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The Preamble(s) of the French Constitution: Content, Status, Uses and Amendment

Abstract. This article analyses the way of the French Constitutional Council, starting with its famous Association decision in 1971, transformed a brief reference to historical declarations of rights in the thin Preamble of the current French constitution (adopted in 1958) into a wide-ranging judge-made catalogue of fundamental rights. This, combined with two important reforms of the procedure for submissions of statutes to the Constitutional Council for review (in 1974 and 2008), are gradually establishing the Constitutional Council as an important actor in the legislative process and a central body for the protection of human rights in France. The article also briefly explores the scope and limits of this protection. It then discusses recent proposals for amending the Preamble. It analyses the only amendment so far, namely the inclusion of a reference to the Charter for the Environment, which aimed at providing a constitutional basis for the protection of environment, as well as other controversial suggestions, such as those aiming at enabling positive discrimination measures towards minorities, the guarantee of media pluralism, the protection of privacy and personal data and the respect of human dignity. It concludes on the use and misuses of comparative law for constitutional reforms.

Keywords: constitutional reform, constitutional preamble, constitutional review, protection of fundamental rights, comparative law

1. Introductory remarks: the 1958 “Political” Constitution, its “Amputated” Constitutional Judge and its “Insignificant” Preamble

As is well-known, France has had a tormented constitutional history, going through many different political regimes, and no less than fifteen constitutions since the French Revolution in 1789. This is to say that

the French should know about constitutions! One can differ as to whether the history of France should be considered a fruitful garden of constitutional thought, a graveyard of constitutional experiments, a “*musée des constitutions*”, or a minefield; in any case it is beyond doubt that the French are rather experienced in constitutions and constitutional changes.¹

The current constitution, which provides for the basic rules for France’s Fifth Republic, was adopted in 1958. It is the longest lasting French constitution after the constitutional laws of the Third Republic (1875). It has been amended twenty-four times.

As to the significance of the Constitution in French political life, it is important to recall that prior to 1958, the system was centered on the *loi* which was, in the words of Jean-Jacques Rousseau, the expression of the “*volonté générale*” (general will).² As such, it

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¹ van Nifterik, G.: French Constitutional History, Garden or Graveyard? *European Constitutional Law Review* (EuConst), 3 (2007) 3, 476.

² See also Art. 6 of the 1789 Declaration of the Rights of Man.

was sovereign and should not be subject to judicial control. This reluctance to submit statutes to any kind of judicial oversight was also reminiscent of the long-standing distrust of the French political class and society towards judges, dating back to the *Ancien Régime*, where judges (*parlements*) had been mostly concerned about maintaining privileges. Consequently, the Constitution was essentially a symbolic document, and was endowed with no serious enforcement mechanism. The 1946 Constitution (Art. 91) did provide for a *Comité Constitutionnel* to check whether the adoption of legislation required the revision of the Constitution. The procedure was nonetheless difficult to engage and remained unused.

The 1958 Constituant deviated slightly from this tradition, by setting up a body, the *Conseil Constitutionnel*, whose task was to check the conformity of legislative proposals and bills with the Constitution. This control was nonetheless minimalist; it provided only for concentrated, abstract and *a priori* constitutional review. Once in force, a statute could no longer be contested, even where it had not been subject to prior “constitutional clearance” or where its incompatibility with constitutional rules only unfolded through its application. Moreover, the control was political.³ First, it was essentially aimed at limiting parliamentary influence over executive affairs and at preventing governmental instability of the kind which destabilised the Third and Fourth Republics.⁴ Basically, the Constitutional Council was meant to be the “guard dog of the executive”.⁵ Second, only a restricted number of political personalities could refer legislation to the Constitutional Council for review. These were the President of the Republic, the Prime Minister or the President of one of the two parliamentary chambers (Assemblée Nationale and Sénat). Where all belong to the same political party, the likelihood of referral would be almost non-existent. Third, the membership of the *Conseil Constitutionnel* was political too, with no legal competences required from its members, and a nomination process controlled by political personalities (three members nominated by the President of the Republic, three by the President of the National Assembly

³ Stone, A.: *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. Oxford, 1992.

⁴ It was part of a general attempt to “rationalise” parliamentarism. Art. 34 of the Constitution fixed the domain of intervention of the legislator; the rest was taken as falling under the competence of the executive (Art. 37 of the Constitution). The Constitutional Council was essentially set up to make sure that the Parliament remained within the limits set by the Constitution and did not endeavor to “govern”, as it did in the previous regimes. The Council did not have the competence to review acts of the governments which interfered with legislative power. It was thus a one-way street, although the Conseil d’Etat, the highest administrative court, could check that decrees and regulations complied with laws and did not interfere with legislative competences. There were two ways to involve the Council in the control of legislation. The Council could be seized during legislative discussions by the Prime Minister (Art. 41 of the Constitution, not much used) where some provisions of envisaged legislation did not belong to the legislative field of competence. Since 2008, the President of each chamber can also raise such issue (Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic). A second situation calling for referral concerns legislative projects, which contain provisions related to the regulatory field (Art. 37.2 of the Constitution). The main mode of referral of proposed legislation to the Constitutional Council is provided by Art. 61 of the Constitution, and takes place after the law has been adopted in parliament, but before it comes into force, and may concern any provision of the Constitution.

⁵ Vie Publique (2010) “Les Origines du Conseil Constitutionnel”, available at <http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/origines-du-conseil-constitutionnel.html>

and three by the President of the Senate), and former Presidents of the Republic were *ex officio* life members.⁶

Let us now turn to the aspect of this Constitution which concerns us here: its preamble. The preambles of past French constitutions not only offered an exposition of the motives or “*proclamation*” (1814, 1815, or 1852); the vast majority of them also included fully fledged bills of rights (1791, 1793, 1795, 1848, and 1946).⁷ Indeed, traditionally, French *constituants* did not provide for self-standing Charters of Rights; neither did they integrate Bills of Rights into the core of the Constitution. The French custom was to place the Declaration of Rights in the preamble. This positioning seemed to indicate that these Declarations of Rights were meant to have purely symbolic value; something which in any case was not such a big deal, since the Constitution itself, for lack of constitutional review system, also remained purely aspirational.

