed both environmental rights and human rights, as it seems to transpire from the 2008 landmark decision of the French constitutional council on the constitutionality of the statute on GMOs. The Charter enshrined a list of environmental rights which have received constitutional value. That is down to the work of the council which affirmed the constitutional value of every rights and duties defined in the Charter. Because of the extension of the constitutional control, it has become clear that the rights declared in the Charter were not only «true» constitutional rights, but also environmental human rights.

I. INTRODUCTION: THE INTRODUCTION OF ENVIRONMENTAL HUMAN RIGHTS IN THE FIFTH FRENCH REPUBLIC CONSTITUTION

The Charter for the Environment was adopted in 2004 and incorporated into the French Constitution in 2005¹. A constitutional amendment brought a major change

¹ Loi constitutionnelle 2005-205, 1 March 2005 (*Loi constitutionnelle relative à la Charte de l'environnement (1)*), JORF 2 March 2005, esp. p. 3697. The Charter is pretty much the result of the will of French right

to the Preamble of the Constitution with the incorporation of a reference to the 2004 Charter². The constitutionalisation of environmental issues has been on the agenda of many constitutional reforms in international and European Constitutions but France was the first jurisdiction to choose the way of a constitutionalisation, declaring environmental human rights in an environmental «bill of rights». The place of the Charter within the constitutional norms has an enormous symbolic significance. The Charter was not incorporated as a text in the Preamble or as a list of articles in the main part of the Constitution but as a separate text. The constitutional amendment introduced a reference to the Charter in the Preamble of the Constitution. Environmental human rights are now enshrined within the Preamble of the French Constitution as constitutional rights, as rights of man and of citizen, are human rights.

The Preamble, like the Constitution, is simple and precise. It first declares as constitutional rights (as interpreted by the Constitutional council) the French human rights, which are the rights of man and of citizen, the liberal rights of the 1789 Declaration. It then lists the socio-economic rights of the 1946 Constitution Preamble and since 2005 the environmental rights of the 2004 Charter for the Environment. But those two bills of rights are simply completing the 1789 Declaration; they are not stand-alone texts. As such, the will of the constituents in 2005 was for the Charter to complete the 1789 Declaration in order to insure the continuity of the French liberal tradition. The objectives, rules and rights listed in the Charter 7 considerations and 10 articles have to be read and interpreted accordingly.

wing leader of the time Jacques Chirac. During the first term office as French president (1995-2002), the choice of a new bill of rights focusing on environmental rights was initiated, «To enshrine a humanist ecology at the heart of our republican pact». He made it one of the major issues of his candidacy (presidential election of 2002). Immediately after his electoral success President Chirac began the implementation of his programme and started in 5 June that year the elaboration process of the Charter. See D. MARRANI, «The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications», *Environmental Law Review*, n.º 10, pp. 12-13. The French (material) constitution has been labelled the *Bloc de constitutionnalité*. Under the Constitution of the Fifth French Republic, are constitutional norm the articles of the Constitution and its Preamble. The Preamble refers to the Declaration of the Rights of Man and the Citizen 26 August 1789 and is completed by the 1946 Constitution Preamble and the 2004 Charter for the Environment. (The 1946 Constitution Preamble also refers to the 1789 Declaration and to the *Principes fondamentaux reconnus par les Lois de la République*, with rights and civil liberties recognised by statute laws of the Third French Republic, while listing the *Principes économiques et sociaux particulièrement nécessaire a notre temps*, the «socio-economic» rights and civil liberties that are particularly useful to our time).

² The first paragraph of the Preamble was completed by «ainsique les droits et devoirs définis dans la Charte de l'environnement de 2004» (and to the rights and duties as defined in the Charter for the Environment of 2004) and is now as follows: The 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 1946 Constitution Preamble, and to the rights and duties as defined in the Charter for the Environment of 2004. The Charter has been adopted as statute law in 2004 and became part of the constitutional norm in 2005.

The Charter has primarily be conceived as an educational tool that focuses on education and formation (article 8) but also on the promotion of a sustainable development (article 6)³. Even before the Charter was classified as constitutional text, its philosophical principles became a reference for the French department of education⁴. For instance in 2004, instruction was given from chief education officers to headmasters of primary and secondary educational institutions on the application of article 8 of the Charter to «generalise the education on the environment for a sustainable development from the academic year 2004»⁵. Environmental education (the programme «EEDD») became a main priority and a fundamental public policy of the French Republic and is now considered as an important part of the curriculum of French primary and secondary schools. Indeed, environmental issues now form part of French republican values that have to be taught to future generations.

The incorporation of the Charter into the constitution of the Fifth French Republic intended that beyond the philosophical aspects of the rights declared and beyond educating the mind, principles, and particularly the most important ones, the prevention principle and the precautionary principle, were to be elevated from legal rights (with a simple protection attached to statutes) to constitutional rights. The Charter introduced a hierarchy in environmental principles that we need to look at in the light of constitutional control operated by the Constitutional council⁶. Since 1982, the council developed *principes à valeur constitutionnel* and *objectifs à valeur constitutionnel*. Principles of constitutional value are directly applicable and can be invoked by individual before a court while objectives of constitutional value are imposed on the legislative power but are never directly invoked before a court⁷. The prevention principle is considered to be an objective

³ Art. 6. - Public policies must promote a sustainable development. To this purpose, they conciliate protection and valorisation of the environment, economic development and social progress. Art. 8. - Education and formation on the environment have to contribute to the exercise of rights and duties listed in the present charter.

