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Judicial Independence – French and European Perspectives

I. Introduction

During the preparatory works for the French Constitution of 1958, *René Cassin*, who drafted the Universal Declaration of Human Rights and who was vice-president of the Council of State (France's highest Administrative Court), said when defining "judicial authority" in Title VIII that "The independence of the Judiciary is the keystone for good Justice".[1]

Judicial independence within the framework of the rule of law is a broad, complex and controversial subject. This is especially true of France, because of our particular attitude to justice since the French Revolution, and even before this critical and fundamental period. We continue to be marked by this unique event. Indeed, unlike in England (influenced by the Common Law and many other social, institutional, historical and cultural factors), judges in France were considered to be the assistants of the "the royal will" up until 1789, and of the "general will" (i.e. of statute law)[2] thereafter. Since the I French Empire, they have been considered to be an arm of the civil service whose independence is only a recent and partial conquest, as is borne out by all the official speeches during the formal sittings of the Court of Cassation since the start of the V Republic to the present.[3] Even if judicial independence has been clearly written into our constitutions since 1946, and is regularly subject matter for the Constitutional Council, it appears to be a goal that either has not been or has only been partially achieved. The repeated judgements in the European Court of Human Rights in 2010 tend to confirm this view.[4]

The first part of this paper will deal, on a broad constitutional scale, with the configuration of judicial independence, its guarantees (material and organic) and its interaction with the rule of law in the constitutions of the member states of the EU. The main purpose, is, in keeping with the general analysis of the symposium, to draw an objective map of the situation from a pure formal and textual (and therefore a slightly partial and narrow) view point. The second part will consider the specificity of the

1 *T. S. Renoux*, L'autorité judiciaire, in: D. Maus/L. Favoreu/J-L Parodi (eds.), L'écriture de la Constitution de 1958, Marseille 1992, p. 684.

2 According to Art. 6 of the Declaration of Human and Civil Rights of 1789 which provides that "The Law is the expression of the general will", which refers to the ideas of *Jean-Jacques Rousseau* and his conception of Statute Law.

3 See speeches of the First President of the French Court of Cassation (*Bertrand Louvel*), of the Public Prosecutor at the French Court of Cassation (*Jean-Claude Marin*) and of the President of the French Republic (*Emmanuel Macron*), during the Formal Sitting of the 15th of January of 2018, https://www.courdecassation.fr.

4 About the statute of the French public prosecutors, see ECHR, G.C. 29.3.2010, *Medvedyev and al. v. France*, Req. n° 3394/03; ECHR, 5th Sect. 23.11.2010, *Moulin v. France*, Req. n° 37104/06..

independence of the French judiciary in relation to the French constitutional principle of the rule of law, which is called the "Etat de Droit" in the French legal tradition.[5]

II. The configuration of judicial independence, its guarantees and interactions with the Rule of Law in the constitutions of the member states of the EU

This analysis is based on an analysis of the wording of each national constitution, by considering the literal meaning of the words and their English translation.[6] This does not take account of either law in action, as well as material or customary constitutions or principles or guarantees at the statute law or case law level.

Topics or words in current national constitutions can be researched using the *constituteproject.org* database, an American database at the University of Texas.[7] 166 out of the 195 national constitutions listed in the database contain an express declaration that "judges are autonomous" or "the judiciary" or "judges" are independent. These provisions extracted from these constitutions not only contain the statement of the principle of judicial independence, but, for most of them, are material safeguards from outside influence particularly from other branches of government. Many of these constitutions refer directly to the "rule of law", (literally – in the words) or indirectly, by referring to the basic definition of the rule of law as a system governed by laws at every level of the power, especially at the judicial level. The EU apart, one can randomly pick constitutions from countries on every continent such as Albania (Article 145 C.), Algeria (Article 156 C.), Andorra (Article 85 C.), Egypt (Articles 94, 184, 186 C.), Iraq (Articles 19 and 88 C.), Israel (chapter 1 – 2 C.), Japan (Article 76 C.), North Korea (Article 160 C.), Qatar (Article 130 C.), Russia (Article 120 C.), South Africa (Article 165 C.), Thailand (Article 188 C.), Tunisia (Article 102 C.), Ukraine (Article 126 and 129), Vietnam (Article 103 C.), Yemen (Article 149 C.) or Zambia (Article 91 C.). Obviously, in the light of these examples, words alone, even at the constitutional level, do not guarantee real independence. *De jure* judicial independence cannot guarantee *de facto* judicial independence, because mere words cannot safeguard *de jure* judicial independence. This is borne out by the fact that that these words are found in constitutions of countries like North Korea, Qatar, Turkey, Russia, and Iraq, and words in constitutions do not express the legal reality and *a fortiori* factual reality (*de facto* independence). This is evidenced by the examples of Poland and Hungary, EU member states, and the open letter written to the Polish government by the Chief Justice of Poland's Supreme Court (*Malgorzata Gersdorf*) in December 2017, who warned against dismantling the democratic rule of law in her country, directly referring to a "coup d'Etat against the Supreme Court".[8] Thus, words are like