At first sight, the 1958 Preamble, does not impress. Nothing like the “We the People of the United States...” which opens the American Constitution. It only consists of two sentences.⁸ The last sentence oddly refers to the right to self-determination of overseas peoples, whilst the first sentence briefly states that “the French people solemnly proclaim their attachment to the rights of the Man and principles of national sovereignty as defined in the Declaration of 1789, confirmed and complemented by the Preamble of the Constitution of 1946”.⁹ However, although in formal terms it stops there, most commentators would agree that, in substantive terms, the Preamble also encompasses what is now Art. 1,¹⁰ which provides that “France shall be an indivisible, secular, democratic and social Republic; ... ensure the equality of all citizens before the law, without distinction of origin, race or religion, [and]...respect all beliefs.” The rest of the Constitution, at least in its original configuration, dealt with the various organs of the state and their relationships. Thus, the only mention of fundamental human rights in the French 1958 constitutional settlement was in the Preamble, which bearing in mind constitutional tradition, did not augere well for the the protection of such rights. However, the apparent modesty of the 1958 Preamble will turn out to be its greatest strength, as it offered a discrete, yet potentially limitless, short-cut to human rights resources.

2. The 1971 Freedom of Association Decision, the Rights Revolution and the Russian Dolls Preamble

From 1958 until the 1970s, France’s Constitution was a “Separation of Power–Constitution” but not a “Charter of Rights and Liberties–Constitution”¹¹ or, to use the typology developed

⁶ Art. 56 of the Constitution.

⁷ Only the rapidly adopted constitutional laws of 1875, which founded the Third Republic, had no preamble. Note, in passing, that it did not prevent it from lasting 70 years...!

⁸ It is one of the shortest Preambles in the world of constitutions. Orgad, L.: The Preamble in Constitutional Interpretation. *International Journal of Constitutional Law*, I-CON (forthcoming), 8 (2010) 5, footnote 15.

⁹ Since the constitutional revision of 2005 (Constitutional Law No 2005–205 of 1 March 2005 relating to the Charter for the Environment), it also makes reference to the rights and duties as defined in the Charter for the Environment of 2004.

¹⁰ Part of what is now Art. 1 used to be Art. 2, until the Constitutional Law No 95-880 of 4 August 1995.

¹¹ Veil, S.: *Redécouvrir le Préambule de la Constitution–Rapport du comité présidé par Simone Veil*. La Documentation Française. 2008, 7.

by Dean Maurice Hauriou, France was endowed with a political constitution, but no apparent social constitution (save for a frail embryo in the 1958 Constitution Preamble).

The “rights’ revolution”¹² took place in 1971, when the Constitutional Council turned the “insignificant” 1958 Preamble into Russian dolls, revealing almost limitless constitutional resources.

Perhaps because they had introduced some kind of constitutional control, the drafters of the 1946 Constitution had explicitly forbidden the weak ancestor of the *Conseil Constitutionnel*, the *Comité Constitutionnel*, from assessing the compatibility of laws with the Constitution’s ambitious and progressive Preamble.¹³ However, as the 1958 Preamble was so “low-key”, the drafters of the Fifth Republic’s Constitution probably thought it unnecessary to take similar precaution and did not make any explicit provision as to its legal value, or rather lack thereof. The *Conseil Constitutionnel* thus did not face formal constitutional obstacle to upgrading the Preamble into a constitutional norm. However, that would mean flexing its muscles, as constitutional traditions in France and abroad suggested that constitutional preambles were meant to be essentially for symbolic, or at least, interpretative purposes, and not to serve as independent sources of rights.¹⁴ It would also have to deploy a fair amount of legal ingenuity to transform the ugly little duck-preamble into a beautiful swam. The Freedom of Association case provided the right opportunity for such delicate operation.¹⁵

In the follow-up to May 1968, the Interior Minister started a policy of limitations of individual freedoms (right to demonstrate, right to free movement, the freedom of the press, the freedom of assembly, and eventually freedom of association). Based on a ministerial instruction, a prefect (a representative of the state at local level) refused to the founding members of the “*Association des Amis de la Cause du Peuple*”, the receipt for the declaration of this association, without which it could not operate. The administrative court annulled the prefect’s refusal. The Minister, who realised that its position was in breach of the law, simply decided to have the law changed. In June 1971, the National Assembly adopted, despite the opposition of the Senate, a legislative proposal which enabled a prefect to delay his/her issuance of an authorisation until judicial authorities had reviewed the lawfulness of an association. The President of the Senate referred the law to the Constitutional Council.

The judges of the *Rue de Montpensier*¹⁶ engaged into what I like to call Russian Dolls reasoning. First, the Constitutional Council declared that the 1958 Preamble was an integral part of the Constitution. In doing so, it integrated the Preamble into the “*bloc de constitutionnalité*”, that is the collection of constitutional norms against which statutes can

¹² This expression is also used in the French context by Lasser (2009); however, he uses it in relation to the way the “*contrôle de conventionnalité*”, whereby national courts checked the compatibility of national legislation with international agreements, especially the European Convention on Human Rights, enabled national courts to limit legislative infringements of human rights, in a manner which was not allowed by constitutional review (at least until the 2008 reform).

¹³ Art. 92 of the 1946 Constitution.

¹⁴ Orgad: *op. cit.*

¹⁵ Decision No 71-44-DC Freedom of Association of 16 July 1971.

¹⁶ Address of the Constitutional Council.

be reviewed (analogy with the “*bloc de légalité*”).¹⁷ Second, the Constitutional Council explained that the 1958 Preamble proclaimed the “attachement” of the French people to human rights as expressed in the 1789 Declaration, and confirmed in the 1946 Preamble. From these, it concluded that these two documents also had constitutional value. In doing so, it basically granted the 1946 Preamble a status which the 1946 Constituant had refused it.¹⁸ Third, it noted that the 1946 Preamble itself referred to the fundamental principles recognised in the laws of the Republic. Since the famous “*Loi 1901*” (an ordinary law), which was such a “republican” law, had granted protection to the freedom of association, such freedom therefore should also have constitutional status.

To sum up, by granting constitutional value to the 1958 Preamble, the Constitutional Council also gave the texts to which the 1958 Preamble made reference, namely the 1789 Declaration and the 1946 Preamble, similar superior status. By the same token, it conferred on all the rights and principles to which these two constitutional documents referred, or which could be derived from them, the nature of supreme law. The Preamble thus operated like Russian dolls, with new constitutional rules and principles to be derived from past constitutional documents, themselves found in the current Preamble.

3. Moving towards comprehensive constitutional review: the 1974 and 2008 revisions

The Freedom of Association decision was welcome in legal circles and by the public alike. It became such a “popular” issue, that V. Giscard d’Estaing, during his presidential campaign, made the promise that he would extend the right to refer laws to the Constitutional Council to a wider range of personalities. When he became President of the Republic in 1974, he obtained a revision of the Constitution which granted the right to submit proposed legislation to the Council to sixty deputies and senators.¹⁹ This reform marked a second turning point for the protection of fundamental rights through constitutional review in France.