⁴ There is here a parallel with the 1789 Declaration, which was also a philosophical reference until 1971.

⁵ Circulaire 2004-110, 8 July 2004, BOEN 28, 15 July 2004, p.1473 (*Généralisation d'une éducation à l'environnement pour un développement durable (EEDD) - rentrée 2004*). It has to be noted that this document replaces a previous one, Circulaire 77-300, 29 August 1977, BOEN 31, 9 September 1977, p. 2507 (*Instruction générale sur l'éducation des élèves en matière d'environnement*). The requirement to develop teaching on environmental protection was always present in the curriculum through specific educational programmes (on forests and animals for example) but never on a general basis. This generalisation of environmental education follows the first law adopted in 1976 on environmental protection (*Loi n.º 76-629 du 10 juillet 1976 relative à la protection de la nature*. JORF, 13 July 1976, p. 4203).

⁶ Fifth Republic Constitution: Title VII, Arts 56-63. Available at: www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#_Toc308601189 (5 February 2015).

⁷ See F. LUCHAIRE, «Brèves remarques sur une création du Conseil constitutionnel: l'objectif de valeur constitutionnelle», *Revue Française de Droit Constitutionnel*, n.º 64, October 2005, pp. 675-684; and the

of constitutional values while the precautionary principle is the (unique) principle of constitutional values in the Charter. Therefore, the precautionary principle is set at the top of the hierarchy. It is considered specifically in article 5 of the Charter as a 'principle' (principle of constitutional value). And has been known in the French legal order since 1992, after the 'integration' of Principle 15 of the Rio Declaration into French law⁸. Its definition under article L.110-1.1.^o of the Environmental Code, states that the absence of certainty, based on current scientific and technical knowledge, must not delay the adoption of effective and proportionate measures aiming to prevent a risk of serious and irreversible damage to the environment at an economically acceptable cost⁹.

Another definition of the precautionary principle is given in the Charter.

Even if scientific knowledge is uncertain where damages occur which could have serious and irreversible effects on their environment, public authorities shall within their own domains of competences, apply the precautionary principle through the implementation of procedures for the evaluation of risks, and the adoption of provisional and proportionate measures in order to prevent the damage occurring.

As such this declared right is more like a duty of public authorities, with a limited scope. The procedure of evaluation of risks and the adoption of provisional and proportionate measures should avoid the occurrence of damage. What is rather interesting is how the text of the Charter is balanced here. The principle of constitutional value «precautionary principle», concerns only public authorities. This diminishes its scope dramatically. Article 3 of the Charter outlines the prevention principle without referring to it as a «principle» (it is instead considered as an objective of constitutional values, see table below)¹⁰.

Everyone shall, within the limits imposed by Statute Law, prevent possible damages to the environment one may create or, failing that, limit their consequences.

Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi constitutionnelle (n° 992) relatif à la Charte de l'environnement, available at:

<http://www.assemblee-nationale.fr/12/rapports/r1595.asp>. (5 February 2015).

⁸ The Rio Declaration is often considered as the path towards sustainable development, also considered the start of the third generation of human rights. Available at:

<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>
(5 February 2015).

⁹ Introduced under the *Loi 92-654 du 13 juillet 1992 relative au contrôle de l'utilisation et de la dissémination des organismes génétiquement modifiés et modifiant la loi 76-663 du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement*, JORF, 16 July 1992, p. 9461. Then again the most important step was the codification operated under the *Loi 95-101 du 2 février 1995 Loi relative au renforcement de la protection de l'environnement*, JORF, 3 February 1995. Since *Loi 2002-276 du 27 février 2002 art. 132* JORF, 28 February 2002 it appears in the first article (Article L.110-1) of the environment code, *Code de l'environnement*, enshrining the general principles of environmental law (precautionary, prevention, participation). Accessible in English at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (5 February 2015).

¹⁰ Luchaire, objectif de valeur constitutionnelle.

However, its scope appears to apply to everyone, blurring in that case the border between right and duty, as does also the new responsibility objective (article 4):

Everyone shall contribute to repairing damages one causes to the environment, within the limits imposed by Law.

If we look at articles 3 and 4, the two «objectives of constitutional values», responsibility and precautionary principle, are not as explicit and developed as the principle of constitutional value «prevention principle», included in article 5. However, there is a different scope, which balances this lack of precision. The two articles use the terms «everyone shall» and therefore they are applicable to everyone, again blurring the thin line between rights and duties. In concrete terms, let us look briefly at the example of GMO experimentation. There are strong probabilities that GMO experimentation would be considered in breach of article 5 if the experimentation was conducted by a public authority but not if conducted by a private company¹¹.

In fact, the Charter was never meant to be only a philosophical document. It was supposed to be a concrete legal text, a text that was a guide for the lawmakers and used as in matters of to constitutional control. That was all. In fact the Charter proved to be more complex than expected and its legal outcome more wide reaching. It became rapidly a text that was very philosophical but also very practical, used by individuals and lawyers, a philosophico-legal document. As environmental human rights became declared, an increase of their protection occurred too, changing the nature of the protection from a traditional constitutional control to human rights protection. That is what we will in turn analyse.