5 *L. Heuschling*, Etat de droit – Rechtsstaat – Rule of Law, Dalloz 2002.

6 The following words and their combination: independence; independent; autonomy; autonomous; separation; judicial; justice; judiciary; judges; courts, etc.

7 https://www.constituteproject.org/, 18.1.2018.

8 Address by the First President of the Supreme Court on the reforms of the judiciary in Poland, 22.12.2017, http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm.

ineffectual paper tigers, what highlights how important the context is, beyond the words and the positive law. Indeed, the rule of law, beyond standards and indicators, is a matter of culture, a culture which must be shared by politicians and judges themselves, and then by society as a whole.

In the EU, it is no surprise that most of the member states have both literal statements of judicial independence and guarantees (material and organic) for that independence. However, this is not true for all. Among the six founding states, Luxembourg's constitution does not refer to the word "independence" in Chapter VI "On Justice", but contains some guarantees like irrevocability or references to incompatibilities. In Luxembourg, judges are directly appointed by the Grand Duke, on the advice of the Superior Court of Justice, for the heads of some courts. The Constitution of the Netherlands is built on the same model. Among the EU 28 member states, half refer to the empire of law or/and the Constitution. For instance, Article 177 of the Spanish constitution provides that

Justice emanates from the people and is administered on behalf of the King by judges and magistrates members of the Judicial Power who **shall be independent**, shall have fixity of tenure, **shall be accountable for their acts and subject only to the rule of law** – Members of the Constitutional Court shall be independent and enjoy fixity of tenure during their term of office.

The Swedish constitution provides that

> Neither the Riksdag, nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges.

Some of the EU's member states, especially in the Eastern part of the EU, have reproduced part of Article 6 § 1 of the ECHR on the due process of law, following the same literal pattern, where the influence of the Venice Commission during the democratic transition was essential. This was recognised and used by the European Commission, which considered the Venice Commission to be a real partner when initially framing relationships with the candidate countries and then subsequently with the member states.[9] 21 member states have set up an independent constitutional body (a Council or a High Council for the Judiciary) to guarantee the independence of judges with appointment and/or disciplinary powers.[10] In most member states judges are appointed by the executive (Head of State, Prime Minister or Minister of Justice) from candidates proposed by the Judicial Appointments Committee. Other authorities or bodies (like

9 About the role of the Venice commission in the determination of European constitutional standards, especially in the framework of judiciary independence (for judicial appointment process), see *B. Budquicchio/P. Garrone*, Vers un espace constitutionnel commun? Le rôle de la Commission de Venise, in: B. Haller/H. C. Krüger/H. Petzold (eds.), Law in Greater Europe, Towards a common legal area. Studies in honour of Heinrich Klecher, La Haye/London 2000, p. 3-21.

