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Security impulses and protection of rights: the law on immigration before the French Constitutional Council*

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1. *Introduction*

In the last decade, a growing demand for security and anti-immigration policies seems to have spread all over Western European countries, propelled particularly by the nationalist right-wing parties that are leading in the polls across the continent. France is no exception. A few months before the 2024 European elections and after a long parliamentary ordeal, displaying splits within the presidential majority and strong tensions between the political forces, a reform on immigration and asylum was approved in December 2023. However, several appeals to the Constitutional Council have held back its entry into force, denouncing numerous aspects of unconstitutionality. The constitutional judge was vested with an extremely delicate task and had to strike a difficult balance between the indispensable protection of the rule of law and the political will to contain the migratory flow and promote security. The affair marks a harsh clash between politics and law, whose aftermath is yet to be highlighted, and constituted a new episode in the long debate on the relationship between constitutional justice and the legislator. The Constitutional Council, in fact, has long struggled to assert its role in France, because its establishment was considered to be in conflict with the traditional principle of parliamentary sovereignty[1].

The goal of this article is to discuss the circumstances surrounding the decision above and the principles relied upon by the constitutional judge. The political debate that led to the approval of the law will be

* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

[1] L. Favoreu, *La politique saisie par le droit*, Paris, 1988, p. 108

described in paragraph 2, while the appeals referring the reform project to the Constitutional Council will be analysed in paragraph 3. Paragraph 4 will highlight the core rationale of the constitutional judge's ruling; paragraph 5 will discuss the consequences of a ruling that upset the French political and institutional system, whereas a comparative point of view confronting the Italian jurisprudence on extraneous amendments will be outlined in paragraph 6.

2. *A troubled genesis*

The first discussions about reforming immigration legislation date back to 2022. The legislative elections that year had in fact produced a fragmented political framework, depriving the President of the Republic of the absolute majority in the National Assembly. This is an unusual fact for French politics, as the Heads of State have always enjoyed wide majorities in Bourbon Palace since the end of the third cohabitation in 2002.

Indeed, it has been highlighted in the literature that the 2022 legislative elections put an end to the so-called *fait majoritaire*, or the presence of a stable and homogeneous government majority in the National Assembly, which had persisted since 1962 and was one of the distinctive features of the history of the Fifth French Republic compared to the chaotic experience of the Fourth Republic[2]. The electoral system, characterized by the two-round election of representatives in single-member constituencies, had always allowed a party or a coalition of parties to obtain the majority of seats in the Lower House. The President of the Republic could normally rely on a Parliament loyal to him, thus allowing him to appoint a Prime Minister of his choice; vice versa, even when the legislative elections delivered the parliamentary majority to a political faction hostile to the Head of State, political stability was still guaranteed: in cases of cohabitation, in fact, the Prime Minister, linked to the National Assembly by a relationship of confidence, became the protagonist of French political life, with a reduced capacity of the President of the Republic to influence the choices of the Government. In this context, the legislative elections of 2022 represented a remarkable novelty, introducing a significant obstacle to the

[2] B. Dolez, A. Laurent, *When the sequential election train derails - A look back at the making of the 2022 Hung Parliament* in *Revue française de science politique*, Volume 72, Issue 4, July 2022, p. 563-581

absolute predominance of the Head of State on the French political scene that had lasted for twenty years and that had had its maximum incarnation precisely with the "jupiterian" presidency of Emmanuel Macron[3].

The legislative elections of June 2022 delivered an unprecedented scenario of fragmentation to the country: the presidential coalition failed to secure an absolute majority, while the left and right components, especially the sovereignist one, got strengthened in the National Assembly[4]. President Macron thus confirmed Élisabeth Borne as Prime Minister, who consequently had to lead a minority government[5].

Previously, the presidential election in April had seen a strong surge for Marine Le Pen, leader of the sovereignist party *Rassemblement National* (RN), who had obtained more than 40% in the second round.

It is worth noting that the situation has become even more intricate with the 2024 legislative elections, held after the dissolution of the *Assemblée Nationale* ordered by Macron, following the defeat of his party in the European elections. The context of fragmentation in Parliament has thus been confirmed and forming a government has become even more difficult[6].

In Autumn 2022, faced with the rise of their nationalist political opponents, the coalition that supports Emmanuel Macron imposed on the legislative agenda an intervention aimed at addressing the issues of reception and integration of foreigners, as these matters contributed to the important electoral result of the right-wing parties.

Furthermore, due to the absence of a parliamentary majority, the Macronists were forced to negotiate with other political forces. The main interlocutors became *les Républicains* (LR), who for their part insisted on the need for new immigration measures.

At the end of 2022, a first draft was sent to the *Conseil d'État*. The project contained heterogeneous measures that triggered the reaction of numerous segments of civil society.

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[3] Macron's presidential attitude was described as «*jupitérien*» by R. Brizzi and M. Lazar in *La Francia di Macron*, Bologna, 2017, p. 156

[4] *Les résultats des élections législatives 2022* in *Le Monde* (https://www.lemonde.fr/resultats-legislatives-2022/)

[5] On the new political context following the 2022 legislative elections, see P. Taylor, *France learns parliamentary democracy the hard way* in *Politico*, July 2nd 2022 (politico.eu)

[6] See J.-M. Denquin, *République présidentielle, cohabitation, République parlementaire* in *JusPoliticum Blog*, July 24th 2024 (https://blog.juspoliticum.com/2024/07/24/republique-presidentielle-cohabitation-republique-parlementaire-par-jean-marie-denquin/).

Provisions to simplify and accelerate the repatriation of irregular migrants, greater restrictions for residence permits and changes to the procedure for the judicial protection of asylum seekers were foreseen.

The legislative process went on with difficulty, but a decisive push towards its approval came in October 2023, after an irregular foreigner who had become close to Islamic radicalism killed his former history teacher in Arras, a few days after the Hamas attack on Israel[7].