This reform basically enabled the parliamentary Opposition to use constitutional review systematically to obtain the partial or full invalidation of bills, or threatening to use it, to secure amendments in planned legislation. The new perspective of negotiating in the shadow of constitutional review thus changed the legislative game. It also enabled the Constitutional Council to play a greater role in the protection of fundamental rights and freedom, and to flesh up the Constitution, and more particularly, its Preamble, at least *in abstracto*.

The reform nonetheless maintained the French constitutional review system within a pure Kelsenian tradition, focused on a procedural and theoretical aspects. Further expansion of the right to apply to the Constitutional Council where thus halted for quite a while, although academics and politicians regularly called for a more comprehensive review system, to enable constitutional compatibility checks after a statute had come into force (for

¹⁷ In fact, this decision was only the logical result of a less-known decision adopted in the previous year, which had already established the legal value of the preamble, although in relation to the conformity of a treaty (and not a statute) to the Constitution (Decision No 70-39 DC European Community Budget of 19 June 1970).

¹⁸ Orgad: *op. cit.* 13.

¹⁹ Constitutional Law No 74-904 of 29 October 1974 on the revision of Art. 61 of the Constitution.

example, 1990 Badinter proposal, 1993 Vedel Committee report). These nonetheless remained *lettre morte*, due to the Senate's opposition. The idea eventually returned on the political agenda, when President Sarkozy, in its Epinal speech of 12 July 2007, raised the question, and entrusted a Committee of Reflection on modernisation of the institutions of the Fifth Republic, chaired by Edouard balladur, to examine possible reforms. The work of the Committee led to the important 2008 constitutional revision, which amended many constitutional rules.²⁰ For our purpose, we should mention that the amendments created a new institution, the Defensor of Rights, a sort of Ombudman, whose task will be to make sure that administrations and public bodies respect citizens' rights (New Title XIA). The constitutional revision also introduced a long-awaited *a posteriori* and concrete constitutional control mechanism, by means of exception, through the Priority Preliminary Ruling on the Issue of Constitutionality (in French, *Question Prioritaire de Constitutionnalité* or QPC).

This reform should enable the Preamble to develop its full social potential and the Constitutional Council to finally become a real guardian of fundamental rights and liberties. Indeed, the new Art. 61-1 of the Constitution provides that "if, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes *the rights and freedoms guaranteed by the Constitution*, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period." The organic law, which determines the conditions of application of the new mechanism, specifies that the question must be relevant to the dispute and serious, and that the legislative provision should not have been already declared as complying with the Constitution by the Constitutional Council.²¹

What this new constitutional review mechanism will actually bring remains to be seen. Some believe it comes too late to transfer the Constitutional Council as the choice defensor of human rights, for such role has already been taken up, for quite a while, by the European Court of Human Rights,²² or even the European Court for Justice.²³ But one can also be more optimistic. The road to Strasbourg is a long one, and the QPC, if the *Cour de Cassation* and the *Conseil d'Etat* play the game, and refer all questions which fulfill the conditions, offers a short-cut to Paris.²⁴ If the judges take care of at least aligning their standards of protection with the Strasbourg judges, any rational being would opt for the QPC. Truly

²⁰ Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic.

²¹ Organic law No 2009-1523 du 10 December 2009 related to the application of Art. 61-1 of the Constitution.

²² Chantebout, B.: *Droit Constitutionnel*. Paris, 2009, 578; M. de Lasser, S. O.: *Judicial Transformations: the Rights Revolution in the Courts of Europe*. Oxford, 2009.

²³ In that regard, it is interesting to note that the Cour de Cassation recently sent a reference for a preliminary ruling challenging the compatibility of the QPC with the principle of supremacy of EU law; however, the ECJ considered it compatible with EU law, taking into account the Conseil d'Etat and Conseil Constitutionnel's explanations of the operation of the procedure, as not interfering with courts' ability to interpret national law in conformity with EU law and to set aside national measures incompatible with EU law. C-188/10 and C-189/10 Aziz Melki and Selim Abdeli [2010], nyr.

²⁴ Recently, the *Conseil D'Etat* refused to refer a QPC concerning the constitutionality of measures relating to the dissolution of sport associations to the Constitutional Council, arguing that the question was not new and serious. The parties are planning to take the case to the European Court of Human Rights. CE, 2ème et 7ème SSR, 8 October 2010, *Groupement de fait Brigade Sud de Nice et M. Zamalo* (No 340849).

enough, it is problematic that legislative provisions which have already been given a priori abstract clearance cannot be challenged through the QPC, even if their application revealed unforeseeable constitutional flaws; these renders many of the legislative provisions adopted since 1974 “untouchables”. Yet, the reform should still help to clear up the French legal order from legislative provisions which, either for lack of jurisdiction, negligence, or political calculation, have remain “unchecked”.

The procedure was used for the first time in May 2010. After five months of actual operation, the pace of examination of legislative provisions by the Council under the QPC is accelerating, with around twenty decisions per month over the last two months. This should be contrasted with the one or two decisions a month delivered under the previous system. More significantly, from all the provisions referred under the QPCs, the Council found that one-third were in either a total or partial violation of the Constitution, or that they were only compatible if interpreted and applied according to its instructions.²⁵ Finally, and unsurprisingly, QPCs basically concern the compatibility of statutes with rights and principles protected on the basis of the Preamble. With that in mind, the new review procedure should contribute to the Preamble establishing itself as the central pillar of constitutional review in France.

4. The “rights and liberties guaranteed by the Constitution”: a “judge-made” catalogue based on the France’s constitutional tradition

Let us now turn to the question of which rights and liberties are hiding in our Russian Dolls Preamble, which contain constitutional texts drafted over a range of more than two hundred years, for different regimes, with different, and perhaps even conflicting, ideologies in mind? How do these fit, and interact, with one another to build a protective web for peoples’ rights.

The information page of the *Conseil Constitutionnel* specifies that “the rights and liberties guaranteed by the Constitution” which statutes must respect are the ones mentioned in the 1958 Constitution (as amended), the text to which the 1958 Constitution refers, namely the 1789 Declaration, the 1946 Preamble, the fundamental principles recognised by the laws of the Republic (referred to in the 1946 Preamble) and, since 2005, the Charter for the Environment. However, in reality, there is more than that, since from these sources, the Constitutional Council derived a number of further constitutional principles and objectives.²⁶

The 1789 Declaration of Rights was strongly inspired by the Enlightenment philosophy. Drafted by the Marquis de Lafayette, it was destined to become the basis for a constitution for France. It was based on the notion of natural rights, the concept of social contract (Locke and Rousseau) and Montesquieu’s theory of separation of powers. It is thus a text with a strong liberal and individualist orientation, focused on what we now refer to as “first

²⁵ Over the fifty or so decisions made so far under the QPC, about 20% found a total or partial non-conformity (about half with temporal limitations of their effects), and another 10% of the decisions declared compatibility with reserve of interpretation.