II. A PHILOSOPHICO-LEGAL DOCUMENT DECLARING ENVIRONMENTAL HUMAN RIGHTS

During the legislative debate in 2004, members of the assemblies predicted that incorporating a new bill of rights into the French constitution would increase the scope of constitutional control. It was a complex bill, not only declaring at the same time rights and duties but also considering new areas of human rights protection. In addition, many were forecasting what indeed happened later, that the scope of control of the Constitutional council would be enlarged. This was a consequence of the idea that the preamble of the Charter was specifically supposed to serve as a guide for the control. There has been, in fact, a diversity of impact, authors commenting that some articles (like articles 8, 9 and 10) would have no legal effects, while articles 1 to 7 would¹². One may easily see that the

¹¹ However, if a private company is allowed to experiment it may face responsibility under article 4 of the Charter.

¹² Y. JEGOUZO, «La Charte de l'environnement», *AJDA Chroniques*, 2005, p. 1156.

diversity of impact relates to the differences in the legal (or not) substance of the rights incorporated in the Charter:

EFFECT OF THE CHARTER		
POLITICAL EFFECTS/ UNCLEAR LEGAL EFFECTS	Declaratory effects	Preamble para. 1, 2, 4, 5
	Operational effects	Preamble para. 3 article 8 to 10
CLEAR LEGAL EFFECTS	Objectives of constitutional values	Preamble para. 6 and 7 Article 1 to 7
	Principle of constitutional values	Article 5

Source: N. Chahid-Nourai, «La portée de la Charte pour le juge ordinaire» (2005) *AJDA Chroniques* 1175, translated and edited by the author.

1. Rights with political or unclear legal effects

On political/unclear legal effects, we find article 8 and the educational objective of the Charter. Its primary objective is to be a guide for institutions, particularly the French Parliament and Government. The political/unclear legal effects, of the Charter are applied *a priori*, in the decisions, acts and during policymaking processes of the administration. In that sense, it is a philosophico-legal document.

Those political/unclear legal effects are followed by what may be defined as clear legal effects.

2. Rights with clear legal effects

The principles of the Charter were always meant to guide the legislative power in its law making process because of the structure of the hierarchy of norms imposed by the Fifth French Republic Constitution, combined with the constitutional control through the Constitutional council. As spotted by president Chirac.

The *Conseil constitutionnel* (...), examines bills voted by the parliament through the principles of the Charter. And these principles guide the work of the government during the elaboration process of the projects of law. I think particularly about the future law on GMOs or those transposing the environmental liability directive¹³.

The Charter became a new instrument of controlling constitutionality of bills as expected, but it also became a document used in traditional civil and administrative liti-

¹³ Speech by J. CHIRAC, Palais de l'Élysée, 1 March 2006 (*premier anniversaire de la promulgation de la charte de l'environnement*), See <http://discours.vie-publique.fr/notices/067000825.html>. (5 February 2015).

gations. In addition, the extension of the scope of constitutional control in France meant that protection of human rights increased, including those linked to the environment.

III. FROM TRADITIONAL CONSTITUTIONAL CONTROL TO HUMAN RIGHTS PROTECTION

The Constitutional council was set up in 1958 as a quasi-independent agent, populated mainly by politics rather than jurists¹⁴; it was never intended to be a supreme court¹⁵. The principle had been that it could review the conformity of a statute prior to its promulgation (ex ante) but not after the promulgation (ex post). Article 61 stated that ordinary laws or international agreements could be scrutinised by the council after they had been voted on by the French parliament and before promulgation of the text or ratification of an international agreement. Initiative for the action was originally given to the President of the Republic, the Prime Minister and the President of the National Assembly; it was later extended to the Senate or 60 deputies or 60 senators to allow the opposition to take an active part in the process. In addition, *lois organiques*—statutes that complete the Constitution without need of constitutional amendments and the rules of procedure for parliamentary assemblies—were automatically scrutinised. Since the adoption of the Constitution in 1958, a bill can be referred to the Constitutional council constitutional control.

After 1971, the Constitutional council extended its jurisdiction above the articles of the Constitution, that is to its Preamble as well¹⁶. It recognised as part of a *bloc de consti-*

¹⁴ There are nine appointed members of the Council including its president, plus all the former presidents of the Republic. Currently, Valéry Giscard d'Estaing, Jacques Chirac and Nicolas Sarkozy are members of the Council, although their proper participation is very variable.

¹⁵ It may seem strange in the country that has strictly applied the philosophy of Rousseau and the principle that the law is the expression of the general will, to see a mechanism of constitutional control put in place to assure the supremacy of the constitutional text. The legislative organ became for the people, titular of the sovereignty, the mouth through which to express the general will. While the essence of sovereignty was vested in the people/nation, the legislative organ has been considered as the body in charge of exercising sovereignty. Since 1958, there has been the introduction of a «real» or efficient constitutional control that contributed for the first time to the creation of a «real» hierarchy of norms. This was extended by the revisions of 1971 (with the presentation of a material constitution) and 1976 (extension of control). In 1985, a landmark decision exposed the mission of the Constitutional Council: its mission is to scrutinise the work of the French Parliament. Particularly, statute law is said to be the expression of the general will in conformity with the constitution: *La loi votée n'exprime la volonté générale «quedans le respect de la constitution»* (Décision n.º 85-197 DC du 23 août 1985).