10 Seven Member States do not have an independent body (CZ, DE, EE, CY, LU, AT and FI). These independent bodies are grouped in an umbrella organisation called "the European Network of Councils for the Judiciary" (ENCJ) which is a precious source of information for judiciary systems in Europe, especially for the European commission balances and analysis, https://www.encj.eu/.

court presidents or judges) may deliberate or be consulted on the candidate judges.[11] Therefore, most of the EU member states can be considered as having a high level of formal constitutional guarantees for the judicial independence. Even in Hungary, the 2013 constitutional reform did not abrogate these formal provisions. The reform was carried out in the name of national sovereignty, which had effect for the *res judicata* (of the Constitutional Court decisions)[12] and the overall organisation of the judiciary (via changes in the organisation of the courts and in the National Council of the Judiciary's functions and organisation). This is more insidious and dangerous for the rule of law.[13] Judicial independence has been dismantled in Poland by ordinary statute law (more than 13 statute laws),[14] accompanied by a legal and *de facto* neutralisation of the Constitutional Court (by the government refusing to publish the Constitutional Court's decision of December 2015 which declared the new Polish Diet's Statute law on electing constitutional judges to be partly unconstitutional).[15]

The French model of judicial independence is not perfect even if it is far from these Eastern European examples. It is in the middle from the purely constitutional point of view.

III. The French model of judicial independence. The halfway point

As *Voltaire* said, "France is the country where there are the most contradictions". But, as *Jean-Jacques Rousseau* said, "Contradictions are better than prejudices", especially in the field of justice. First, some preliminary clarification on the configuration of the judiciary power and its independence in the French constitutions since 1791 is required (1.). Second, the independence of the judiciary in France is still a narrow concept with a conflicting purpose (2.).

1. Preliminary remarks on the place of the judiciary and its independence in the French constitutions

Two important conclusions are apparent from looking at the former French constitutions. Firstly, the history of the judicial independence appears to be the story of a major missing reference, which secondly, is related to a relegated and subordinate power.

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11 See for more details the Eurobarometer for 2017, EU Justice Scoreboard 2017, European Commission, 4.10.2017, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=56908.

12 Not affecting the effectiveness of former Constitutional Court decisions but their case law status.

13 See *International Bar Association,* Still under threat: the independence of the judiciary and the rule of law in Hungary, October 2015, https://www.ibanet.org.

14 With an official goal: to make the judicial system more effective and able to fight corruption!

15 For details about these processes and the European Commission actions (Rule of Law recommendations, and the threat of sanctions under Art. 7 of the EU Treaty) both in Poland and Hungary on the violation of the Judiciary's independence, see http://europa.eu/rapid/press-release_IP-17-5367_fr.htm.

a) The history of the major missing reference

There is no direct reference to the concept of the judicial independence in any of the 15 French Constitutions except the last two (the 1946 and 1958 Constitutions). Paradoxically, the word "*independence*", which is barely used, is sometimes associated with the executive or legislative powers, in the constitutions of the Empires,[16] but not for the judicial power. Nevertheless, the French constitutional principle of the rule of law was proclaimed in 1789 in Article 16 of the Declaration of Human and Civic Rights (which forms part of the French "Constitutional Block", according to the Preamble of the 1958 Constitution), and which provides that "*Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution*".

b) Relation to the relegated and subordinate power

The independence of the Old Regime's judges (the former French *"Parlements"*), illustrated by the power of *"Le Parlement de Paris"* and the contested use of the "*Droit de remonstrance*" (the French equivalent of the "judicial review" in England but within the framework of an *a priori* judicial control) was killed off by the French Revolution. The Revolution relegated the judicial power (which was accused of having been "corrupted by its exercise") to a simple "*mouthpiece of the law*" (*Montesquieu*) in a legal and political system governed by statutes. The so called French "Legicentism" led to the assertion of the "Rule of Statute Law" rather than the Rule of Law (*Raymond Carré de Malberg*).

Jean-Guillaume Thouret (the rapporteur of the draft Judicature bill in 1790), called on the National Assembly to "*'regenerate' the French judiciary"* because of its past abuses. Therefore, the story of the French judicial system is one of a relegated power, regarded not only as being "under the statute law" but also as "subordinate to the statute law". The legislative referee and the obligation to state reasons, introduced by the Judicature Act of 1790, bear witness to this concept of justice, subordinated to the general will of statute law and even to the will of the Parliament. The Consulate and the First French Empire accentuated this relegation of the judiciary, adding to the subordination to the statute law, a subordination to the executive power which is still seen today through the President's constitutional function as "*the guarantor of the independence of the Judiciary"*, "*assisted by the High Council of the Judiciary"* (Article 64 C. 58). This Council was created by the 1946 Constitution in reaction to the sad experience of the Vichy Regime (June 1940 – August 1944) where the judiciary after an expurgatory process, was subordinated to the will and the person of *Marechal*

16 Which are, the Senatus-consulte organique du 28 Floréal an XII (the 18th of May of 1804), the Constitution of 1815 (in force during the Hundred Days and called "la Benjamine" because of the name of its author, the famous French liberal thinker and author *Benjamin Constant*) and the Constitution of 25 December 1852.