In November 2023, the Senate, historically the House where the right-wing parties are strongest due to its election mechanism[8], approved several amendments to the text, making the bill even tougher in its attempt to combat immigration in France[9].

The new measures approved included the introduction of the crime of illegal residence, a reduction in social benefits for foreigners (precluding access to public healthcare), further limitations on the *ius soli* for the acquisition of French citizenship, the withdrawal of the residence permit for failure to respect the «values of the Republic».

The measures, voted by a centre-right majority including LR and also by the RN deputies, provoked a strong reaction of disapproval from associations for the defence of human rights and against racism, as well as from the centre-left.

At the end of November the text reached the National Assembly. In the Parliamentary Committee for Laws, some changes introduced in the Senate were toned down, causing discontent among the right and in any case not satisfying the left. The support of the Minister of Interior Gérald Darmanin was not enough to keep the relative majority party united: the macronists were divided over the text and the House rejected it by a few votes[10]. The Republicans reacted asking for a constitutional revision in the immigration matter.

In the aftermath of this rejection, the Mixed Joint Commission was convened to find an agreement between senators and deputies.

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[7] *Killing of French teacher inflames tensions over security, immigration* in *Politico*, October 16th 2023 (politico.eu).

[8] J. Gicquel, J.-É. Gicquel, *Droit constitutionnel et institutions politiques*, Paris, 2019, p. 786.

[9] *Projet de loi « immigration » : le Sénat a achevé le durcissement du texte, avant une très probable adoption* in *Le Monde* (lemonde.fr), November 10th 2023.

[10] *Projet de loi « immigration » rejeté à l'Assemblée : les différentes options dont dispose le gouvernement* in *Le Monde* (lemonde.fr), December 11th 2023.

The compromise text effectively incorporated a large part of the draft approved by the Senate, to the great satisfaction of the right.

The bill was definitively approved on December 19th 2023[11] by both Houses, despite several dozens of *Renaissance* parliamentarians abstaining or voting against[12].

The crisis within President Macron's party broke out in an already delicate context for the Borne Government, which in 2023 faced, among other things, strong popular protest over the approval of the controversial pension reform. As a political consequence, Prime Minister Élisabeth Borne resigned on January 8th 2024[13] and was replaced by Gabriel Attal.

3. Appeals to the Constitutional Council

After the approval, four appeals were presented to the *Conseil Constitutionnel*. These are two *saisines parlementaires* (i.e. appeals presented by 60 deputies and 60 senators, in this case elected for left leaning parties), an appeal by the President of the National Assembly and one presented by the President of the Republic.

These are preventive appeals before the law comes into force, in accordance with Art. 61 par. 2 C.

It is interesting to note that both Emmanuel Macron and the President of the Lower House Yaël Braun-Pivet asked the constitutional judge to review a law that their own party ultimately endorsed[14]. President Macron openly hoped that the Constitutional Council would remove the most controversial provisions of the reform and several members of his

[11] See the adopted text, no. 220 of 19 December 2023, on the website of the National Assembly (https://www.assemblee-nationale.fr/dyn/16/textes/l16t0220_texte-adopte-provisoire.pdf).

[12] W. Audureau, A. Miliani, P. Breteau, *Le projet de loi « immigration » a bien été adopté avec les voix du Rassemblement national* in *Le Monde* (lemonde.fr), December 20th 2023.

[13] Resignation notice of Élisabeth Borne on the website of the French Government, January 8th 2024 (https://www.info.gouv.fr/actualite/composition-du-nouveau-gouvernement).

[14] The *saisine présidentielle* can play a significant role in the functioning of French institutions, particularly in cases of disagreement between the presidency and the parliamentary majority (see L. Philip, *Bilan et effets de la saisine du Conseil Constitutionnel* in *Revue française de science politique*, 1984, no. 4-5, p. 1000). The referrals made by the President of the Republic are often formulated in broad terms, yet they are not entirely devoid of utility in safeguarding fundamental rights and freedoms (see *infra*, note 23).

political party maintained that some of the new rules were unconstitutional. Gérald Darmanin, whose name is linked to this bill, stated in front of the Senate on December 19th 2023 that the law contained dispositions «manifestly and clearly in contrast with the Constitution»[15]. It is emblematic of a significant short-circuit in the French political class.

The president of the Constitutional Council Laurent Fabius was very critical of the appeal presented by the President of the Republic. He criticized a «certain confusion between law and politics» and denounced that the Executive acted in a manner inconsistent with the rule of law, leading to the approval of regulations which they knew were unconstitutional. It would be unacceptable, from the point of view of the constitutional judges, for the Government to pass on to the Constitutional Council the task of correcting a law that the Government itself did not have the courage to confront politically[16].

Notably, in the ritual exchanges of greetings for the new year 2024 with President Macron, Fabius warned precisely about the risk of breaking with the rule of law to respond to the political expectations of citizens: in his opinion this would mean «calling into question our democratic pact to replace it with a pact with the devil»[17].

Moreover, the appeal made by the President of the Republic is somewhat incoherent with his function of guardian of the Constitution, as attributed to him by Article 5 C. It is a desuetude proper of the French system to have a President of the Republic who can control the legislative process but can also challenge in front of the judges the laws approved by his own majority[18]. In the literature, it has been observed that presidential *saisine* constitutes a particularly effective instrument for the President of the Republic to influence the legislative process. Conversely, the utility of

[15] S. Slama, *À propos de la loi pour contrôler l'immigration, améliorer l'intégration, entretien avec Serge Slama, professeur à l'Université Grenoble Alpes* in *La Revue des droits de l'homme*, January 2024, p. 2.