²⁶ “Qu’entend-on par ‘droits et libertés que la Constitution garantit?’”, under Question Prioritaire de Constitutionnalité, at <http://www.conseil-constitutionnel.fr/>

generation” rights.²⁷ It recognises civil rights, or the “rights of a man as a person”,²⁸ such as the principles of equality (Art. 1), liberty (Arts 1 and 4), including the right to safety and civil resistance (Art. 2), legality and legal certainty (Arts 7–8), the presumption of innocence (Art. 8), the freedom of opinions and thoughts (Art. 10), the freedom of expression (Art. 11), and the right to property (Arts 2 and 17). It also recognises political rights, or the “rights of the man in relation to the Nation”, such as the right to participate directly or indirectly in the elaboration of the law (Art. 6), equal access to public positions (Art. 6), the unity of national sovereignty (Art. 3), the principle of agreement to taxation and its equal sharing (Art. 14), the existence of *force publique* (Art. 12), the control and accountability of the administration (Art. 15), and legal guarantees (Art. 16).

The Declaration has been a wonderful source of inspiration for the recognition and protection of civil and political rights, since the Constitutional Council has granted constitutional value to every rights it contains.²⁹ However, its anachronism sometimes poses problematic restrictions on constitutional jurisprudence. Notably, the formal equality notion on which it is based prevents positive discrimination measures in France.³⁰ The only way out is to amend the Constitution itself, to provide for a “concurrent” constitutional basis for affirmative action. Art. 1 of the Constitution was thus amended on in 1999, to include that “statutes shall promote equal access by women and men to elective offices and posts”.³¹ It served as a basis to the 2000 statute on equal access of women and men to electoral mandate and elective functions,³² which the Council eventually validated.³³ However, the narrow focus of the constitutional amendment excluded positive measures beyond the political world. In 2008, the Constitution was thus amended again to enable legislative promotion of equal access between men and women to “positions of professional and social responsibility” (new Art. 1).³⁴ Yet, to the extent that the successive constitutional amendments only focus on sex discrimination in certain fields, the formal equality principle of the Declaration still blocks the way to other types of positive discrimination measures, towards ethnic minorities for example. It is seen as effectively blocking the way to any “communautarist” legislation. Art. 1 also prohibits statistical information on ethnicity or race, despite the strong support

²⁷ Note in passing that it only granted rights to men and male citizens, and not to women (despite Condorcet’s support to the inclusion of women). It prompted Olympe de Gouges to publish a concurrent Declaration of the Rights of Woman and the Female Citizen in September 1791. Women equal rights were eventually recognized in the 1946 Constitution. The principle also did not apply to slaves.

²⁸ Veil: *op. cit.* 21.

²⁹ The first time that a statute was checked against a provision of the Declaration was in the Conseil Constitutionnel Decision 73-51 DC Finance Law of 27 December 1973, concerning the principle of equality.

³⁰ For example, Decision No 82-146 Local Elections of 18 November 1982, confirmed by a decision No 98-407 Regional Elections of 14 January 1999.

³¹ Constitutional law No 99-569 of 8 July 1999 relating to the equality between women and men.

³² Law No 2000-493 of 6 June 2000 to favor the equal access of women and men to electoral mandate and elective functions.

³³ Decision No 2000-429 DC Equal access of women and men to electoral mandate and elective functions.

³⁴ Constitutional law No 2008-624 DC on the Modernisation of the Institutions of the Fifth Republic.

from the academic and scientific community for such data, as many consider them as essential in the fight against discrimination.³⁵

The Preamble of 1946, for its part, is “a legal discourse of political nature”,³⁶ which aims a fairer society.³⁷ In addition to adhering to the French liberal constitutional tradition through a reference to the 1789 Declaration and the “fundamental principles recognised by the laws of the Republic”, the 1946 Preamble adds its own list of political, social and economic principles “particularly necessary to our times”, such as equal rights for men and women (para 3), the right to protection of health, material security, rest and leisure of mothers, children and older workers (para 11), the right of the family to the conditions of development (para 10), the right for anyone unable to work to have suitable means of existence (para 11), and the right to asylum for persecuted persons (para 4). It also includes workers rights, such as the right to work and have a job (para 5), the right to defend ones interests through trade union membership and action (para 6), the right to strike (para 7), and the right to the determination of working conditions and participation in the management of companies (para 8). Finally, it added the right to education, vocational training and culture through a laic and free education system (para 13), solidarity and equality in the face of national catastrophies (para 12), and a few principles related to international relations (paras 14–18). The Constitutional Council’s first reference to such principles necessary to our times was in its famous Abortion decision of 1975,³⁸ which established the right to health.

So much for the rights and principles explicitly mentionned in this bundle of constitutional texts. These are, in any case, only the visible tip of the iceberg, as the constitutional judge also needs to identify what lies behind the cryptic, and apparently open-ended, formula of the “fundamental principles recognised by the laws of the Republic”, to which the 1946 Preamble refer without further ado.³⁹ The *Conseil d’Etat* had already started such process by recognising, as early as 1956, the freedom of association as such principle.⁴⁰ The Constitutional Council followed up and recognised a number of such principles, such as the freedom of association (identified in the groundbreaking decision of 1971), the rights of the defense or “due process” (1976),⁴¹ individual freedoms (1977),⁴² the freedom of education (1977),⁴³ including the freedom of higher education⁴⁴ (1999), the freedom of

³⁵ Decision No 2007-557 DC Immigration management of 15 November 2007. Veil: *op. cit.* 60.

³⁶ Koubi, G.: *Le Préambule de la Constitution de 1946. Antinomies juridiques et contradictions politiques*. PUF, 1996. 9.

³⁷ Conac, G.: *Le Préambule de la Constituion de 1946. Une Genèse difficile, un itineraire imprévu*. In: Conac, G.–Prétrot, X.–Teboul, G. (eds): *Le Preamble de la Constitution de 1946. histoire, analyse et commentaires*. Paris, 2001, 4.

³⁸ Decision No 74-54 DC Abortion of 15 January 1975.

³⁹ Simone Veil submits that it proceeded of the desire of the 1946 Constituant to link the Constitution back to the political liberalism of the Third Republic, and definitely end with the Vichy regime. Veil: *op. cit.* 23.