Petain.[17] It was presided by the President of the Republic and the Minister of Justice until 2008. This judicial set up has not really changed since and has been described by *Jean Foyer*, a former Minister of Justice and famous professor of law as:

> An appointed Justice which forms a judiciary body, like an officer corps, with subordinate officers (first instance judges), senior officers (judges of the courts of appeal) and, at the top, generals (judges of the Court of Cassation).[18]

The word *"power"* is used for the judiciary in four of these constitutions (1791, 1795, 1815 and 1848) whilst the word "order" in three of them (1803, 1814 and 1830). The Constitution of the V Republic uses the word "authority", associated with the fundamental constitutional function prescribed by Article 66 of the Constitution – *"guardian of the freedom of the individual"* – and material and formal guarantees: the principle of the permanent tenure of judges and the President of the Republic and the High Council of the Judiciary, in compliance with one of the five conditions prescribed to the writer of the future Constitution of the V Republic by the Constitutional Act of 3 June 1958. As is stressed by Article 16 of the Declaration of Human and Civic Rights, one of the most fundamental responsibilities within the framework of the rule of law is to guarantee judicial independence at the constitutional and legislative levels.

However, the French constitutional provisions on the "judicial authority" show how narrow this protection of judicial independence really is. These provisions, which are reduced to three articles in one title (Title VII: Articles 64, 65 and 66 C.)[19] consider the independence of the judiciary not as being a goal but as a means for ensuring the respect of "liberty" in its unique meaning, because the pluralistic meaning is considered to have been connected to the Parliamentary function since 1789.[20] In comparison to other constitutions these provisions, except Article 65 on the High Council of the Judiciary, are general in nature. In 1958, this generality was seen to be a way of giving the lawmakers referred to by the Constitution, enough room for manoeuvre to implement these rules. Indeed, this was supposed to guarantee the success of the constitutional referendum (with very general constitutional principles) and a deep and necessary reform of the judiciary[21] based on a simple legislative reform. So, the favourable treatment given to the legislator, means that there are very few constitutional guarantees for this principle. This constitutional flexibility is also a source of danger.

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17 Which was not so far from the Bonapartist tradition and its inheritance and therefore was not complete with the French judicial tradition, see. *C. Bachelier/D. Peschanski*, L'épuration de la magistrature sous Vichy, in: Association Française Pour l'Histoire de la Justice (ed.), L'épuration de la magistrature de la Révolution à la Libération, Paris 1994, p. 103; *A. Bancaud*, Vichy et la tradition de l'étatisation de la justice. Histoire d'un demi-succès, in: M.-O. Baruch/V. Duclert (eds.), Serviteurs de l'État. Paris 2000, p. 497-510.

18 *J. Foyer*, quoted by *Renoux*, fn. 1.

19 Art. 64 concerns the statement of Judicial order; article 65 concerns the High Council of the Judiciary and Art. 66 is the French Habeas Corpus with a constitutional definition of the judicial function as "guardian of the freedom of the individual".

20 See about that meaning, *Renoux*, fn. 1.

21 *Renoux*, fn. 1.

2. A narrow concept for a contradictory purpose

This leads to two main observations: firstly, there are still internal contradictions in the French judicial order despite of some recent improvements relating to the judiciary independence (a); secondly, the legal concept of the judicial authority in the French judicial system is narrow, because of the existence of two other legal orders: the administrative order and the constitutional order, both with special independent powers, long way from the standard model (b).

a) Internal contradictions in the French judicial system

Unlike the UK or the USA, judicial authority in France consists of public prosecutors and judges, and both are considered to be magistrates. A similar structure exists in Germany, Italy or other European countries as well as the European Public Prosecutors project.