[16] S. Barbarit, *Loi immigration : pourquoi Laurent Fabius reproche à l'exécutif de politiser le Conseil constitutionnel?* in *Public Senat* (publicsenat.fr), January 11th 2024.

[17] L. Fabius, *Intervention du Président du Conseil constitutionnel à l'Ecole nationale de la magistrature* on the website of the Conseil Constitutionnel, February 29th 2024 (https://www.conseil-constitutionnel.fr/actualites/intervention-du-president-du-conseil-constitutionnel-a-l-ecole-nationale-de-la-magistrature).

[18] P. Mouzet, *Saisine blanche, fumée blanche* in *AJDA*, 2015, p. 1385.

referring a bill back to Parliament is limited, as such a referral requires the countersignature of the Prime Minister[19].

Professor Derosier of the University of Lille in an interview with *Public Senat* on January 11th 2024 observed that there is a tendency for politicians to use the *saisine* as a loophole to achieve their purposes, without particular consideration for the Constitution[20].

Particularly, Macron's *saisine* presented itself as generic, as is common for presidential appeals, without indication of the specific reasons for censorship. In fact, in the appeal the President of the Republic simply referred the draft to the *Conseil*, stating his desire that the provisions should not come into force before the judges have verified their compliance with constitutional rights and freedoms[21].

This "blank appeal" (*saisine blanche*) can be problematic for the Constitutional Council, which normally limits its examination to the sole provisions indicated by the appellants, as affirmed in ruling no. 2011-630[22].

However, a limited usefulness can be recognised to the *saisines blanches*: in general, the *Conseil* in front of such appeals may declare that the parliamentary procedure that led to the approval of the contested law was unconstitutional (and this eventually occurred in the case of the *loi immigration*)[23].

The appeal presented by the president of the National Assembly is more specific. Braun-Pivet notes that the amendments approved by the Senate did not receive the advisory opinion of the Council of State and

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[19] D. Camoni, *Il rinvio delle leggi, tra poteri del Presidente della Repubblica e incidenza sulle forme di governo comparate* in *DPCE online*, 2023/1, p. 17.

[20] S. Barbarit, *ibid.*

[21] *Saisine par Président de la Republique*, December 21st 2023 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm).

[22] See decision no. 2011-630 of May 26th 2011 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2011/2011630DC.htm); on this subject, M. Benrahou, *Une saisine blanche n'est définitivement pas irrecevable* in *JusPoliticum Blog* (https://blog.juspoliticum.com/2023/06/09/une-saisine-blanche-nest-definitivement-pas-irrecevable-par-merwane-benrahou/).

[23] J.-P. Derosier, *Retour sur les « saisines blanches » du Conseil constitutionnel* in *Constitutions*, 2019, p. 479.

Attentive scholars have noted that the *saisine blanche* can allow the Conseil Constitutionnel to raise questions of constitutionality before itself *ex officio*, particularly in the presence of external contributions (*contributions extérieures*) sent to the Conseil itself in support of the *saisine* (in S. Slama, *ibid.*, p. 2).

indicates three articles which in her opinion deserve censure: Article 1 which requires Parliament to debate once a year on migration policies, Article 3 which extends the minimum duration of stay in France in order to request family reunification and Article 19 which imposes new requirements for access to some non-contributory social benefits. According to the appellant, these rules would violate the right of the Houses to set their own calendar, the right to privacy and the principle of equality. Furthermore, she asks for the examination of Art. 11 (which introduces a mandatory deposit for the issuance of a residence permit for study purposes) due to its extraneous nature to the initial bill[24].

The deputies' complaint appears much more detailed and focused precisely on the issue of the extraneous nature of the amendments adopted in the Senate. The appellants invoke Art. 45 par. 1: «[...] all amendments which have a link, even an indirect one, with the text that was tabled or transmitted, shall be admissible on first reading» and ask the Constitutional Council to confirm its jurisprudence.

Amendments unrelated to the originally deposited text are known in literature as *cavaliers législatifs*. The issue of a potential violation of Article 45, paragraph 1, concerning Senate-approved modifications lacking any connection to the government's initial proposal, will be crucial in the constitutional review of the *loi immigration*, as will be discussed later.

It has been noted that many provisions adopted by the Upper House were poorly written and had not been examined by the Council of State, nor had an impact assessment been prepared for them. Incidentally, according to some scholars, the procedure for adopting the bill would have also violated the separation of powers, because the Government had convened the Mixed Joint Commission on the basis of the text approved by the Senate, ignoring the rejection motion approved by the National Assembly[25].

Furthermore, some provisions are individually contested for other reasons. Article 1 is contested because it would not be within the legislator's powers to bind Parliament to debate the issue of immigration annually.

[24] *Saisine par Présidente de l'Assemblée Nationale*, December 21st 2023 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm).

[25] S. Slama, *ibid.*, p. 4.

Other provisions would violate the right to lead a normal family life, the right to privacy, the right to health, the right to a fair trial, the principle of equality, the principle of clarity and intelligibility of the law[26].

These rights are contained in the Preamble to the Constitution of 1946 and in the Declaration of the Rights of Man and Citizen of 1789, referred to in the Preamble to the Constitution of 1958 and therefore suitable to constitute a parameter of constitutional legitimacy according to the constant jurisprudence of the *Conseil Constitutionnel*[27]. The European Convention on Human Rights, ratified by France, also comes into focus[28].

Also the appeal raised by the senatorial minority tend to highlight these same violations[29].

4. *The judgement of the Constitutional Council*

On January 25th 2024 the *Conseil Constitutionnel* issued decision no. 2023-863[30].

The constitutional judge carried out a partial censure, declaring 32 out of 86 articles unconstitutional and provoking the anger of right-wing parties[31].

As regards Article 1 of the project of law, the Constitutional Council accepted the observation of the President of the National Assembly, the deputies and the senators, according to which it is not possible for an

[26] *Saisine par 60 députés*, December 22nd 2023 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm).