¹⁶ Cons. const., Decision 71-44 DC 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*, JORF 18 July 1971, p. 7114. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html>. (5 February 2015).

*tutionnalité*¹⁷, a corpus of constitutional norms, the Preamble of the 1958 Constitution, itself referring to the former declaration of rights, and public and civil liberties¹⁸. As it stands, an addition to the Preamble is therefore sufficient to extend the *bloc de constitutionnalité*, i.e. the constitutional norms. The reference to the Charter in the Preamble, as it does for the other bill of rights (the 1789 Declaration and the 1946 Constitution Preamble)¹⁹ allowed the Constitutional council to review the constitutionality of a statute. Bills containing provisions which could be in breach of the Charter should be censured and never be enacted as statute law. One could foresee a great development of the entire framework of French environmental law. The addition of a bill consecrating environmental human rights in the Constitution of the French Fifth Republic, was supposed to change and influence the legislative quality of the acts of the French parliament, mainly as an instrument of constitutional control. But it went further. What is very important in matters of constitutional rights is how these can be enforced. Indeed, declaration of rights are of course a right step forward for a governing body. That said, it is much more important to have one or more mechanisms to concretely protect human rights than having these declared. It now seems that the influence of the Charter has surpassed all hopes and had a far greater impact than was initially expected.

Since the 2005 constitutional amendment, the reference to the Charter in the Preamble allows the *Conseil constitutionnel* to review the constitutionality of a bill in light of environmental human rights as well²⁰. More developments followed. Article 1 of the Charter, which proclaims that everyone has the right to live in an environment that is balanced and respects health, was proclaimed a *liberté fondamentale*, a fundamental freedom²¹. In addition, it was forecasted that proposals (ie bills initiated by Parliament) or projects (ie bills initiated by the government) such as that for an eco-tax could be put forward without risking censure as was the case eco-tax project²². This should be read in the light of the 2000 case. In 2000, the Constitutional council ruled that a proposed eco-tax did not conform to the

¹⁷ L. FAVOREU and L. PHILIP, *Index thématique des Grandes décisions du Conseil constitutionnel*, Dalloz, Paris, 1999. L. FAVOREU, «Bloc de constitutionnalité», in O. DUHAMEL and Y. MENY, *Dictionnaire constitutionnel*, P.U.F., Paris, 1992, pp. 87-89. See also note 1.

¹⁸ *Ibid.*

¹⁹ M. VERPEAUX, «L'enfer constitutionnel est pavé de bonnes intentions», *AJDA Chroniques*, 2004, p. 1209. Since 2008 the control may be applied to promulgated laws although before, it was only possible to control non-promulgated ones.

²⁰ *Cit.*

²¹ H. GROUDY S. PUGEAULT, «Le droit à l'environnement, nouvelle liberté fondamentale», *AJDA Jurisprudence*, 2005, p. 1357. This was already stated by article L. 521-1 of the *Code de justice administrative*.

²² Cons. const., Decision 2000-441 DC, 28 December 2000, *Loi de finances rectificative pour 2000*, JORF 31 December 2000, p. 21204. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2000/2000-441-dc/decision-n-2000-441-dc-du-28-decembre-2000.460.html>. (5 February 2015).

Constitution. It considered that this tax did not respect the principle of equality in relation to public charges. Of course, in the 2000 ruling no reference was made to the Charter for the Environment of 2004 as the Charter was only incorporated in 2005²³.

Since its incorporation, the Council has ruled many times on the rights and duties protected by the Charter. As mentioned previously, in the landmark 1971 decision incorporating bills of rights in the Constitution²⁴, the Constitutional council exposed its reasoning in the case of constitutional control involving the Preamble of the Fifth Republic Constitution (rather than the Constitution itself): the council expressly referred to the Constitution and its Preamble, then they incorporated the Preamble in the constitutional norms and finally they associated it in the single term «Constitution». It was therefore in the following decisions only necessary to consider the Constitution without specifying which particular texts or parts of the constitutional norms the council was considering (the Preamble or articles). The implied use of the Preamble became the normal way of operating constitutional control. Example of the use of article 61 began in 2005, over a matter unconnected with environmental issues. Therefore, we are facing a similar operation here in the case of the Charter. Two methods of using the Charter by the council, in ex ante constitutional control, can be found chronologically, one express, one implied.

1. Express uses of the Charter in ex ante constitutional control

In March 2005²⁵, two individuals decided to contest the legality of a presidential *décret* that triggered a submission to referendum of a Treaty, on the basis that it was contrary to article 5 of the Charter²⁶. The Constitutional council held that it was not relevant to mention the Charter and did not scrutinise the alleged non-conformity of the statutory instrument²⁷. «Considering, (...), that in any case, the treaty establishing a Constitution for Europe is not contrary to the Charter for the Environment of 2004». But it was a good opportunity for the council to refer to the Charter, and to consider it as part of the Constitution, as it had previously done for the other bills of rights in 1971. The only problem of this case was that in its ruling, the Constitutional council solely considered

²³ D. MARRANI, «How to End an Attempt to Institute a Carbon Tax: the Conseil constitutionnel declares that article 7 of the 2010 Budget instituting a carbon tax does not conform to the Constitution of the French Republic», *Env Law Rev*, n.º 13, 2011, pp. 50-55.