The prosecution has been conceived in two ways since the Revolution, either as a means for enforcing laws (laws of public order) logically linked to the executive power within the framework of a criminal policy fixed by the government, or as a part of the judicial function. Since *Napoleon*, prosecutors have been considered to be magistrates despite the historical hierarchical link with the government, where magistrates are considered to be civil servants with a special status. Moreover, "magistrates" of both functions can switch to another function without real limits.[22]

Unlike the UK or the USA, the public prosecutors in France are halfway between the judiciary and executive power. This is true despite recent reforms like the abolition of the presidency of the *High Council of the Judiciary* (HCJ) by the President of the Republic or the enforcement of the powers of the HCJ (after the Constitutional Reform Act of 2003 and 2008, completed by Organic Acts, the last one being from 2016)[23] or the end of the Ministry of Justice's powers to give specific instructions to the public prosecutors in certain cases. After an Act of 2013[24] the Minister can only give general instructions. The 1993 and 2008 Constitutional Reform Acts tried to rebalance the composition of the HCJ and its powers (appointment proposals): the power of recommendation for judges of the Court of Cassation and the senior judges of the courts of appeals and the first instance courts, and the opinion of all public prosecutors.[25]

Despite these reforms and the will to reinforce the HCJ, the European Court of Human Rights condemned France twice in 2010, considering that the French public

22 See *J.-C. Farcy*, Histoire de la Justice en France de 1789 à nos jours, éd. La découverte, coll. "Repères", 2015, pp. 85-108; *J.-P.Royer/J.-P. Jean/N. Derasse/B. Durand, J.-P. Allinne,* Histoire de la Justice en France du XVIIIe siècle à nos jours, 5e éd., PUF 2016, p. 1221 f.

23 Loi organique n° 2016-1090 du 8 août 2016 *relative aux garanties statutaires, aux obligations déontologiques et au recrutement des magistrats ainsi qu'au Conseil supérieur de la magistrature, JORF* n°0186 du 11 août 2016.

24 Loi n° 2013-669 du 25 juillet 2013 *relative aux attributions du garde des sceaux et des magistrats du ministère public en matière de politique pénale et de mise en œuvre de l'action publique, JORF* n°172, du 26 juillet 2013.

25 *M. Le Pogam*, Le Conseil supérieur de la magistrature, Lexis Nexis 2014.

prosecutors are not a judicial authority within the meaning of Article 5 § 3 of the ECHR because of the lack of "procedural guarantees of independence and impartiality and the fact that he/she is a prosecuting party".[26] The position of the French public prosecutors (25 percent of the French magistrates) is therefore quite worrying because their powers have been strengthened in many fields in the last ten years: the prosecution powers, the quasi-judgement powers (the real power to propose a sentence: the settlement and the plea bargaining process), and the investigatory powers in the fight against specific crimes (terrorism, organized crime, drug trafficking). As a result, most crimes are not referred to an investigating judge (a sitting or a court judge) today. Therefore, the guarantee of the independence of the French public prosecutors is more than ever a necessity for the respect of the rule of law. However, this independence is not yet guaranteed because of the organic and functional links with the executive, despite the efforts made so far. This issue was recently debated before the French Constitutional Council within the scope of a "Priority question of constitutionality PQC)" involving Article 5 of the Organic Act of 1958 on the Status of the Judiciary. Indeed, this Article establishes an administrative hierarchy between the Ministry of Justice and the Public Prosecutors, even if the individual instructions were banned in 2013 in favour of the general instructions. Also, it recognises freedom of speech for the prosecutors. The French Constitutional Court said that this system did not infringe the separation of powers, the due process of law, the rights of the defence, or the independence of the judiciary. According to it, Article 20 of the Constitution provides that "The government shall set out and conduct the national policy. It directs the civil administration and the armed forces", and Article 64 on the "independence of the judiciary"[27] must be reconciled. Therefore, the special organic and functional connection between the executive power and a part of the judiciary is considered to conform with the French Constitution.