[27] See *ex multis* Cons. const., déc. n° 71-44 DC du 16 juillet 1971, *Liberté d'association.*

[28] The provisions of the ECHR are not considered an intermediate parameter of constitutionality in the French legal system; their reference here therefore serves an interpretative purpose. On this subject, L. Montanari, *La difficile definizione dei rapporti con la CEDU alla luce del nuovo art. 117 della Costituzione: un confronto con Francia e Regno Unito* in *DPCE*, 2008

[29] *Saisine par 60 sénateurs*, December 27th 2023, *ibid.*

[30] For the complete text of the ruling, see the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm).

[31] N. Tacchi, *Conseil constitutionnel: ce qui reste du projet de loi immigration* on *Le Point* (lepoint.fr), January 26th 2024.

ordinary law to impose a debate on Parliament, in respect of its prerogative to determine its own calendar[32].

Called to evaluate Article 2, regarding the rejection of irregular migrants, the Constitutional Council evokes, as requested by the appellants, its own precedents, which establish the illegitimacy of the so-called *cavaliers législatifs* (literally, legislative riders) per violation of Article 45 C: these are modifications made to the text originally presented at first reading which have no connection, even indirect, with its object.

Actually, the notion of *cavaliers législatifs* is not present in the constitutional text. Its origin dates back to the parliamentary rules of procedure of the Third Republic and from there transposed into subsequent regulations; as such, the *Conseil* in its first years of activity had not considered that it fell within its scope of competence. Only in 1985 did the *Sages* change their case law, asserting that they were competent to judge the inadmissibility of amendments extraneous to the original draft thanks to a joint interpretation of Articles 39 and 44 C: they based the prohibition of the *cavaliers législatifs* on the distinction between the right of amendment and the right of legislative initiative; the latter would be violated by amendments extraneous to the deposit, which would end up replacing the presentation of a new bill[33]. The *Conseil*, starting from the 2000s, then developed the so-called «funnel jurisprudence» (*jurisprudence de l'entonnoir*), aimed at overcoming the distinction between amendments and legislative initiative and oriented to seek a clear connection between the amendment and the text presented. The constitutional judges thus have an appreciable margin of manoeuvre with which to weigh the object of the amendment, its scope, its importance, without it being clear whether they prefer a qualitative or quantitative analysis of the provisions in order to affirm their nature as *cavaliers*[34].

[32] «*Il ne résulte ni de l'article 48 de la Constitution ni d'aucune autre exigence constitutionnelle que le législateur peut imposer au Parlement l'organisation d'un débat en séance publique ou la fixation par ce dernier de certains objectifs chiffrés en matière d'immigration. Une telle obligation pourrait faire obstacle aux prérogatives que le Gouvernement ou chacune des assemblées, selon les cas, tiennent de la Constitution pour la fixation de l'ordre du jour*» in Cons. Const., no. 2023-863, par. 7.

[33] L. Depussay, *Le « cavalier », cheval de Troie dans la procédure législative* in *Sens public*, 2006 (https://sens-public.org/articles/264/)

[34] L. Depussay, *ibid.* The article makes particular reference to decision no. 2006-535 DC of 30 March 2006, *Loi per l'égalité des chances*, in which the Council reaffirms its competence to judge the inadmissibility of amendments extraneous to the text presented at first reading.

The draft presented by the Government on February 1st 2023 contained only 27 articles, compared to 86 of the text eventually approved.

In the case of Article 2, the Council stated this was not a case of *cavalier législatif*. Many other provisions, however, were censored because of their extraneity to the initial bill.

As regards Articles 3, 4 and 5, regarding family reunification, the *Conseil* ignored the complaints about the alleged violation of respect for family life, simply noting that they are unconstitutional because they have no connection with the text of February 1st.

For this same reason, 29 other Articles of the law were declared unconstitutional[35].

Article 14 was censored in part because it imposes excessively restrictive conditions, not balanced with other constitutional interests, for the review of the residence application.

As regards Article 38, it was declared unconstitutional, because by authorizing the taking of fingerprints and the photographic representation of the foreigner without his consent and in the absence of authorization from the Judiciary, it unnecessarily compresses the individual freedom of the migrant (in contrast with Articles 2, 4 and 9 of the 1789 Declaration).

Scholarship has noted that the *Conseil Constitutionnel* has so far not been particularly sensitive to the rights of migrant people, but the methods of adoption of this law, with the flood of amendments aimed at compressing those rights approved by the Senate, may have been the factor provoking such a harsh reaction of censure from the constitutional judge[36].

It has also been observed that the constitutional judge, especially in the last twenty years, has assumed an almost pedagogical role towards the legislator, committing himself to promoting the quality of legislative texts and in particular verifying the sincerity of the parliamentary debate, compromised by the *cavaliers législatifs*[37]. In its most recent rulings, the Council has made more explicit the reasoning it follows to assess the coherence of amendments with respect to the original text, in order to make the risk of censorship more predictable by other actors[38]. With ruling no.

[35] These Articles are n. 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 22, 24, 25, 26, 32, 33, 45, 47.3, 47.4, 48, 50, 58, 64.2, 65, 67, 68, 69, 81.

[36] S. Slama, *ibid.*

[37] P. Esplugas-Labatut, *Une jurisprudence constitutionnelle trop « à cheval » sur les « cavaliers législatifs »?* in *Recueil Dalloz*, 2024, n° 5, p. 219.

[38] J. Maïa, *Le contrôle des cavaliers législatifs, entre continuité et innovations* in *TitreVII*, n. 4, April 2020

2019-794, it was affirmed that the provisions disconnected from the text discussed at first reading were illegitimate because they could compromise the quality of the parliamentary work[39].