²⁴ DC 71-44, Seeabove 16.

²⁵ Cons. const., Decision 24 March 2005 REF, Decision sur des requêtes présentées par Monsieur Stéphane Hauchemaille et par Monsieur Alain Meyet, JORF 31 March 2005, p. 5834. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2005/2005-31-ref/decision-n-2005-31-ref-du-24-mars-2005.107222.html>. (5 February 2015).

²⁶ *Ibid*, para. p. 4.

²⁷ *Ibid*, para. p. 7.

the position of the Charter in the list of constitutional norms and nothing else. Later on in April 2005, it did substantially consider the Charter itself²⁸, on a bill on the creation of a maritime register. It was referred to the Constitutional council, which considers the Charter explicitly in paragraph 13, 36, 37 and 38 of the decision. Paragraph 37 is probably the most important one for the matter that concerns us here. It stated that the application of article 6 had to be left to the discretion of the legislature.

Considering that following the dispositions of article 6 of the Charter for the Environment of 2004: «Public policies must promote sustainable development. For this purpose, they conciliate protection and valorisation of the environment, economic development and social progress»; it is a power for the legislature to determine, in the respect of the principle of conciliation laid down by those measures, the terms of its implementation.

Following this decision, a parliamentary debate concerning the French energy policies took place in July 2005²⁹. The then oppositions triggered a constitutional control of the bill. It was thought by the applicants that the bill was in breach of the principle of equality enshrined in article 6 of the Charter³⁰, the Council deciding on that occasion the the bill did not infringe article 6³¹. As well as these express uses implied uses of the Charter may also be found in bills relating to environmental issues.

2. Implied uses of the Charter in ex ante constitutional control

After the first attempt of April 2005³², it was in December 2005³³, during the finance bill discussion that concerned the credits allocated to ecology and sustainable development

²⁸ Cons. const., Decision 2005-514 DC 28 April 2005, *Loi relative à la création du registre international français*, JORF 4 May 2005, p. 7702. This bill was declared in conformity with the Constitution. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2005/2005-514-dc/decision-n-2005-514-dc-du-28-avril-2005.967.html>. (5 February 2015).

²⁹ Cons. const., Decision 2005-516 DC 7 July 2005, *Loi de programme fixant les orientations de la politique énergétique*, JORF 14 July 2005, p. 11589. This bill was declared in conformity with the Constitution. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2005/2005-516-dc/decision-n-2005-516-dc-du-07-juillet-2005.968.html> (5 February 2015).

³⁰ *Ibid.*, para. p. 23.

³¹ *Ibid.*, para. p. 25.

³² Cons. const., Decision 2005-513 DC, 14 April 2005, *Loi relative aux aéroports*, JORF 21 April 2005, p. 6974. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2005/2005-513-dc/decision-n-2005-513-dc-du-14-avril-2005.966.html>. (5 February 2015). This bill was declared in conformity with the Constitution. (paragraph 12 of the decision concerned the modulations of a tax based on reducing or compensating impacts on the environment).

³³ Cons. const., Decision 2005-530 DC, 29 December 2005, *Loi de finances pour 2006*, JORF 31 December 2005, p. 20705. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2005/2005-530-dc/decision-n-2005-530-dc-du-29-decembre-2005.975.html>. (5 February 2015). This bill was declared partially not to be in conformity with the Constitution.



that the Charter was used as reference³⁴. As in previous occasion after 1971, the implied use of the Charter in constitutional control became the preferred approach of the Constitutional council. This continued in subsequent cases, such as the November 2006 decision on a bill relating to the energy sector³⁵ and of February 2007 decision on a bill relating to the development of the area of *La Défense* in Paris³⁶. The proper use of the new bill of rights as tool for the protection of environmental human rights increased after 2008.

3. After 2008: The Charter for the environment, the ex post constitutional control and environmental human rights

Departing from previous constitutional practice, the Constitution of the Fifth French Republic, the Constitutional council's scope of control has been extended to incorporate an ex post constitutional control in France³⁷.

As mentioned above, until 2008, only ex ante control existed. Prior to the 2008 modifications, it was impossible to challenge the constitutionality of a statute that had already come into force³⁸. The modification to the text of the Constitution of the Fifth French Republic, passed on 23 July 2008, introduced a priority preliminary ruling on the issue of constitutionality as an ex post mechanism of control (Article 29)³⁹.

The radical change meant that any individuals involved in legal proceedings were given the right to initiate an ex post review under Article 61-1 of the Constitution, which states:

If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter

³⁴ *Ibid.*, para. pp. 11-14.

³⁵ Cons. const., Decision 2006-543 DC, 30 November 2006, *Loi relative au secteur de l'énergie*, JORF 8 December 2006, p. 18544, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2006/2006-543-dc/decision-n-2006-543-dc-du-30-novembre-2006.1014.html>. (5 February 2015). This bill was declared partially not to be in conformity with the Constitution.

³⁶ Cons. const., Decision DC 2007-548, *Loi relative aux règles d'urbanisme applicables dans le périmètre de l'opération d'intérêt national de La Défense et portant création d'un établissement public de gestion du quartier d'affaires de La Défense*, JORF 28 February 2007, p. 3683. This bill was declared to be in conformity with the Constitution. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-548-dc/decision-n-2007-548-dc-du-22-fevrier-2007.1174.html> (5 February 2015).

