

Decision n° 2004-505 DC of November 19th 2004

The Treaty establishing a Constitution for Europe

On October 29th 2004 the Constitutional Council received a referral from the President of the Republic pursuant to Article 54 of the Constitution with regard to the question of whether authorisation to ratify the Treaty establishing a Constitution for Europe signed in Rome on the same date requires a prior revision of the Constitution;

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution of October 4th 1958 and in particular to Title XV thereof : " On the European Communities and the European Union";

Having regard to Ordinance n° 58-1067 as amended (Institutional Act on the Constitutional Council);

Having regard to the Treaty establishing the European Community;

Having regard to the Treaty on European Union;

Having regard to the commitments entered into by France with respect to the European Communities and the European Union;

Having regard to the European Convention on Human Rights and Fundamental Freedoms;

Having regard to the decisions of the Constitutional Council n°s 2004-496 DC dated June 10th 2004, 2004-497 DC dated July 1st 2004, 2004-498 DC and 2004-499 DC dated July 29th 2004;

Having regard to decision n° 4774/98 of the European Court of Human Rights (*Leyla Sahin v. Turkey*) dated June 29th 2004;

Having heard the Rapporteur

On the following grounds :

WITH RESPECT TO APPLICABLE NORMS OF REFERENCE:

1. In the Preamble to the Constitution of 1958 the French people solemnly proclaimed "its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946";

2. Article 3 of the Declaration of Human and Civil Rights provides that " The principle of any sovereignty lies primarily in the nation"; the first indent of Article 3 of the Constitution of 1958 provides that "National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum";

3. The Preamble to the Constitution of October 1946 proclaims in indent 14 that the French Republic "shall respect the values of Public International Law. ", and in indent 15, that " Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary for the organization and preservation of peace";

4. Article 53 of the Constitution of 1958 formally establishes, as does Article 27 of the Constitution of 1946, the existence of " treaties or agreements relating to international organization" ; that such treaties or agreements can only be approved or ratified by the President of the Republic pursuant to a statute;

5. The French Republic belongs to the European Communities and the European Union in the conditions provided for by Title XV of the Constitution; in particular, pursuant to article 88-1 thereof, " The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common";

6. These texts having constitutional value enable France to participate in the creation and development of a permanent European organization, vested with separate legal personality and powers of decision-making by reason of the transfer of powers agreed to by the Member States ;

7. When however commitments entered into for such purposes contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty, authorisation to ratify such measures shall require a prior revision of the Constitution ;

8. It is on the basis of such principles that is incumbent upon the Constitutional Council to examine the Treaty "establishing a Constitution for Europe", together with the Protocols and annexes thereof; those provisions of the said Treaty which merely reiterate commitments already entered into by France are however excluded from any such examination as to their conformity with the Constitution;

WITH RESPECT TO THE PRIMACY OF THE LAW OF THE EUROPEAN UNION:

9. Firstly, the provisions of the "Treaty establishing a Constitution for Europe", and in particular those pertaining to the entry into force and revision thereof and the possibility for signatories to withdraw therefrom, show that said instrument retains the nature of an international treaty entered into by the States signatory to the Treaty establishing the European Communities and the treaty on European Union;

10. The name given to this new Treaty does not require as such any ruling as to its constitutionality; Article 1-5 thereof, pertaining to the relations between the European Union and the Member States thereof, shows that the title of said treaty has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order;

11. Secondly, pursuant to Article 88-1 of the Constitution : "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common"; that the drafters of this provision thus formally acknowledged the existence of a

Community legal order integrated into the domestic legal order and distinct from the international legal order;

12. Article 1-1 of the Treaty states that "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European union, on which the Member states confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it"; pursuant to article 1-5, the Union shall respect the national identities of Member States "inherent in their fundamental structures, political and constitutional"; pursuant to Article 1-6 "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States"; a declaration annexed to the Treaty shows that this Article does not confer on the principle of primacy any greater scope than which it previously had;

13. If Article 1-1 of the Treaty replaces the bodies established by previous treaties by a single institution, the European Union, upon which Article 1-7 confers legal personality, the provisions of this Treaty, particularly the close proximity of Articles 1-5 and 1-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the Constitutional Council in its decisions referred to hereinabove; that hence Article 1-6 submitted for review by the Constitutional Council does not entail any revision of the Constitution