As mentioned, the prohibition of *cavaliers législatifs* appeared in the constitutional jurisprudence since the 1980s. The decision no. 86-225 of 1987[40], for example, declared the partial illegitimacy of a bill due to the presence of the so-called "Seguin amendment", an amendment unrelated to the draft originally presented to Parliament. This ruling was widely criticized by MPs of both the right and the left because in their opinion the constitutional judge had assumed the right to decide the dispute based on rules not precisely defined in the Constitution, but resulting from a judicial interpretation of generic provisions on legislative matter. The scrutiny of the regularity of parliamentary proceedings was perceived as an interference with the terrain of political decision-makers[41].

A brief digression on the evolution of the relationship between the Constitutional Council and political power in France may be necessary to better understand the context in which the decision on the *loi immigration* is situated. The tensions following the ruling of January 25th 2024 are not, in fact, a "bolt from the blue" but rather a new episode of misunderstanding and conflict in a relationship that has not always been harmonious.

As a matter of fact, the role of the *Conseil Constitutionnel* has not been easily understood by the French political class since its introduction with the 1958 Constitution. At times, the Legislative has not failed to show its impatience with the incursions of the constitutional judges. Former Prime Minister and former member of the Constitutional Council Lionel Jospin even observed that the *Conseil Constitutionnel* does not belong to the French tradition[42].

The relationship between constitutional judges and political power has often been fluctuating.

The Constitutional Council, an institution established by the 1958 Constitution, reflects the spirit of that text, which marked the beginning of

[39] See Cons. Const., ruling. no. 794-2019 of December 20th 2019, par. 55 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/2019/2019794DC.htm).

[40] See Décision n° 86-225 DC du 23 janvier 1987 on the website of the Conseil Constitutionnel (https://www.conseil-constitutionnel.fr/decision/1987/86225DC.htm).

[41] L. Favoreu, *ibid.*, p. 147-149.

[42] A. Delcamp, *Le Conseil constitutionnel et le Parlement* in *Revue française de droit constitutionnel*, 2004/1, n. 57, p. 37-83

the French Fifth Republic. The introduction of the *Conseil* into the legal system responded to the need to create an institution capable of limiting the power of Parliament. The Fourth Republic had been characterised by significant governmental instability, and thus the new political course, inaugurated under General De Gaulle – who was recalled to power to address the severe Algerian crisis (1954-1962) – could not but set as its primary objective the containment of what were perceived as the "excesses" of parliamentarism.

Particularly significant in this regard are the words of Michel Debré, one of the key figures in drafting the constitutional text: «[t]he Constitution thus creates a safeguard against deviations from the parliamentary system»[43].

In the new Constitution, the Parliament saw its role marginalised compared to the first decade after the war. In this context, the presence of the *Conseil* did not appear to be conceived as a means for the legislative power to uphold its prerogatives in the face of the growing authority of the President of the Republic and the government appointed by him. Rather, its function was to ensure that this very power remained within the limits that had been assigned to it. In other words, the role entrusted to the Constitutional Council was that of a guarantor of rationalised parliamentarism[44].

Added to this was the cultural misunderstanding with which the French political class regarded constitutional review. The principle of parliamentary sovereignty, which had been solemnly affirmed during the French Revolution, was seen by the parliamentary elite as at risk of being undermined by the intrusion of a non-democratic authority – namely, that of constitutional judges – who could override the Parliament by striking down laws it had enacted.

In brief, the relationship between the *Conseil* and Parliament was marked by distrust from the outset[45], but it has undergone a significant

[43] «*La Constitution crée ainsi une arme contre la déviation du régime parlementaire*». See Michel Debré, *Discours devant le Conseil d'État, 27 août 1958* in *Digithèque MJP* (*https://mjp.univ-perp.fr/textes/debre1958.htm*)

[44] B. Genevois, *L'influence du Conseil constitutionnel* in *Pouvoirs*, n. 49, 1989.

[45] A first clash between the *Conseil* and the Parliament occurred soon in 1959 with the partial censorship of the Rules of procedure of the Assemblies (decision n. 59-2 DC of June 17th, 18th and 24th 1959, *Règlement de l'Assemblée Nationale* and decision no. 59-3 of June 24th and 25th 1959, *Règlement du Sénat*). On that occasion, the President of the Senate Marcel Prelot openly showed his displeasure at the intervention from the newly established

evolution in the decades following the entry into force of the 1958 Constitution.

Over time there has been a progressive acceptance of the role of the Conseil Constitutionnel. The introduction of the *saisine parlementaire* under the presidency of Valéry Giscard d'Estaing, which occurred with the constitutional revision of 1974, contributed to the normalization of relations between the Conseil and Parliament: the possibility for 60 deputies or senators to request a ruling from the constitutional judge has in fact reduced the distance between the political class and the judges, transforming the Conseil into a sort of arbiter between the majority and the opposition[46]. This institution has increased the importance of the *Sages* in the French constitutional system, strengthening the protection of citizens' fundamental rights, while also giving the Constitutional Council a distinct political dimension. Frequently seized by opposition appeals, the Council's role as a check on legislative power – controlled by the parliamentary majority – was thus enhanced[47]. In this regard, the Constitutional Council has played a key role in the development of the rule of law, and particularly in the principle of legality, in France[48].

More recently, the 2008 constitutional revision marked a significant increase in the powers of the Constitutional Council, introducing incidental judicial review: the ex post control of the constitutional legitimacy of laws passed by the Parliament has strengthened the protection of citizens' rights, while diminishing the role of the Legislature in favour of the Judiciary[49].

Although the Constitutional Council can no longer be considered the "*arm of the Government*", as it was in the early days of the Fifth Republic, it is undeniable that it continues to play an important role in ensuring governmental stability, while maintaining a stringent oversight of the Executive over the Assemblies[50].