³⁷ The power to review a statute may be *a priori* or *a posteriori* promulgation. The *ex ante* review applies to statutes that have not yet entered into law (similar to a bill stage) while an *ex post* review applies to statutes that are laws (similar to Acts of Parliament).

³⁸ See note 15.

³⁹ *Loi constitutionnelle de modernisation des institutions de la Ve République*, JORF 0171, 24 July 2008 p. 11890.

may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period⁴⁰.

Article 61-1 of the Constitution introduced a right for any individual involved in legal proceedings before a court (either administrative or judicial) to contest a statute on the basis that it might infringe the rights and freedoms guaranteed by the Constitution. There are conditions for admissibility. Applications must be referred to the Constitutional Council by one of the French supreme courts- the *Conseil d'Etat* as supreme court of the administrative court system, or the *Cour de cassation*, as supreme court of the judicial court system, which will filter applications to the Constitutional Council that both supreme courts have a duty to filter applications. According to Article 62 of the Constitution, if a statute is considered to be unconstitutional by the Council, it will then be repealed:

A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

As Article 61-1 came into force on 1 March 2010, what became increasingly important were human rights, defined as the rights and freedoms guaranteed by the Constitution⁴¹. What are these rights and freedoms? Are they human rights? And what about the rights and duties of the Charter? Are they including the environmental human rights of the 2004 Charter for the Environment. Classification on the matter came after 2008, there were two significant cases: the 2008 landmark case on the statute on GMOs (<the

⁴⁰ Available at: www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#_Toc308601189 (5 February 2015).

⁴¹ Governmental regulations executing the loi organique completing the Constitution in application of Art. 61-1 of the Constitution provided a starting date of 1 March 2010 for the new *ex post* mechanism. See: Loi organique 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution. See: [http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021446446&categorieLien=id\(5](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021446446&categorieLien=id(5) February 2015). Décret n.° 2010-148 du 16 février 2010 portant application de la loi organique n.° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution and Décret n.° 2010-149 du 16 février 2010 relatif à la continuité de l'aide juridictionnelle en cas d'examen de la question prioritaire de constitutionnalité par le Conseil d'Etat, la Cour de cassation et le Conseil constitutionnel.

Law on Genetically Modified Organisms»⁴² and the 2009 case on the 2010 budget bill creating a «carbon tax», although that one being less topical for this article⁴³.

4. The 2008 landmark decision: environmental human rights for all?

The 2008 decision was a landmark one for environmental human rights. The Council had to consider if the statute on GMOs conformed to the Constitution⁴⁴. For the first time, the Council considered the value of the rights and duties included in the Charter, stating that they all had constitutional value in paragraph 18 of the decision:

Article 5 of the Charter for the environment provides: «When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage». These provisions, like all the other rights and duties set out in the Charter for the Environment, have constitutional status. They are thus binding upon the Government and administrative authorities within the limits of the areas under their jurisdiction. It is thus incumbent upon the Constitutional Council, when asked to rule under Article 61 of the Constitution, to ensure that Parliament has not failed to respect the principle of precaution and has taken the necessary measures to ensure compliance with said principle by other public authorities⁴⁵.

The issues raised by the legal nature of the Charter were not new. From its incorporation in the Constitution in 2005, the rights and duties of the Charter have been found to be of different normative value as we have mentioned previously. The Constitutional Council differentiated between principles of constitutional value (directly applicable and to be invoked by individuals before a court) and objectives of constitutional value (imposed on the legislative power but never directly invoked before a court). It meant for the Charter

⁴² Cons. const., Decision 2008-564 DC 19 June 2008, JORF 26 June 2008, p. 10228 (*Loi relative aux organismes génétiquement modifiés*). This bill was declared to be, in part, not in conformity with the Constitution. Available, in English, at: www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2008564DCen2008_564dc.pdf. (5 February 2015).

⁴³ Cons. const., Decision 2009-599 DC 29 December 2009, JORF 31 December 2009, 22995 (*Loi de finances pour 2010*). This bill was declared to be, in part, not in conformity with the Constitution. Available at: www.conseil-constitutionnel.fr/decision//decisions-depuis-1959/2009/2009-599-dc/decision-n-2009-599-dc-du-29-decembre-2009.46804.html. (5 February 2015)

⁴⁴ D. MARRANI, «Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts», *Sustainable Development Law & Policy*, pp. 52-57.

⁴⁵ DC 2008-564, para. 18.

and the Constitutional council that depending on how the rights and duties are classified, the Council could vary the depth of its scrutiny. A broad interpretation would give full value to rights and duties, which, therefore, became constitutional rights, enforceable directly, while a narrow interpretation would imply the necessary implementation of those rights and duties by the legislature. This was a great importance for environmental human rights. For instance, Article 6 of the Charter received a narrow interpretation. The Council stated:

Under Article 6 of the Charter for the Environment of 2004, public policy should promote sustainable development. To this end, they reconcile the protection and enhancement of the environment, development economic and social progress, it is for the legislature to determine, in accordance with the principle of reconciliation laid down by these provisions, the terms of its implementation⁴⁶.