WITH RESPECT TO THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION:

14. It is therefore necessary to rule on the conformity with the Constitution of the "Charter of Fundamental Rights of the European Union" which constitutes the second part of the Treaty submitted for review by the Constitutional Council;

15. Firstly, pursuant to Article II-111 of the Treaty and excluding Articles II-101 to II-104, which only concern the "institutions, bodies, offices and agencies of the Union", the provisions of the Charter are addressed to the Member States " when they are implementing Union law", and "only" in this case; pursuant to paragraph 5 of Article II-112, the Charter contains, in addition to "rights" directly enforceable before national courts "principles" which constitute aims which may only be invoked in relation to acts of a general scope pertaining to their implementation; that among such "principles" are found " the entitlement to social security benefits and social services"; the "right to work", the "right of the elderly to lead a life of dignity and independence and to participate in social and cultural life", the "principle of sustainable development" and "a high level of consumer protection";

16. Secondly, paragraph 4 of Article II-112 of the Treaty provides that, insofar as the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, "these rights shall be interpreted in harmony with those traditions"; the rights defined in Articles 1 to 3 of the Constitution, which proscribe any recognition of collective rights of any group defined by origin, culture, language or beliefs are thus respected;

17. Thirdly, the Preamble of the Charter states " The Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the

authority of the Praesidium of the Convention which drafted the Charter"; paragraph 7 of Article II-112 of the Treaty also provides that " The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States";

18. In particular, if the first paragraph of Article II-70 recognises the right of everyone, whether individually or in community with others, to manifest religion or belief in public, the explanations of the Praesidium specify that the right guaranteed by this article has the same meaning and same scope as the right guaranteed by Article 9 of the European Convention for the protection of Human Rights and Fundamental Freedoms; this right is subject to the same limitations, in particular those involving public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others; Article 9 of the Convention has been constantly applied by the European Court of Human Rights, on the latest occasion in the decision referred to hereinabove, in harmony with the constitutional traditions of each Member State; the Court has thus given official recognition to the principle of secularism recognized by various national constitutional traditions and leaves States considerable leeway to define the most appropriate measures, taking into account their national traditions, to reconcile the principle of freedom of religion and that of secularism; the provisions of Article 1 of the Constitution whereby "France is a secular republic" which forbid persons to profess religious beliefs for the purpose of non compliance with the common rules governing the relations between public communities and private individuals are thus respected ;

19. Moreover the scope of Article II-107 of the Treaty, pertaining to the right to an effective remedy and a fair trial, is wider than that of Article 6 of the European Convention, since it concerns not only disputes involving civil rights and obligations or the grounds for a criminal prosecution; it nevertheless emerges from the explanations given by the Praesidium that public access to court hearings may be subject to the limitations provided for in this article of the Convention; thus " the press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice";

20. Furthermore, if, pursuant to Article II-110, " No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has been finally acquitted or convicted within the Union", the very wording of this Article, as is confirmed by the explanations of the Praesidium, means that these provisions apply solely to criminal law and not to administrative or disciplinary proceedings; that furthermore, the reference to offences, and not to the acts involved, leaves French courts of law free, subject to due respect for the principle of proportionality of sentences, to punish those crimes and offences which prejudice the fundamental interests of the nation as provided for by Title I of Book IV of the French Criminal Code, taking into account the ingredients of such crimes and offences and the specific interests involved:

21. Fourthly, the general limitation clause contained in paragraph 1 of Article II-112 provides: " Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others", that the explanations of the Praesidium specify that the "general interests recognised by the Union" include in particular interests protected by the first paragraph of Article I-5, whereby the Union shall "respect their essential

State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security";

22. As is shown by the foregoing, the Charter, either as regards the contents of the articles thereof or the essential conditions pertaining to the exercise of national sovereignty, does not require any revision of the Constitution,

WITH RESPECT TO THE PROVISIONS OF THE TREATY

PERTAINING TO THE POLICIES AND THE FUNCTIONING OF THE UNION

23. Pursuant to Article 88-2 of the Constitution, as amended subsequent to the revisions of the Constitution dated June 25th 1992, January 25th 1999 and March 23rd 2003: " Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on February 7th 1992, France agrees to the transfer of powers necessary for the establishment of the European Economic and Monetary Union - Subject to the same reservations and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on October 2nd 1997, transfers of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed upon. - A statute shall determine the rules governing the European arrest warrant pursuant to instruments adopted under the Treaty on European Union";