Council on the internal functioning rules of the Upper House, which in his opinion should not be subject to judgement by a body external to the Parliamentary Assembly itself. See A. Delcamp, *ibid.*

[46] A. Delcamp, *ibid.*

[47] L. Philip, *Bilan et effets de la saisine du Conseil constitutionnel* in *Revue française de science politique*, 1984/4, p. 988-1001.

[48] L. Favoreu, *L'apport du Conseil constitutionnel au droit public* in *Pouvoirs*, n. 13, 1991.

[49] O. Bonnefoy, *Les relations entre Parlement et Conseil Constitutionnel: les incidences de la question prioritaire de constitutionnalité sur l'activité normative du Parlement*, 2016 (Hal Open Science, https://theses.hal.science/tel-01246522v1)

[50] P. Avril, *Le Conseil constitutionnel est-il toujours le bras armé du gouvernement dans le parlementarisme rationalisé ?* in *Les Nouveaux Cahiers du Conseil Constitutionnel*, n. 50, 2016

In approximately 70 years, from 1958 to the present, it can be said that the relationship between the Constitutional Council and the Parliament has undergone a gradual normalisation, also thanks to the spread of a culture of constitutionality that has permeated the various French institutions[51]; however, at times, a sense of discomfort still emerges within the political class towards constitutional justice, especially when it is perceived that the Council is making an "intrusion" into the decisions of the governing majority. The interpretation of Article 45 of the Constitution undoubtedly remains one of the most significant points of conflict with the legislative power, and the case of the *loi Darmanin*, with the uncomposed reactions of certain political figures in response to the ruling, is a clear example of this.

It the literature, it has been observed that the Constitutional Council adopts a particularly severe interpretation of Article 45 C. The admissibility of amendments to the text originally filed is in fact assessed with reference to the individual initial provisions, and not with regard to the object of the legislative draft. In this case, it is rather evident that many of the censored provisions had a connection with the rationale of the text, i.e. the control of immigration, and nevertheless fell under the axe of the *Sages* because they lacked a specific connection with the few provisions of the original draft[52].

Decision no. 2023-863, along with the jurisprudence underpinning it, is thus not exempt from potential criticism. By censoring *cavaliers*, the Constitutional Council effectively restricts the legislator's room for manoeuvre. While this approach favours governmental stability, it does not contribute to the enhancement of the democratic process in France[53]. As noted by Professor Fargeaud of the University of Lorraine, the restrictive interpretation of the criteria for the admissibility of parliamentary amendments risks undermining the political compromises that were essential for the approval of the final version of the law. In the case of the *loi immigration*, while the *Conseil* has promoted respect for the rule of law, it may have excessively constrained the legislative process and, ultimately, representative democracy itself[54].

In this decision, the *Conseil Constitutionnel* also appeared indifferent to the modification of Article 45 C introduced by the 2008 constitutional

[51] P. Jan, *Le Conseil constitutionnel* in *Pouvoirs*, n. 99, 2001, p. 71-86.

[52] Esplugas-Labatut P., *ibid.*

[53] S. Benzina, *Loi 'immigration' : une décision constitutionnelle habile aux frais des droits des parlementaires* in *JusPoliticum Blog.*

[54] B. Fargeaud, *On achève bien les chevaux : le Conseil constitutionnel, les cavaliers législatifs et la loi 'immigration'* in *JusPoliticum Blog.*

revision. That revision aimed at softening the inadmissibility of amendments extraneous to the text at first reading, allowing them to have even an indirect connection with the provisions of the tabled legislative initiative[55]. The judges of *rue de Montpensier*, in other words, are reluctant to soften their scrutiny of the *cavaliers législatifs* and, in the case of the immigration law, it has been very convenient for them to confirm their jurisprudence, regardless of the intent of the 2008 modification[56]. It has been observed that the amendment to Article 45 C has ended up consolidating the case law of the Council on the matter, simply by endorsing what it already held, namely that provisions lacking any connection with the original draft were to be considered illegitimate[57].

As for the reactions of some political figures, it has been noted that the prospects for reform of the Constitution seem to represent a frontal attack to the rule of law, a reversal of direction compared to the introduction of the preventive control of constitutionality dating back to 2008 and a threat to the protection of everyone's rights, because the rules that concern immigrants are often a testing ground also for the rules that concern non-immigrants[58]. As previously noted, the *Conseil*'s jurisprudence is not necessarily immune from criticism, as one could argue against such a restrictive review of parliamentary powers[59]. However, in this case, the attacks on the judges do not appear to have been driven by serious legal arguments but rather by a desire to oppose an intervention by constitutional justice that has essentially defended the rights of immigrants. For its part, the Constitutional Council has, unsurprisingly, reaffirmed a jurisprudential approach that was already well known to French lawmakers.

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[55] Art. 20 of constitutional law n. 2008-724 of July 23rd 2008 has in fact added to Art. 45, par. 1, C the words: «[w]ithout prejudice to the application of Articles 40 and 41, all amendments which have a link, even an indirect one, with the text that was tabled or transmitted, shall be admissible on first reading».

[56] Esplugas-Labatut P., *ibid.*

[57] J. Maïa, *ibid.*

[58] As a matter of fact, the 2008 constitutional reform had led to an expansion of the *Conseil Constitutionnel*'s syndicate possibilities. Part of the political class today instead seems eager to "tie the hands" of the *Sages*. See N. Klausser, V. Champeil-Desplats, M.-L. Basiliengainche, *Petit à petit, l'illibéralisme fait son nid : quand la loi immigration annonce d'autres atteintes à l'Etat de droit* in *La revue des droits de l'homme*, 2024, no. 25, p. 1-3.