The Council considered, in this case, that only statutes could implement those rights and duties, establishing specific procedures for their exercise.

In the 2008 case, the consecration of the constitutional status meant that all the rights and duties included in the Charter were included. In effect, this prepared the way for the next step in accessing these rights and duties as environmental human rights. However, it also levelled those rights and duties with other constitutional rights and duties: the rights and freedoms guaranteed by the Constitution.

That said, the Constitutional Council specified that an article-by-article or section-by-section analysis of any rights and duties defined in the Charter would take place in its interpretation. However, once again, the classification of rights and duties does not have the same outcome before and after 2008. So far, only seven have been considered by the Council, while only Articles 1 to 4 and Article 7 were invoked as the basis for an ex post ruling. The Council clarified the extent of the new controls in the matter. It specified that these rights and duties were within the scope of Article 61-1 as rights and freedoms guaranteed by the Constitution and that, as such, they may be invoked in support of an ex post constitutional control.

It also worth noting that the Constitutional council has refused to consider that the general statements contained in the Charter were purely philosophical and without imperative force. The Council's task has been to identify the normative impact of the general statements in its interpretation. In the 2009 decision on carbon tax⁴⁷, the Council took into account the fact that the duties established by Article 2 of the Charter for the Environment («Everyone shall take part in the preservation and improvement of the environment»), Article 3 («Everyone shall, within the limits imposed by statute law, prevent possible damages to the environment one may create or, failing that, limit their

⁴⁶ DC 2005-514, para. 37.

⁴⁷ DC 2009-599.

consequences») and Article 4 («Everyone shall contribute to repairing damage one causes to the environment, within the limits imposed by law») were all objectives of constitutional values. It declared: «like the ensemble of rights and duties defined in the Charter of the Environment, [they] have constitutional value»⁴⁸. The Constitutional council also reaffirmed that the rights and duties included in the Charter confirm and complete the 1789 Declaration; they are not separate or even autonomous from it. For instance, in the 2009 decision, the Charter's rights and duties were analysed in terms of being a complement to Article 13 of the 1789 Declaration which stated: «For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay»⁴⁹. This cleared the way to go a step further: the Council enlarged the scope of operation of the Charter by giving individuals a proper means by which to enforce their environmental constitutional rights.

To conclude, we need to mention the completion of the recognition work by the Constitutional council. In addition to recognising that the ensemble of rights and duties declared in the Charter had constitutional value It recognised that the rights and freedoms guaranteed by the Charter were also rights and freedoms guaranteed by the Constitution⁵⁰, it also extended these to the ex post mechanism, in the decision QPC Michel Z of 2011 and QPC Association France Environnement of 2011⁵¹. As such, the rights declared are now truly protected, not simply declared, not simply guiding the law makers, but also in the hands of the public who can make use of these⁵².

IV. CONCLUSION: GREENER' CONSTITUTIONAL FUTURE

We have seen briefly that the Charter, a bill of rights that was initially a philosophico-legal text, was designed as a guide for the lawmakers. As such, it was supposed to drive the bills but also central and local regulations in a «greener» way, during their elaboration

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ DC 2008-564.

⁵¹ Cons. const., Decisions 2011-116 QPC, 8 April 2011, *M. Michel Z. et autre [Troubles du voisinage et environnement]*, JORF 9 April 2011, p. 6361, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2011-116-qpc/decision-n-2011-116-qpc-du-08-avril-2011.95732.html>. (5 February 2015), and 2011-183/184 QPC, 14 October 2011, *Association France Nature Environnement [Projets de nomenclature et de prescriptions générales relatives aux installations classées pour la protection de l'environnement]*, JORF 15 October 2011, p. 17466, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2011-183/184-qpc/decision-n-2011-183-184-qpc-du-14-octobre-2011.100273.html>. (5 February 2015).

⁵² For a broader study see: D. MARRANI, «The Intersection between Constitution, Human Rights and the Environment: The French Charter for the environment and the new ex post constitutional control in France», *Env Law Rev*, 2014, pp. 91-105.

process. It was also a bill of rights that would help a «greener» constitutional control after the enactment of bills. With the evolution of the French Constitution generally, and the way the constitutional review has changed in practice, the matters of constitutional control became more topical. First, there was *ex ante* control, as forecasted during the first years after the constitutionalisation of the Charter, then we had its increased use in *ex post* control. As such, that bill of rights which was a philosophico-legal text became a very practical legal text that could both used by individuals and lawyers. Because of the link between the Charter rights and the evolution of constitutional control, the environmental human rights became not only declared but also truly protected. We therefore witnessed an evolution from a traditional constitutional control to human rights protection.