24. The clauses of the Treaty which transfer to the European Union powers affecting the essential conditions of the exercise of national sovereignty in areas or on terms other than those provided for in the Treaties referred to in article 88-2 require a revision of the Constitution;

25. The "principle of subsidiarity" as set forth in Article I-11 of the Treaty implies that, in areas which do not fall within its exclusive competence, the Union shall act "only if and insofar as the objectives of the proposed actions cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"; however the implementation of this principle may not suffice to prevent transfers of competence authorised by the Treaty from taking on a dimension or being carried out in such a way as to affect the essential conditions of the exercise of national sovereignty;

26. Pursuant to Article I-34 of the Treaty, unless otherwise provided for, the "European law" and the "European framework law" due to replace the "Community regulation" and "Community directive" shall be adopted, on the basis of proposals put forward solely by the Commission, jointly by the Council of Ministers, with the qualified majority provided for in Article I-25, and the European Parliament under the ordinary legislative procedure provided for in Article III-396; all matters coming under the competence of the Union, in particular those involving the "area of freedom, security and justice" referred to in Chapter IV of Title III of the third part of the Treaty will therefore, unless excluded, be subjected to this ordinary legislative procedure;

With respect to the new manners of exercising powers already transferred applicable upon the entry into force of the Treaty;

29. Any provisions of the Treaty which, in a matter inherent to the exercise of national sovereignty and already coming under the competences of the Union or the Community, modify the applicable rules of decision-making, either by replacing the unanimous vote by a qualified majority vote in the Council, thus depriving France of any power to oppose such a decision, or by conferring decision-making powers on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative, require a revision of the Constitution;

30. Consequently, once the measures involved are dependent upon a decision of the Council acting by a qualified majority, in particular under the provisions of Articles III-270 and III-271, when relating to powers already transferred in the field of judicial cooperation in criminal matters, of articles III-273 and III-276, which concern the structure, functioning, mission and tasks of Eurojust and Europol, and those of b) of paragraph 2 of Article III-300 relating to actions or positions of the Union decided on the proposal of the Minister of Foreign Affairs of the Union, they require a revision of the Constitution;

31. The same applies to provisions conferring decision-making powers on the European Parliament, in particular those of Article III-191, which provide that a European law or framework law shall determine the measures necessary for the use of the Euro, and those of the first paragraph of article III-419, which in matters concerning the area of security, freedom and justice, makes the establishing of any "enhanced cooperation" within the Union dependent upon the approval of the European Parliament;

32. The same applies to the provisions of Article III-265 insofar as they replace the individual power of initiative vested in each Member State under previous Treaties by a joint right of initiative of a quarter of Member States, allowing the latter to put forward a draft European act in matters concerning the area of freedom, security and justice, such as those mentioned in Article III-273 concerning Eurojust, and in Articles III-275 to III-277 relating to police cooperation;

With respect to the adoption of qualified majority voting under a subsequent European decision:

33. Any provision of the Treaty called a "bridge provision" by those negotiating the same, and which, in a matter inherent to the exercise of national sovereignty makes it possible, even though making such a change dependent upon an unanimous decision of the European Council or the Council of Ministers, to replace a system of unanimity voting by one of a qualified majority, requires a revision of the Constitution; such modifications will not require any ratification or approval at national level likely to entail a review of the constitutionality of the same on the basis of Article 54 or 61, paragraph 2, of the Constitution;

34. Such is the case in particular as regards the measures pertaining to family law with cross-border implications provided for by paragraph 3 of Article III-269, the minimum rules of criminal procedure provided for by d) of paragraph 2 of Article III-270 and the minimum rules pertaining to the definition and punishment of particularly serious crimes with cross-border dimensions provided for by the third indent of paragraph one of Article III-271; the same applies to paragraph 7 of Article 1-40 and paragraph 3 of Article III-300, which make it possible for decisions relating to foreign policy and common security and defence policy, the scope of which is not limited by the Treaty, to be henceforth taken by the Council acting by a

qualified majority, upon a unanimous decision to said effect taken by the European Council, but without any ratification at national levels;

With respect to the simplified revision procedures provided for by Articles IV-444 and IV-445 of the Treaty.