[59] On the critical aspects of this decision by the *Conseil Constitutionnel*, see also G. Drago, *Loi Immigration: le Conseil constitutionnel a-t-il raisonné en droit ou en politique?* in *Le Club des Juristes*, February 8th 2024 (https://www.leclubdesjuristes.com/opinion/loi-immigration-le-conseil-constitutionnel-a-t-il-raisonne-en-droit-ou-en-politique-4715/)

In front of the attacks on the rule of law represented by the criticism against the intervention of the *Conseil*, it is useful to recall the teaching of Georges Vedel, who observed that the constitutional jurisdiction does not expropriate the people of their sovereignty, but ensures that ordinary law does not introduce measures that would have required constitutional revision[60]. Contrasting the *Conseil* and the Parliament means ignoring the contribution that each, with its own authority and competence, gives to the French constitutional experience and to the correct development of the democratic principles enshrined in the 1958 Charter[61].

5. *An uncertain aftermath*

The censure of the *cavaliers législatifs* allowed the Constitutional Council to dismantle the structure of the *loi Darmanin*.

By resorting to this technique, the constitutional judge avoided the scrutiny on the merit of the provisions, with the exception of a couple of articles. In this way the *Conseil* did not get down into the more political terrain of the immigration issue, perhaps hoping to safeguard itself from protests from the one or the other political faction, depending on the balance that should have been struck between guaranteeing rights and respecting the democratic sovereignty of Parliament.

Following the decision, however, both *les Républicains* and the *Rassemblement National* lashed out at the judges, accusing them of taking the place of the legislator. The French right not only immediately called for the approval of a new law that would reintroduce the censored rules and contested the interpretation of Art. 45 C, but also called for a constitutional revision[62]. According to Marine Le Pen's party, a constitutional amendment approved with a popular referendum (as foreseen by Art. 89 C) is the only way to approve the new immigration policies. As a matter of fact, on January

[60] A. Delcamp, *ibid.*

[61] A. Delcamp, *ibid.*

[62] J. Paugam, *Loi immigration: LR et RN exigent désormais une révision constitutionnelle* in *Les Echos* (lesechos.fr), January 25th 2024.

25th 2024 a constitutional bill proposal on immigration and citizenship was presented by the leader of RN to the National Assembly[63].

Olivier Marleix (LR) has affirmed that the Constitutional Council «has a dubious and very restrictive conception of Article 45 of the Constitution, contrary to the letter of the text» and the gaullist centre-right, noting that the judges did not rule on the merit, intend to restore the rules regarding the crime of residence, the bail for foreign students and the access to citizenship[64].

After the ruling, the law was promulgated by the President of the Republic on January 26th 2024 (law no. 2024-42). The immigration issue, however, not only remains open from a political point of view, but the part of the *loi Darmanin* which survived the scrutiny of the constitutional judges is not out of danger.

It is in fact possible, starting from the 2008 constitutional revision, to raise a «*question prioritaire de constitutionnalité*» (QPC) to contest the conformity with the Constitution of a provision of law that must be applied to a specific case before the judge.

In this way, even the provisions that so far have not been examined by the Constitutional Council could be declared illegitimate and the judges of *rue de Montpensier* themselves could be forced to rule on the merit, as Fabius admitted[65].

6. A comparative point of view

Constitutional review on the homogeneity of legislative texts is not limited to the case law of the *Conseil Constitutionnel*. Looking at the Italian constitutional jurisprudence, although a notion analogous to that of the French *cavalier législatif* has not been developed, it can be observed that the issue has been addressed in some rulings.

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[63] *Proposition de loi constitutionnelle Citoyenneté-Identité-Immigration, n° 2120* on the website of the *Assemblée Nationale* (https://www.assemblee-nationale.fr/dyn/16/textes/l16b2120_proposition-loi).

[64] *Censure de la loi immigration: les Républicains exigent un nouveau texte avec les dispositions censures* in *Le Figaro* (lefigaro.fr), January 25th 2024.

[65] J. Toussay, *Pourquoi la censure de la loi immigration par le Conseil constitutionnel n'est peut-être pas terminée* in *Huffington Post* (huffingtonpost.fr), January 27th 2024.

The Constitutional Court, in particular, has had the opportunity to specify that the decree-laws adopted by the Government and the respective conversion laws must respect the principle of homogeneity, and can only contain provisions consistent with the purpose for which the act was issued by the Executive. This has been highlighted with remarkable severity by the Italian constitutional judges in some judgments that have censored certain amendments approved by the Parliament during the process of conversion.

The declarations of unconstitutionality have been made only in this particular field, that is, in the case of decree-laws and related conversion laws, since the constitutional judges have not exercised an equally penetrating control over laws in the formal sense, as is instead the practice of the Conseil Constitutionnel and as occurred in the specific case of the *loi immigration*.

In this regard, judgments no. 171/2007 and no. 128/2008 stated that the lack of homogeneity is an indication of the possible violation of the requirements of necessity and urgency provided for by art. 77 of the Constitution for decree-laws. More clearly, judgment no. 22/2012 considered the unconstitutionality of all the heterogeneous provisions, for this reason alone to be considered in conflict with art. 77 of the Constitution[66].

A very significant case, in this sense, is represented by decision no. 32/2014: on that occasion *Palazzo della Consulta*, recalling its judgment no. 22/2012, declared unconstitutional the regulation on narcotics introduced in a decree-law containing provisions regarding the holding of the 2006 Turin Winter Olympics. The extraneity of the amendments concerning the regulation of psychotropic substances with respect to the theme of the decree-law provoked a clear reaction from the constitutional judges, who observed – as in other rulings – that the introduction of provisions without any connection with the government act at the time of conversion into law represented a violation of art. 77 of the Constitution due to the lack of the requirements of necessity and urgency that characterize these acts having the force of law[67].