⁴⁰ CE, *Amicales des annamites de Paris*, 11 July 1956, Rec 317.

⁴¹ Decision No 76-70 DC Prevention of occupational accidents of 2 December 1976.

⁴² Decision No 76-75 DC of Vehicle Search of 12 January 1977.

⁴³ Decision No 77-87 DC Freedom of education and conscience of 23 November 1977.

⁴⁴ Decision No 99-414 DC Agricultural Orientation of 8 July 1999.

thoughts (1977),⁴⁵ the independence of administrative justice (1980),⁴⁶ the independence of University professors (1984),⁴⁷ the judicial review competence of administrative courts (1987),⁴⁸ the notion of judicial courts as guardians of private real estate (1989),⁴⁹ and the educative nature of criminal sanctions for minors (2002).⁵⁰ The *Conseil d'Etat* added to that list the duty of the state to refuse extradition when it is asked for political motives (1996)⁵¹ and the principle of “*laïcité*” (2001).⁵² These, by and large, correspond to values which are recognised in most European constitutional systems. However, aware of the potentially limitless nature of the notion and risk of arbitrariness, the Constitutional Council rapidly put some limits to this category of constitutional norms, by considering that only really fundamental principles, stating a sufficiently important rule, in a sufficiently general manner and concerning essential fields for the life of a nation, such as fundamental liberties, national sovereignty or the organization of public powers, could be granted constitutional value. In addition, it explained that they must be found in, and never have been derogated from, laws adopted under a republican regime prior to 1946.

In addition to these principles “based” on republican laws, the *Conseil Constitutionnel* also endeavoured to flesh up the Constitution and its Preamble, by recognising “principles” and “objectives” of “constitutional value”, which are not explicitly referred to in the constitutional texts, but can be deduced from them. The Constitutional Council recognised for the first time an objective as having constitutional value in the famous Decision on the Audiovisual Law, which established the objective of pluralism of the press and media of objective of constitution.⁵³ These objectives can serve to place limits of individual rights which are constitutionally protected. But let us detail a little how these principles and objectives are discovered by the constitutional judge.

For example, from Art. 6 of the 1789 Declaration, the Constitutional Council drew a principle of equality before justice. Based on this, it considered that the legislator could not impose more than one penalty for the same offence,⁵⁴ could not refuse to legal persons a right of response which natural persons have,⁵⁵ or could not prevent victims of strike from introducing law suits to obtain compensation.⁵⁶ From Art. 11 of the 1789 Declaration on the freedom of communication, it derives a right to information, and from that, the objective of pluralism of the press and media,⁵⁷ or the right of access to the Internet as a fundamental freedom.⁵⁸ From the principle of individual freedom provided by Art. 2 of the Declaration

⁴⁵ Decision No 77-87 DC Freedom of education and conscience of 23 November 1977.

⁴⁶ Decision No 80-119 DC Validation of Administrative Act of 22 July 1980.

⁴⁷ Decision No 83-165 DC University freedoms of 20 July 1984; Decision No 2010-20/21 QPC University of 6 August 2010.

⁴⁸ Decision No 86-224 DC Competition Council of 23 January 1987.

⁴⁹ Decision No 89-256 DC Urbanism and new towns of 25 July 1989.

⁵⁰ Decision No 2002-461 DC Justice Law of 29 August 2002.

⁵¹ *Conseil d'Etat*, Decision of 3 July 1996, Ass., Koné, Rec. 255.

⁵² CE, SNES, 6 April 2001.

⁵³ Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

⁵⁴ Decision No 75-56 DC Penal Law of 23 July 1975.

⁵⁵ Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

⁵⁶ Decision No 82-144 DC Staff Representation of 22 October 1982.

⁵⁷ Decision No 84-181 DC Concentration, Financial Transparency and Pluralism of Press Undertakings of 11 October 1984.

⁵⁸ Decision No 2009-580 DC HADOPI of 10 June 2009.

or Art. 66 of the Constitution, it constructs not only the right to come and go, but also the prohibition of arbitrary detention, the inviolability of the home, the right to private life,⁵⁹ in particular regarding the protection of personal data,⁶⁰ the right to marry, the right to have a normal family life, and the right to family reunion for foreigners.⁶¹ Probably the most far-stretched “discovery” is that of the principle of protection of human dignity, which the Council derived from the first sentence of the 1946 Preamble, providing that “all human being without distinction of race, religion or beliefs, possess inalienable and sacred rights”.⁶²

Other principles having constitutional value are the continuity of public services,⁶³ the freedom to carry out a business (*liberté d’entreprendre*),⁶⁴ or contractual freedom.⁶⁵ As for the “objectives of constitutional value”, these cover the safeguard of public order, the respect of others’ freedom, the preservation of the pluralist character of means of socio-cultural expressions,⁶⁶ the pluralism of beliefs and opinions,⁶⁷ the protection of public health,⁶⁸ the prevention of public order offences, in particular threat on the security of persons and goods, and the search for those committing offences,⁶⁹ the possibility for everyone to have a decent accommodation,⁷⁰ the accessibility and clarity of the law,⁷¹ the fight against tax fraud and evasion,⁷² and the financial balance of social security.⁷³

Next to the list of recognition, we should also add the list of rejections, that is the principles to which the Council refused to give constitutional value. These are the principle of legitimate expectations,⁷⁴ the transparency of public activities,⁷⁵ the equity between generations,⁷⁶ the criminal irresponsibility of minors,⁷⁷ the “*principe de faveur*” in labor

⁵⁹ Decision No 76-75 DC Vehicle Searches of 12 January 1977, No 94-352 DC Security Law of 18 January 1995, No 99-416 DC Universal health Cover Law of 23 July 1999, No 2003-467 DC Internal Security Law of 13 March 2003; No 2010-25 QPC Internal Security Law of 16 September 2010.

⁶⁰ Decision No 2004-499 DC Treatment of Personal Data of 29 July 2004.

⁶¹ Decision No 93-325 DC Immigration of 13 August 1993.

⁶² Decisions No 94-343/344 DC Organ donation of 27 July 1994; No 2010-25 QPC “Internal Security Law” of 16 September 2010.

⁶³ Decision No 79-105 DC “Continuity of Public Service of radio and Television” of 25 July 1979

⁶⁴ Decisions No 81-132 Nationalisation Law of 16 January 1982 and No 92-316 Corruption and Transparency Law’ of 20 January 1993.

⁶⁵ Decisions No 81-132 Nationalisation Law of 16 January 1982.

⁶⁶ Decision No 82-141 DC Audiovisual Communication of 27 July 1982.