35. Firstly, for the reasons set forth hereinabove, the general "bridge clause" found in Article IV-444 instituting a simplified revision process for the Treaty also requires review by the Constitutional Council ; the first paragraph of this Article allows the European Council to authorise the Council, except in defence matters, to act by a qualified majority in an area or case where the Treaty requires unanimity, while the second paragraph authorises the adoption of laws in accordance with ordinary legislative procedure whenever Part III provides for a special legislative procedure; in the absence of any national ratification procedure making it possible to review the constitutionality of said laws, these provisions require a revision of the Constitution, notwithstanding the faculty given to each national Parliament to oppose the implementation thereof;

36. Furthermore, article IV-445 institutes a simplified revision procedure concerning internal policies and action of the Union; it provides that on the proposal of a Member State, the European Parliament or the Commission, the European Council, acting unanimously, "may adopt a European decision amending all or part of the provisions of Title III of Part III" relating to the internal policies and action of the Union; that pursuant to the second indent of paragraph two, this European decision shall only come into force once it has been approved by the Member States "in accordance with their respective constitutional requirements"; this reference to the constitutional rules of the Member States refers, where France is concerned, to the Parliamentary authorisation provided for by Article 53 of the Constitution.

WITH RESPECT TO THE NEW POWERS VESTED IN NATIONAL PARLIAMENTS IN THE FRAMEWORK OF THE UNION

37. The Treaty submitted to the Constitutional Council increases the participation of national Parliaments in the activities of the European Union; it grants them new prerogatives and as such it is necessary to decide whether these prerogatives can be exercised within the framework of the current provisions of the Constitution;

38. Firstly, Article IV-444 introduces, as mentioned above, a simplified revision procedure of the Treaty; it provides for the notification of national Parliaments of any initiative taken in this respect and adds : "If a national Parliament makes known its opposition within six months of such notification, the European decision ... shall not be adopted"

39. Secondly, the second indent of paragraph 3 of Article I-11 provides that national Parliaments shall ensure compliance with the principle of subsidiarity by the institutions of the Union in accordance with Protocol 2; that under articles 6 and 7 of the latter taken together with article 3 of Protocol 1, a national Parliament or, as may be, one of the Chambers thereof, may henceforth, within six weeks of the transmission to it of a draft European legislative act, send the Presidents of the European Parliament, Council and Commission a reasoned opinion on why it feels that the draft legislative act does not comply with the principle of subsidiarity; the draft act must be reviewed when these reasoned opinions represent one third of the votes allocated to the national Parliaments, or one quarter of the votes in areas of judicial cooperation in criminal matters or police cooperation; to this effect,

each national Parliament has two votes, with each Chamber in a bicameral Parliament having one vote; after such review, the body from which the draft originates may decide to maintain, amend or withdraw the draft.

40. Thirdly, article 8 of Protocol 2 provides that the Court of Justice, which has jurisdiction in actions on the grounds of infringement of the principle of subsidiarity, may also examine actions brought by a Member State " in accordance with its legal order on behalf of its national Parliament or a Chamber of it";

41. The recognised right of the French Parliament to oppose a modification of the Treaty under the simplified revision procedure provided for by Article IV-444 requires a revision of the Constitution in order to allow it to exercise this prerogative; the same applies to the faculty given to it, if need be according to the specific procedures of each of its two Chambers, to send a reasoned opinion or to bring an action before the Court of Justice in the framework of the monitoring of the respect for the principle of subsidiarity;

WITH RESPECT TO THE OTHER PROVISIONS OF THE TREATY:

42. None of the other provisions of the treaty submitted to the Constitutional Council pursuant to Article 54 of the Constitution requires any revision of the latter;

WITH RESPECT TO THE WHOLE OF THE TREATY:

43. Authorisation to ratify the Treaty establishing a Constitution for Europe requires a revision of the Constitution on the grounds set forth hereinabove,

HELD

Article one : Authorisation to ratify the Treaty establishing a Constitution for Europe requires a prior revision of the Constitution.

Article 2.- The President of the French Republic shall be notified of this decision, which shall be published in the *Journal Officiel* of the French Republic

Deliberated by the Constitutional Council sitting on November 19th 2004 and composed of Mr Pierre MAZEAUD, President, Messrs Jean-Claude COLLIARD, Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER, Mr Pierre STEINMETZ and Mrs Simone VEIL.