Besides the problem of the independence of an essential part of the judicial power in France, the fact that the legal concept of the judicial authority in the French judicial system is narrow still remains an issue. It does not include two parts of the French justice system, which are at the heart of the rule of law because of their role in controlling actions by public authorities (administrative and legislative acts, and in some countries constitutional acts): the administrative justice and the constitutional justice.

b) The narrowness of the concept of the judicial authority in the French judicial order

aa) The administrative judicial order beside the judicial order

The French legal system is characterized by the "judicial dualism", which is also shared by many other countries in the EU (six to be precise)[28] but which is not as pronounced as in France. In France and the other mentioned countries, most cases involving the administrative field or issues (liability, judicial review of administrative acts,

26 ECHR, 29.3.2010, *Medvedyev v. France;* ECHR, 23.11.2010, *Moulin v. France.*

27 *Conseil constitutionnel*, 2017-680 QPC, 8.12.2017, Union syndicale des magistrats [Indépendance des magistrats du parquet], http://www.conseil-constitutionnel.fr.

28 France, Greece, Italy, Belgium, Luxembourg and the Netherlands.

governmental contracts, etc.) are settled in special courts under the supervision of the Supreme Administrative Court and the Council of State. These administrative and constitutional legal orders run parallel to the judicial order. Conflicts of jurisdiction are settled by a special court called the "*Tribunal des Conflits*" (the Conflicts Court),[29] which is not a supreme court, and which only decides which legal order has jurisdiction in a case of conflict. This system is based on the Judicial Organisation Act of 1790 that established the principle of separation between administrative and judicial authorities, but its roots go back to the Edit of Moulin of *Charles IX*, issued in 1566. It was completed as a dual judicial order by the Administrative Justice Act of 1872. It made the Council of State a real court, whose decisions were pronounced in the name of the French people, like the judgements of the judicial authority, and were given binding force of the judgements for the first time.[30] The 1958 Constitution – like all previous French Constitutions, but unlike most other European constitutions with a judicial dualism – does not recognize the principle of independence of this specific order, but only to the judicial order. This principle was more a question of convention and of an unwritten rule than a question of a concrete and positive rule. Nevertheless, the French Constitutional Council recognized the constitutional value of this principle for the administrative judicial order in the famous decision of 22 July 1980, on the "Fundamental Principle Recognized by the Statute Laws of the Republic", (which was recognized, for the time according to the Constitutional Council, by the Administrative Justice Act of 1872), conversely to the principle of judiciary independence based on Article 64 of the Constitution: one principle based on two different norms, with two different aims. Later, in 2003, the Constitutional Council recognized a general principle of independence for both legal orders and for all courts (even professional courts) on the basis of Article 16 of the Declaration of Human and Civic Rights.[31] The ECHR has not contested this principle, unlike the principle of impartiality due to the presence of the Government Commissioner (*"Commissaire du Gouvernement"*, an administrative magistrate whose function is to propose a solution to the case and who presents a personal and independent speech on the solution after the investigation is finished) during the deliberations.[32] Nevertheless, the regulatory status of the members of the Council of State, instead of having a legal status like other members of courts (administrative courts and judicial courts), and the organic and functional connection between the Prime Minister and the Council of State, is still an obstacle to the complete independence of the judicial administrative order from a formal point of view.

29 Created in 1848, then removed in 1851, and finally restored in1872, see *B. Pacteau*, Le Conseil d'Etat et la fondation de la Justice administrative française au XIXe siècle, PUF 2013, p.125 f.

30 *Pacteau,* fn. 29, p. 183 f.

31 *Conseil constitutionnel*, 2003-466 DC, 20 February 2003, Organic law on local judges, http://www.conseil-constitutionnel.fr.