⁶⁷ Decision No 2004-497 DC Electronic and Audiovisual Communication Law of 1 July 2004.

⁶⁸ Decision No 90-283 DC Fight against Tobacco Dependence and Alcoholism Law of 8 January 1991.

⁶⁹ Decision No 94-352 DC National Security of 18 January 1995.

⁷⁰ Decision No 94-359 DC Accommodation Diversity Law of 19 January 1995.

⁷¹ Decision No 99-421 DC Codifications of 16 December 1999.

⁷² Decisions No 99-424 DC Finance Law of 29 December 1999; 2010-19/27 QPC Modernisation of the Economy Law of 30 July 2010.

⁷³ Decision No 2002-463 DC Social Security Financing of 12 December 2002.

⁷⁴ Decision No 97-391 DC Urgent fiscal and financial measures of 7 November 1997.

⁷⁵ Decision No 93-335 DC Urbanism and construction of 21 January 1994.

⁷⁶ Decision No 97-388 DC Pension saving fund (PEP) of 20 March 1997.

⁷⁷ Decision No 2002-461 DC Justice Law of 23 August 2002.

law⁷⁸ or recently the prohibition, exception and exclusivity related to gambling and betting.⁷⁹

And of course, one should also bear in mind the rules and principles which the Conseil uses to determine the degree of control which it applies (for example, proportionality, the sanction of only manifest errors).⁸⁰

It is important to point out that there is no hierarchy within this “*bloc de constitutionalité*”, based on the origin of the norm, or its form. In French constitutional law, unlike in Germany, no norm have supra-constitutional value and are inalienable. A 2003 decision of the Constitutional Council confirmed it, when it declined having competence to assess the compatibility with the Constitution of laws amending it.⁸¹ In case of contradiction, the rights and principles “must be conciliated, and they do not exclude each other; thus, a ‘recognised fundamental principle’ like that of the ‘continuity of the public service’ justifies some restrictions to the right to strike, expressly proclaimed by the Preamble of 1946.”⁸² Also, as noted before in relation to the principle of equality, since the constitutional value of the 1789 Declaration and the 1946 Preamble is based on the 1958 Constitution, amendments to the Constitution can “go against” them. In France, the Preamble, although an independent source of rights, thus still does not go as far as “walking before the Constitution”.⁸³

The creative and expensive nature of constitutional jurisprudence is not typically French. And modern trends also point at greater reliance on constitutional preambles not only as providing determinant interpretative guidance, but also as creating rights.⁸⁴ Yet, the scope of the French Constitutional Council’s law-making has been remarkable, considering the frail constitutional basis, and its weak (original) institutional position. Probably its closest “competitor” in Europe is the European Court of Justice, which developed a substantial catalogue of fundamental rights based on no legal basis at all.

This is for the theory. Now what does this mean in practice? Indeed, it is one thing to declare rights and values as constitutional, it is another one to give them a concrete realisation.

5. Constitutional practice and the protection of human rights

Some noted a certain timidity in the application of the “hard won” principles, in the aftermath of the 1971 “coup”. For example, the Council never invalidated any of the major socialist reforms of the early 1980s, mostly “amputating legislation” by sanctioning flaws in implementing legislation or giving interpretative or application directions.⁸⁵ However, during the R. Badinter’s presidency (1986–1995), the Council became more activist.⁸⁶ Not

⁷⁸ Decision No 2004-494 DC Vocational Training and Social Dialogue of 29 April 2004.

⁷⁹ Decision No 2010-605 DC Gambling and Betting of 12 May 2010.

⁸⁰ Veil: *op. cit.* 24–25.

⁸¹ Decision No 2003-469 DC Decentralisation of 26 March 2003.

⁸² Decision No 79-105 DC Continuity of Public Service of Radio and Television of 25 July 1979.

⁸³ Schmitt, C.: *Constitutional Theory* (Seitzer, J.–Thornhill, C. eds). Durham, 2008, 79.

⁸⁴ Orgad: *op. cit.*

⁸⁵ Although these decisions could have some important practical impact. For example, his decision on the nationalization law led to an increase of 30% of the compensation granted to shareholders of nationalized companies, and his 1984 decision “saved” the press group Hersant, which had been targeted by the law on the press. (Stone Sweet 1992)

⁸⁶ Chantebout, B.: *Droit Constitutionnel*. Paris, 2009. 595.

only did it invalidate a number of legislative provisions, it also made a greater use of interpretative restrictions (“*declarations de conformité sous réserves*”), by which it imposed “its” interpretation of the law on those who will apply and enforce it. It started to write precise decisions which left no margin of maneuver for those who had to revise the law to make it pass the constitutional test. At some stage, it even seemed to want to lock-in fundamental freedoms, such as the right to asylum or the freedom of communication,⁸⁷ by only validating legislative provisions which reinforced them (“*effet de cliquet*”); however, this policy was not pursued.⁸⁸

In practice, the “interference” of the Constitutional Council disturbs the political class, which on occasions, worked to exclude it from the process (for example reform of the *Code Pénal* in 1992). Besides, it results in the government needing to resort more frequently to constitutional revision in order to pass legislation. We already mentioned the revisions to allow equal chances between men and women; there was also a reform related to the right to asylum in the application of the Schengen agreement.⁸⁹ In 1999, the refusal by President Chirac to engage a revision of the Constitution to allow the adoption of the Charter on regional and minority languages was strongly criticized by the socialists as being a move against civil liberties. It remains that, again, this constitutional revision frenzy is not a French phenomenon and seems to be common currency other EU countries, too.

To sum up, stone by stone, the Constitutionnal Council built on the foundations of the Preamble an comprehensive bills of rights. Yet, this gradual discovery of new principles, which may be accelerated with the new reform which will also give a more “individual drive” to the constitutional case law, is being criticized by some commentators as favoring particular interests over the public good.⁹⁰ Indeed, with the QPC, the speed of construction is likely to accelerate, on a piece-meal basis, as disparate provisions from past statutes are examined by the Council. It may also be that, wary of this new “social” legitimacy, the Constitutional Council becomes more “sensitive” to individual human rights arguments which plaintiffs can now put directly to it, rather than through the mediation of members of the parliament. This semi-direct link with the “people” may grant the Council, and the courts which refer cases to him, a new autonomy, which could affect the direction of the case law. It is too early to tell us, but one should watch for inflections in the case law.