The idea of environmental human rights is not new⁵³. But it does not mean that we can simply refer to environmental human rights to truly have robust protection of those rights. In addition, we always have floating around that debate the issue of «universal» conception of rights and «local» one. Can we just say for instance that the 1789 Declaration of Rights is a universal declaration, even though the enforcement of the declared rights is only local? That said, rights declared in 1789 found echoes not only in other local declarations but also in universal ones, making us believe that the 1789 rights have universal values. That question is even more complex in the case of environmental issue. It seems logical that environmental questions should be treated at a level that is trans borders and not simply local, because for instance fluids, water, air, do not know borders. It would therefore be more efficient to have an international or transnational level in environmental human rights protection. But it is also well know that there is little hope for the moment of a broad international protection of these rights, even though like in the case of the 1789 rights, a universal declaration of those environmental rights in a way or an other is normal. We may now be able to refer to environmental human rights in the case of the French Constitution. But here too it was neither simple nor obvious to do so. We are able to analyse the evolution since 2005. First, the Charter was incorporated into the constitutional arsenal. Then it was given recognition as «part of the Preamble», then its rights and duties were recognised, and recognised as equal to the rights and freedoms guaranteed by the Constitution first in *ex ante* constitutional control, then in *ex post* constitutional control. As such, not only we have here rights that are declared, but we also have rights that are protected.

The state, or any kind of governing body, is more or less faced with a difficult choice: to protect humans or to protect their environment (the environment of humans protected

⁵³ See for example, N. POPOVIC, «In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment», 27 *Colum. Hum. Rts. L. Rev.* 487 (1995-1996).



for humans). And human rights are considered as rights only for humans, not really rights for the environment. Environmental rights act as patches of the «human» legal puzzle, in a sort of permanent justification of mankind's playground, its physical environment: sky, land and sea. The problem is circular and has two levels. The first level is that international law imagines a protection at a different level than national law. But international law, even though it appears logically relevant to environmental protection, because of the fluidity of most pollutions, has no «real» means to implement effective protection so it relies on the national level for implementation of that protection. The second level is that environmental law is a law created for mankind more or less for its environment (sky, land and sea), not truly a law for the environment; it is really the law of the environment of all of us. Hence we have the «integration» of environmental rights into the «category» of human rights. In a way, human rights have become rights «to do»: rights to do a number of things that include affecting the environment. Why? Simply because the environment is our playground. Of course, it is not completely our consideration of what is going on right now that is important but rather our vision of what may happen to our environment, of what is at risk, and how this may affect the future of mankind. This is in that way that the protection of our environment may only make sense: The «spatio-temporal» human realizing that her/his play area is basically «mortal» and likely to disappear, becomes aware that s/he should be protecting it in order to be able to continue to play in that gigantic playground. The most efficient way to do so is to declare rights in order to take care of the matter, like you would publish rules of a game. And where to declare those rights? The best way is into the highest norms of a specific jurisdiction - its Constitution. There is a correlation between human rights and their environmental side. We aim to protect for the future, for our future, to be sure that we or our children will be able to use our playground later. We protect because environmental rights, becoming human rights, are rights that were here before us, like every other human rights. But in their case, the «before us» touches the core of life, its place of birth, the place where the human race begins. Humans are entities so afraid of their own death that they will only react out of fear for their own limitations. In this sense, constitutions provide us with the rights of humans to use with care the playground «environment». The interconnections between the Charter for the Environment and the democratisation of the role of the Constitutional council is thus a clear sign of the fear that transcends us as a subject of law; it also reveals rights that are more deeply connected to the questions of who and what we are. The Charter was only supposed to be merely a document enshrining environmental issues into the French Constitution. With the evolution that has taken place, it has now become an effective legal tool, a real «bill of rights», truly reinforcing environmental rights, environmental human rights.



TÍTULO

REFORZANDO LOS DERECHOS AMBIENTALES: LA CARTA FRANCESA DEL MEDIO AMBIENTE

SUMARIO

I. INTRODUCCIÓN: LA INCORPORACIÓN DE LOS DERECHOS HUMANOS AMBIENTALES EN LA CONSTITUCIÓN DE LA QUINTA REPÚBLICA FRANCESA. II. UN TEXTO FILOSÓFICO-LEGAL QUE ESTABLECE DERECHOS HUMANOS AMBIENTALES. 1. ¿Derechos con efectos políticos y ambiguos efectos legales? 2. Derecho con efectos legales. III. DEL CONTROL CONSTITUCIONAL TRADICIONAL AL REGIMEN DE PROTECCIÓN DE LOS DERECHOS HUMANOS. 1. Aplicaciones expresas de la Carta en controles constitucionales ex ante. 2. Aplicaciones implícitas de la Carta en controles constitucionales ex ante. 3. Aplicaciones implícitas de la Carta en controles constitucionales ex post. 4. La decisión emblemática de 2008: derechos humanos ambientales para todos. IV. CONCLUSIÓN. UN FUTURO CONSTITUCIONAL MAS AMBIENTAL.

PALABRAS CLAVE

Carta del Medio Ambiente; Derechos humanos ambientales; Constitución de la V Republica francesa; Derechos constitucionales.

RESUMEN

La Carta de Medio Ambiente fue integrada en la Constitución de la V Republica Francesa en 2005. La Carta ha devenido en un importante instrumento legal que, a mi juicio, ha transformado tanto el ordenamiento de los derechos ambientales como de los derechos humanos, como parece deducirse de la decisión del Consejo Constitucional francés de 2008 relacionada con la constitucionalidad del estatuto de los OMGs. La Carta reconoce una lista de derechos ambientales con valor constitucional, como avala el trabajo del Consejo al afirmar el valor constitucional de todos los derechos y obligaciones establecidos en la Carta. En virtud del ámbito del control constitucional, puede afirmarse que los derechos declarados en la Carta constituyen no solo «auténticos» derechos constitucionales, sino también derechos humanos ambientales.

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