32 France was condemned by the ECHR for infringement of the principle of impartiality because of the presence of this magistrate during the deliberations. The procedure was changed by decree in 2006 to respect the principle of impartiality, see ECHR, 7.6.2001, *Kress v. France*, Af. N° 39594/98; *R. Le Goff*, Le commissaire du gouvernement est mort, vive le commissaire!, *AJDA* 22, 19.6.2006, p. 1210-1212.

bb) The constitutional judicial order beside the other judicial orders

This specificity is shared by all the European countries with a constitutional court that is exclusively responsible for the constitutional review of statute law and other general norms. Nevertheless, this constitutional review was not formally introduced by the constituting power in 1958, which only decided to create a regulatory body of the Parliament's activity based on the new constitutional principles of the division of competences between the legislative and regulatory powers, to benefit the executive branch. Therefore, the French constitutional justice is the result of an empowerment process by the Constitutional Council itself (since the famous decision *Freedom of association* of 16 July 1971),[33] and the constituting power, initiated by the Constitutional Reform Act of 1974,[34] and enforced by the Constitutional Reform Act of 2008 that introduced an *a posteriori* constitutional review procedure (the "Priority Question of Constitutionality " [PQC]) which complemented the initial constitutional review procedure[35] and involved the "normal" courts and the ordinary litigants in the constitutional mechanism.[36] Therefore, it was logical that the principle of independence was not expressly recognized for the Constitutional Council in the provisions of the constitution, and it has still not been specifically affirmed today, even after the PQC. Even though its members and the political authorities considered that independence was deeply linked to its constitutional function,[37] this was not asserted by the Constitutional Council until 2008 (a decision on the constitutional review of the Organic Law issued just before the 50th anniversary of the 1958 Constitution). It declared that "*All provisions of Title VII of the Constitution state that the constituent power is intended to guarantee the independence of the Constitutional Council*".[38] Indeed, a lot of functional and organic guarantees result from these constitutional provisions,[39] supplemented by the Organic Law Act on the Constitutional Council, and even by regulatory measures.[40]

33 Decision no. 71-44 DC of 16.7.1971, Freedom of association (in English), http://www.conseil-constitutionnel.fr.

34 Loi constitutionnelle n° 74-904, 29.10.1974, portant révision de l'article 61 de la Constitution.

35 According to Art. 61-1 C., supplemented by an Organic Law of 2009 "If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State (Conseil d'État) or by the Supreme Court (Cour de Cassation) to the Constitutional Council which shall rule within a fixed period.".

36 See many explanations (in English) about that new procedure, in Priority Preliminary rulings on the issue of constitutionality, http://www.conseil-constitutionnel.fr and also (in French) *E. Cartier*, La QPC, le procès et ses juges.

37 See on that question *J. Thomas*, L'indépendance du Conseil constitutionnel, LGDJ 2011, p. 6, 13.

38 *Conseil constitutionnel*, 2008-566 DC, 9.7.2008, Organic Law relating to the Constitutional Council's archives, (cons. 6), http://www.conseil-constitutionnel.fr.

39 Like the principle of non-removability and non-renewability, and main incompatibilities of its members (with executive or legislative functions), see Art. 56 and 57 C. 58.

40 Decree 59-1292, 13.11.1959 on the obligations of the members of the Constitutional Council.

The Constitutional Council in a recent PQC case about the administrative judges underlined that, under Article 16 of the Declaration of Human and Civic Rights, "The principles of independence and impartiality are inseparable from judicial functions". This general source of the principle of independence appears to also apply to the Constitutional Council today, after the introduction of the PQC in March 2010. The first use of a request for a preliminary ruling to the European Court of Justice in 2013 by the Constitutional council, and its acceptance by the Court was considered as the final step in its recognition as a real constitutional court.[41]

Nevertheless, the problem of the composition of the Council means that the task is not yet complete for the French constitutional justice. The presence of former presidents of the Republic as *ex officio* life members of the Constitutional Council (which should be reformed by the end of 2019), and the appointment procedure that allows politicians to choose members is a factor for dependency and sometimes partiality. Thus, the French transformation is still incomplete and at the midway point compared to other constitutional courts in Europe, especially in Italy and Germany.[42]

Therefore, the special configuration of justice in France, which is the result of its tumultuous history, which despite the real progress made in recent decades, is still littered with contradictions, is not a guarantee for its independence.