It remains that the “French way”, this web of written and unwritten constitutional norms based on an allegedly symbolic document, is still a bit of an oddity in the European constitutional tradition. Critics are plenty, who stress its lack of transparency and accessibility, and call for (some) codification. One could even point at Europe for inspiration, where the fundamental rights jurisprudence of the ECJ was eventually codified in an EU Charter of Fundamental Rights, which the Lisbon Treaty endowed with legally binding status. However, the French seem to be attached to their “unwritten” declaration of rights. In the country which put together the Code Civil more than 200 years ago, and which has Codes on everything, this constitutional exception looks strange.

⁸⁷ Decisions No 93-325 DC Immigration Law of 13 August 1993 and No 84-181 DC Law on the Concentration, Financial Transparency and Pluralism of Press Undertakings of 11 October 1984.

⁸⁸ Decision No 2002-461 DC Justice Law of 23 August 2002.

⁸⁹ Constitutional Law 93-1256 of 25 November 1993, relating to international agreements in the field of the right to asylum.

⁹⁰ Benoit-Rohmer, F.-Grewé, C.: *Les droits sociaux ou la démolition de quelques principes*. Strasbourg, 2003.

6. The strange reluctance of the French constituent to “touch” at the Preamble

Various projects of amendments, or even total redrafting, of the Preamble have emanated from the civil society (for example project of the Nouveaux Droits de l’Homme Association, in the 1990s) or from the government itself. In 1975, the Edgar Faure “Commission Spéciale des Libertés” listed a number of constitutional principles, which could have taken place in the Preamble, alongside the references to the 1946 Preamble and the 1789 Declaration; these were the principles of diversity, equality of chances, equality between men and women, dignity, right to life and physical and moral integrity, protection of privacy and personal data, and pluralism of the means and expression and medias. However, the Left refused to support the proposal. In 1993, again, a consultation committee on the revision of the Constitution, presided by Dean Vedel considered it desirable to grant express constitutional recognition to certain new rights bearing in mind the conditions of developments of the French society; these were the right to human dignity and private life (proposal 32) and the freedom and pluralism of communication (proposal 33). Finally, in 2008, President Sarkozy set up a Committee chaired by Simone Veil, to analyse the Preamble, and make suggestions as to possible amendments. After a very thoughtful, informed and detailed analysis of the current status, substance and uses of the Preamble, and the pros and cons of a number of specific amendments, it eventually concluded that “the urgency was less in supplementing it, than in exploiting its richness through ambitious, concrete and active policies”.⁹¹ It therefore seems that everytime, the importance of maintaining the rich constitutional *acquis*, the flexibility and adaptation which the current set-up allows, and the complementarity of overlapping international, european, and national constitutional and legislative framework for the protection and promotion of human rights, plead in favor of the status quo.

As put by one of the most eminent French constitutional scholars, Guy de Carcassone,

“...the seventeen articles of 1789, supplemented by the 18 paragraphs of 1946, which themselves incorporate the fundamental principles recognised by the laws of the Republic, constitute a Declaration of Rights and Freedoms, tainted enough by time so that they cannot be called into question, eternal enough so that they remain modern, precise enough to be protective, and vague enough to be subject to evolutions imposed by progress.”⁹²

There is one single exception to the French Constituant’s reluctance touch at the Preamble. As France entered the New Millenium, it was felt that this sedimented constitutional block lacked an ecological flavour.⁹³ President Chirac, supported by French TV presenter, journalist and environmental activist Nicolat Hulot, commissioned the Coppens Committee to put together a draft Charter for the Environment, which was adopted in 2004. The Charter consists of ten articles encompassing third generation rights, including the right of everyone to live in an environment which is balanced and respectful of his or her health, as well as duties imposed on individuals, public authorities and research and

⁹¹ The Committee instructed to read their report “not as the acknowledgement of an impossibility to make France progress on the way to law (justice?) and equality, but as an encouragement to make that ‘she’ moves forward”. Veil: *op. cit.* 6.

⁹² de Carcassone, G.: *La Constitution*. (Traduction by the author) Essais, 6th ed., Paris, 2004, 39.

⁹³ Veil: *op. cit.* 13.

education institutions to take part in the preservation of the environment. It also incorporated a carefully drafted precautionary principle. On 1 March 2005, a constitutional revision for the first time ever amended the Preamble to add a reference to the 2004 Charter for the Environment, thereby giving it constitutional status.

The constitutional value of the Charter was confirmed by the Constitutional Council “GMO” decision, which stated, in 2008, that “all the rights and duties defined in the Charter for the Environment have constitutional value”.⁹⁴ However, in 2005 already, the Council has relied on it to invalidate important legislation,⁹⁵ including the famous law on the carbon tax, as exemptions granted to polluting industries were declared incompatible with provisions of the Charter.⁹⁶ First instance judicial courts have also used the Charter creatively, for example to order the discharge of environmental activists who had destroyed GMO crops and were threatened with criminal penalties.⁹⁷ First instance administrative courts also did not wait long to declare that the Charter had granted the right to a clean and healthy environment the status of “fundamental freedom of constitutional value”.⁹⁸ The Conseil d’Etat, for its part, was rather timid at first, limiting the effects of the provisions of the Charter.⁹⁹ However, in a 2008 decision, he finally recognised the full constitutional value of the Charter.¹⁰⁰

Whilst these judicial confirmation and uses testify that any addition to the Preamble is not anodine and is followed with practical effects, it remains that this only amendment of the preamble since its inception in 1958 does not disrupt the evolutive dynamics of the constitutional block. It simply adds one more written source of constitutional norms, alongside the others.

Despite that all projects aiming at significantly amending the Preamble and codifying the constitutional case law eventually “failed”, it is nonetheless instructive to review the last endeavour, for it highlights well the advantages and drawbacks of the current system, and the adverse consequences that could result from touching at a text which has had such a fruitful progeny.

7. The latest attempt at amending the Preamble: highlights and comments

The Veil Committee was asked to reflect initially on three themes. Two of them are clearly inspired by the limitations imposed by the Declaration’s formal conception of equality. Should one enable the legislator to better guarantee the equal access of women and men to

⁹⁴ Decision No 2008-564 DC GMO of 19 June 2008.

⁹⁵ Decision No 2005-514 DC Ship Register of 28 April 2005. The Council considered that the legislator has not violated the principle of sustainable development of Art. 6 of the Charter. Decision No 2008-564 DC GMO of 19 June 2008. It gave the Council the opportunity to censure some provisions based on the Charter and the Constitution itself.

⁹⁶ Decision No 2009-599 DC Carbon Tax of 29 December 2009, the CC invalidated provisions of the finance law related to the carbon tax, based on “rupture” of equality regarding exemptions provided by the law to industrial and polluting installations covered by a quota scheme, since these quotas were free (para 82). The grounds for exemptions were found to be contrary to Arts 2, 3, and 4 of the Charter (para 79).