The doctrine has had the opportunity to observe that the insertion of provisions inconsistent with the object of the decree-law entails an abuse

[66] S. M. Cicconetti, *Obbligo di omogeneità del decreto-legge e della legge di conversione?* in *ConsultaOnline*, 2012

[67] Corte Cost., March 5th 2014, n. 32, *Considerato in diritto*, § 4 (https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2014:32#diritto)

by the Government, just as the approval of extraneous amendments during the conversion phase entails an abuse by the Parliament: thus, it is the compliance with the constitutional rules protecting liberal democracy and guaranteeing citizens' rights that would be compromised[68].

Furthermore, with regard to the relationship between Parliament and Government, it has been observed that the insertion of intrusive amendments often occurs with the so-called maxi-amendment (*maxiemendamento*), that is a reformulation of the text asked by the Government to the Parliament, whose approval is often requested under a vote of confidence solicited by the Executive: in this way, the prerogatives of Parliament are particularly compressed and there is no effective debate on the provisions introduced on the occasion of the conversion into law, also due to the urgency of respecting the 60-day deadline to transform the decree-laws into law[69].

As far as laws in the formal sense are concerned, the Italian constitutional judge has not intervened directly. The inadmissibility of amendments extraneous to a bill is therefore left to the regulations of the Assemblies[70]; there are no interventions by the Constitutional Court similar to those that the Conseil, also challenging the French political class, has made on the internal mechanisms of the Parliament concerning the coherence of the provisions in the approved texts.

It is possible to observe that the Italian Constitutional Court seems to have set itself up as a barrier to the abuse of the instrument of the decree-law, being interested above all in the protection of the parliamentary debate in front of a government-issued act: the requirement of homogeneity of the decree-law (and of the conversion law) derives from the extraordinary nature of the cases in which this act can be adopted.

The *Conseil Constitutionnel*, for its part, has wielded its jurisdiction also to acts of exclusive parliamentary deliberation, thus standing particularly in defence of the minorities towards the majority: a role that the French constitutional judge has assumed significantly since the introduction of the

[68] C. Bertolino, *La Corte costituzionale torna sui limiti all'emendabilità del decreto-legge in sede di conversione in legge* in *Osservatorio Costituzionale*, no. 2/2023, April 2023, p. 274

[69] A. De Nicola, *La Corte Costituzionale torna sulle disposizioni "intruse" o "estranee" inserite in sede di conversione del decreto-legge: appunti a margine della sentenza n. 245 del 2022* in *Nomos*, 1/2023

[70] For example, Article 97 co. 1 of the Senate regulation reads «orders of the day, amendments and proposals which are extraneous to the subject of the discussion or formulated in inappropriate terms are inadmissible».

saisine parlementaire in 1974, a precious opportunity for the opposition to try to prevent the entry into force of an unwelcome law[71].

7. Conclusions

The ruling shows all the delicacy of the role of the *Conseil Constitutionnel* in the French constitutional architecture. Even before the decision, the Council made it clear through the words of its President that it was not willing to take on political problems which are up to the legislator, strengthened by its democratic legitimacy, to address and resolve. Two attitudes can be observed on the part of the Constitutional Council: on the one hand, the blame towards the political class, which in approving a law that presents conscious elements of unconstitutionality demonstrates poor knowledge of its role and responsibility, and on the other a defensive sentence, which censors a good part of the text for formal reasons.

The *Conseil*, faced with the repressive turn made by the Senate, reacted harshly, albeit with a judgement that avoids addressing the merits of the restrictions imposed on the rights of migrants. The friction between the Court[72] and the legislator is evident and the criticisms addressed to the *Sages* as well as the requests for constitutional revision seem to announce the continuation of a clash that ultimately concerns the ways of interpreting - extensively or restrictively - the rights of migrant people and the respect of the rule of law.

The controversy between the institutions arising from the *loi immigration* is actually part of the fluctuating history of the relationship between the Parliament and the *Conseil Constitutionnel*. The *Conseil*, a novelty of the Fifth Republic, was not immediately understood in its role and function by a political class unaccustomed to constitutional control and above all unwilling to accept an unprecedented intrusion by judges into the logic of legislative power. This ruling, although it fits into a jurisprudence considered by some to be excessively restrictive, is not in fact foreign to the consolidated interpretation of art. 45 C provided by the *Sages* and for this

[71] A. Delcamp, *ibid.*

[72] It is interesting to note that the very definition of the *Conseil Constitutionnel* as a Court has been debated in legal scholarship. A significant development in French constitutional justice, bringing it closer to more advanced experiences in other countries, was the introduction of the *saisine parlementaire* in 1974. See L. Philip, *ibid.*

reason the attacks on the constitutional judges are to be regarded with some concern, even though in similar circumstances in the past they have proved to be without consequences. A solid democracy should be able to recognise itself in the respect of shared rules and not instead neglect them in a moment of high tension on a current political issue.

To conclude, a takeaway can perhaps be drawn from this vicissitude. That is, formal rules, those that pertain to the respect for democratic procedures (in this case, to the completeness of parliamentary debate), are a fundamental garrison for the protection of rights. Beyond the risk of a new law that re-proposes the censored contents and the possible judicial development that a ruling on the merits may entail, decision no. 2023-863 of the *Conseil Constitutionnel* reminds that the guarantee of rights depends on a proper functioning of the institutions, in compliance with a principle that the French ruling class consciously hoped to evade – the principle of constitutional legality.

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ABSTRACT: In December 2023, in a context of growing political tensions around the issue of immigration, the French Parliament approved the controversial *loi immigration*, a law that contained numerous provisions aimed at compressing the rights of immigrant people. This article analyses the ruling of the *Conseil Constitutionnel* which declared part of the law unconstitutional because the amendments approved were unrelated to the text initially deposited. The harsh reaction of the French political class testifies to a problematic relationship with the rule of law, also guaranteed by the constitutional review. Respect for formal rules was invoked to save the substance, i.e. the rights of immigrants.

KEYWORDS: immigration – security - Conseil Constitutionnel - rule of law - saisine

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