cc) Two contradictory views of the legal system

Despite a clear movement towards convergence, both structurally (the judicial architecture) and substantially (the conception of the judge's role, under the influence of the ECHR, which has been partly echoed in the Constitutional Council since 2000), the two orders are still considered to be different parts of the French legal system. This is less and less acceptable to litigants, as well as constitutionally, and from the point of view of the principle of the rule of law. Two concrete examples shall be given here: the first one is the public control of the judiciary. Justice in France is considered to be a public service as well as an expression of sovereignty. As a public service, it appears normal in a democratic system for the judiciary to be controlled at least from the technical point of view. This follows from Article 15 of the Declaration of Human and Civic Rights, which states that *"Society has the right to ask a public official for an account of the official's administration."* Part of this function is performed by the by the HCJ, according to Title VIII, and especially Article 65, whilst other judicial activities, including magistrate activities, are controlled by a special service under authority of the Ministry of Justice: *"L'Inspection Générale des services Judiciaires*" (the General Inspectorate of Judicial Services), which was renamed *"Inspection Générale de la Justice"* (the General Judiciary Inspection) in 2017. The powers of this government department, which was created by an ordinary decree, were recently strengthened by the decree of 5 December 2016. It created the General Judiciary Inspection and increased its scope of competences to the Court of Cassation's activities. This led to angry reactions from the magistrates of the High Court and from French

41 *Conseil constitutionnel*, 2013-314P QPC, 4.4.2013, Jérémy F., http://www.conseil-constitutionnel.fr.

42 *Thomas*, fn. 37, p. 138-139, 186-188, 197-198, 208-209.

legal commentators because of the lack of the guarantees of this department's independence. On the other bank of the Seine in the Palais Royal, the Council of State receives preferential treatment. Indeed, unlike the judicial order, the Council of State controls itself without any direct control by the government or the Minister of Justice. It controls even its own decisions: a double standard for a dual conception of justice and two conceptions of independence![43]

This contradiction and the ensuing controversy in a context of the tension and competition between the Council of State and the Court of Cassation resulted in the Council of State deciding to cancel the controversial decree in a recent case for infringing principle of judicial independence. The decree was cancelled on the basis of this principle. Nevertheless, although the scope to the activities of the Court of Cassation has been curtailed, the control of magistrates' activities was considered to provide sufficient guarantees of their independence and therefore respected the principle of judicial independence.[44]

The second example, following the same paradoxical logic, is the procedure to create codes of conduct for members of both judicial orders. In a 2010 decision the Constitutional Council found that the participation of the Vice-President of the Council of State did not infringe judicial independence, because of the statutory guarantees under the charter of the administrative judges guaranteed their independence from the Vice-President. However, in a 2017 decision, the Constitutional Council found that the participation of the First President of the Court of Cassation infringed this principle: another double standard that demonstrates the asymmetrical and paradoxical approach to justice and its independence in France.

IV. Conclusion

Judicial independence is not an end in itself. It is, in a democratic society, a means to ensure that citizens can protect their rights and liberties, what is as important as the separation of powers. However, the failure of other constitutional mechanisms like the balance of powers, *de facto* paralysed by the principle of majority and the enforcement of executive power in most constitutional systems, means that judicial independence is very important today. In this contemporary context, judicial review and especially constitutional review have become a new way to ensure the balance of powers in our democratic societies, based on another democratic legitimacy, which is different from Parliament (based on the principle of representation): independence.[45] This new configuration needs to be based on new balances that suppose the guarantee of the rule of law without falling into a rule of justice, which would quickly plant the seeds of populist reaction.

Our fundamental purpose in European universities, with our strong common tradition of independence, is now more than ever, to transmit the culture of the rule of law

43 *E. Cartier*, Repenser le dualisme juridictionnel, Les Petites Affiches 2017, p. 3-5.

44 *Conseil d'État*, 23.3.2018, Syndicat Force ouvrière magistrats et autres, http://www.conseil-etat.fr.

45 *P. Rosanvallon*, La légitimité démocratique, 2008.

to make it living and fruitful. Education is the principal key and the main link between freedom of research, while teaching is the second key. Professors and academics, like judges, are also the victims of populist governments, such as we unfortunately have to witness in Turkey (where justice or the so-called "justice" is used against some of our colleagues because of their independence). Maybe this is a little naive, but we must continue to hope, and to practice the rule of law, the philosophical, historical and moral body of principles, amongst which judicial independence is the most essential, and perhaps the most vulnerable.