⁹⁷ *Tribunal correctionnel* of Orléans, 09/12/2005; but the decision was quashed in appeal.

⁹⁸ Administrative Tribunal of Chalons-en-Champagne, order of 29 April 2005, No 050082805.

⁹⁹ CE, 6 April 2006 Ligue pour la Protection des oiseaux (LPO) No 283103, et 19 June 2006 Association Eaux et Rivières de Bretagne, No 282456.

¹⁰⁰ Decision of 3 October 2008 Commune d’Anec, No 297931.

responsibilities, outside of the political sphere? Should one make it possible to have new integration policies valuing the diversity of French society to favor the effective respect of the principle of equality (affirmative action)? The last one was triggered by scientific and medical progress. Are there guiding principles on which to base our approach on bioethics?

A few more topics were also suggested, which have already receive some constitutional recognition in the case law of the CC: the recognition of human dignity, the pluralism of means of expression and media; the respect for private life and the protection on personal data; and the European anchoring of the Republic.

The Veil Committee's work was guided by a number of principles. Some of them are obvious, such as the respect of the French constitutional heritage or of recent constitutional revisions. Wisely, they were also keen to limit the constitutional amendments' frenzy, and considered that the addition of new norms into the Preamble should only occur where these were unlikely to "change" in the medium to long term. However, the Committee was also determined to suggest amendments to the Preamble only if they had an uncontested "*effet utile*". They rejected any symbolic addition, and were strongly opposed to any codification of the case law. They considered that academia or committee works produced enough "descriptive" codifications to ensure the visibility of rights, and that with codification came the risk of limiting constitutional dynamism. Besides, they identified important technical difficulties concerning the scope of such codification. Finally, they also feared that it could be perceived as a threat on the constitutional judges' independence.

Let me develop on some of the points which the Committee had to examine, and which may be relevant to the Hungarian context.

A specific reference to a commitment to the European legal order or to international and European treaties for the protection of fundamental rights was rejected in the sense as it would constitute a pure abandonment of "*soveraineté constituante*" and would not allow for the protection of principles touching on "French constitutional identity" against conflicting European norms.¹⁰¹

Relating to positive action beyond gender issues, although the Committee admitted that the *constitutional acquis* did not enable differentiated treatment based on criteria such as race, origin and religion, it nonetheless rejected the idea that either Art. 1 be modified, or that the Preamble be amended so as to authorize such positive action policies on ethnical or racial grounds. No doubt that the Committee was sensitive to the strong anti-communaurism movement within the French constitutional doctrine and political movements. However, it insisted that the current constitutional texts and case law offered a sufficient margin a maneuver for ambitious positive action policies.¹⁰² It allowed for the special treatment of persons with special difficulties¹⁰³ or in dire social situations (for example young people, aged workers, unemployed)¹⁰⁴ or based on where they live (for example suburbs, rural areas...). In relation to the collection of racial or ethical data, which was considered not compatible with the Constitution¹⁰⁵ they considered that the Constitution allowed for the gathering of sufficiently related data (for example geographical origin, feeling of

¹⁰¹ Decision No 2006/540 DC Copyright Law of 27 July 2006.

¹⁰² Veil: *op. cit.* 57–64.

¹⁰³ Decision No 86-207 DC Economic and Social Order of 26 June 1986.

¹⁰⁴ Decision No 2006-535 DC Equality of Chances of 30 March 2006.

¹⁰⁵ Decision No 2007-557 DC Immigration, Integration and Asylum of 15 Nov. 2007.

belonging...), which could give sufficient indications as to the composition of the population.

Another issue under consideration was the pluralism of the means of expression and media. As exposed earlier, the Constitutional Council declared the pluralism of daily newspaper as being a constitutional objective, necessary to guarantee the free communication of ideas and opinions protected by Art. 11 of the 1789 Declaration. Later on, it extended its cope to radio and television and the internet. Under pressure from the Senate, the constitutional revision of 23 July 2008 amended the Constitution (but not its Preamble) in order to give competence to the legislator (and no longer the executive) to adopt statutes determining the rules relating to “freedom, diversity and the independence of the media”.¹⁰⁶ Although it did not give further constitutional protection to this objective, it led the Veil Committee to decline examining any amendment to the Preamble which would reaffirm this principle.

Concerning the protection of privacy and personal data, these did not have any textual basis in French constitutional documents. However, the constitutional judge had developed a rich jurisprudence, exposed earlier. Based on Art. 2 of the 1789 Declaration, it derived a right to respect of private life, with the result that it allows the exchange and sharing of personal data between public bodies only with individual’s consent and for a purpose of constitutionally protected general interest¹⁰⁷ or prevents legal persons from treating datas relating to offences for the purpose of fighting against fraud.¹⁰⁸ Besides, there exists also quite extensive international standards, as well as protective legislation. Because of these, the Committee felt that any amendment would be superfluous, in particular as international and European treaties provided complementary safeguards. It applied a similar reasoning to the guiding principles related to bioethics.

As for the right (or principle) of human dignity, it considered the notion to be very vague and polyphormic; however, it agreed that Art. 1 of the Constitution could be amended to include a precisely drafted principle of “equal dignity”.

Another aspect which transpires across the Committee’s study, although without being explicitly mentioned, is the difficulty in amending preambles in a consensual manner, once the national urgency and drama which led to a adoption of a new constitution passes. This is not peculiar to France, but is noticeable wherever attempts were made to amend national constitutional preambles.¹⁰⁹

8. Conclusions

Legal transplants are delicate operations. This is even more so in the case of constitutional rules and principles, which reflect not only universal(isable) values, but also norms, values and processes which are peculiar to particular states and their peoples. Comparative constitutional law thus has its limits when it comes to inspiring constitutional reforms. Yet, I hope that this little “tour” of the Preamble of the French Constitution, which highlighted

¹⁰⁶ Art. 4: addition of “Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation.” To the competence of the legislator in Art. 34, the revision added “freedom, diversity and the independence of the media”.

¹⁰⁷ Decision No 93-325 DC Immigration Law of 13 August 1993.

¹⁰⁸ Decision No 2004-499 DC Personal Data of 29 July 2004.

¹⁰⁹ Orgad: *op. cit.* 22.

its “potential” as well as its limits, can contribute to the Hungarian debate on constitutional reform. In any case, at the moment, contemporary France and Hungary seems to have in common a liking for “gradual” rather than drastic constitutional development. But, if I understand well the current Hungarian debate, they may soon depart, for the better or for the worst.