

ANNA CHODOROWSKA

University of Zielona Góra

ORCID: 0000-0002-9660-4049

e-mail: a.chodorowska@wpa.uz.zgora.pl

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## European Dimension of Constitution of the French Fifth Republic

The relationship between French constitutional law and European Union law is ambiguous. The seemingly occurring hierarchy (at the constitutional and European level) conceals a potential danger of unsolvable normative conflicts<sup>1</sup>.

It could be notice that the treaties, which based the European Communities and then European Union were and should be ratified by the President of the French Republic<sup>2</sup> and ratified or approved only by an Act of Parliament and<sup>3</sup> in accordance with the Art. 54 of the French Constitution the authorization for ratification or approval may not be given before the Constitution has been amended<sup>4</sup>. Furthermore, pursuant to Art.55 of the French Constitutional treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party<sup>5</sup>.

In the French doctrine, it is emphasized that the monistic theory dominates as regards the relationship between international law and domestic law. In truth, it is emphasized that the Constitution<sup>6</sup> is the most important legal act, giving it

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<sup>1</sup> B. Bonnet, "Les rapports entre droit constitutionnel et droit de l'Union européenne, de l'art de l'accommodement raisonnable", Titre VII [online], no. 2, *De l'intégration des ordres juridiques : droit constitutionnel et droit de l'Union européenne*, April 2019, <https://www.conseil-constitutionnel.fr/publications/titre-vii/les-rapports-entre-droit-constitutionnel-et-droit-de-l-union-europeenne-de-l-art-de-l-accommodement> [Accessed on: 20.05.2021].

<sup>2</sup> Art. 52, 53 and 54 of Constitution of October 4, 1958 (the French Constitution), Title VI, On treaties and international agreements.

<sup>3</sup> Art. 53 of the French Constitution.

<sup>4</sup> Art. 54 of the French Constitution. The content of Article 54 as amended by Art. 2 of the Constitutional Act No. 92-554 of June 25, 1992. See more: [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.07.2021].

<sup>5</sup> Art. 55 of the French Constitution.

<sup>6</sup> Constitutional Council, 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Decision No. 2004-505 DC. See also, for example, Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*, Decision

absolute precedence, but by making changes to the constitution itself in conflict situations, it actually in practice gives precedence to international law<sup>7</sup>.

The French Constitution was revised many times since the beginning, but most changes have occurred since 1992, due to ratification of the Maastricht Treaty: Economic and monetary union, European citizens to vote in French municipal elections, common visa policy, French language, organic laws for overseas territories, parliamentary resolutions on community acts<sup>8</sup>. The amendment was intended to ensure compatibility with the EU Treaty<sup>9</sup>.

Since the 1990s, the French Constitution was regularly revised due to the adaptation of EU law, especially to “empower the European integration process and strengthen the control of French legislation over the activities of the European Union”<sup>10</sup>.

The process of integration of EU law through the prism of the constitutional law<sup>11</sup>, has been significantly developed by the jurisprudence of the Constitutional Council, the Council of State and the Court of Cassation<sup>12</sup> and it was depended between 2005–2008 due to the Treaty establishing a Constitution for Europe and the ratification of the Treaty of Lisbon<sup>13</sup>.

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No. 2007-560 DC; Constitutional Council, 3 December 2009, Loi organique relative à l'application de l'article 61-1 de la Constitution, Decision No. 2009-595 DC.

<sup>7</sup> L. Burgorgue-Larsen, P.-V. Astresses, V. Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved*, [in:] A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, 2019, pp. 1218–1219, [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.05.2021]; See also: Court of Cassation, 24 May 1975, Société des cafés Jacques Vabre, No. 73-13556; Council of State, 20 October 1989, Nicolo, No. 108243.

<sup>8</sup> The Maastricht Treaty was ratified in accordance with No. 92-1017 of 24 September 1992 authorizing the ratification of the Maastricht Treaty, itself approved by referendum on September 20, 1992.

<sup>9</sup> Loi constitutionnelle n° 93-952 du 27 Juillet 1993 portant révision de la Constitution du 4 Octobre 1958 et modifiant ses titres VIII, IX, X et XVIII (Constitutional Law, no. 93-952 of 27 July 1993); Journal officiel, 1993-07-28, No. 172, pp. 10600–10601. The changes introduced concerned articles of the French Constitution: 2, 54, 74 and the additional introduction of articles: 88-1, 88-2, 88-3, 88-4.

<sup>10</sup> L. Burgorgue-Larsen, P.-V. Astresses, V. Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved*, [in:] A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, 2019, p. 1190, [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.05.2021].

<sup>11</sup> Court of Cassation, 24 May 1975, Société des cafés Jacques Vabre, No. 73-13556; Council of State, 20 October 1989, Nicolo, No. 108243.

<sup>12</sup> B. Bonnet, “Les rapports entre droit constitutionnel et droit de l'Union européenne, de l'art de l'accommodement raisonnable”, vol. 7 [online], no. 2, *De l'intégration des ordres juridiques : droit constitutionnel et droit de l'Union européenne*, April 2019, <https://www.conseil-constitutionnel.fr/publications/titre-vii/les-rapports-entre-droit-constitutionnel-et-droit-de-l-union-europeenne-de-l-art-de-l-accommodement> [Accessed on: 21.05.2021].

<sup>13</sup> Loi constitutionnelle no. 2008-103 du 4 Février 2008 modifiant le titre XV de la Constitution (Constitutional Law No. 2008-103 of 4 February 2008 modifying Title XV of the Constitution,

Several changes to the French Constitution of 1958 have been made due to influence of EU law. Among the most important amendments to the French Constitution are:

- The Constitutional Law of 25 June 1992 related to the Maastricht Treaty created a new title entitled “On the European Communities and the European Union”, adding Art. 88-1 to 88-4 to the French Constitution<sup>14</sup>;
- The Constitutional Law of 25 November 1993 on international agreements on asylum due to the Schengen Agreement, which added Art. 53-1 to the French Constitution<sup>15</sup>;
- The Constitutional Law of 25 January 1999 on revisions to the ratification of Amsterdam Treaty, changed some provisions of Art. 88-2 and 88-4 and added a second paragraph to Art. 88-2 of the French Constitution<sup>16</sup>;
- Constitutional law of March 25, 2003, on European Arrest – with changes to Art. 88-2 of the French Constitution<sup>17</sup>. Pursuant to this Constitutional Act of 2003, the Article 88-2 of the Constitution is supplemented by a paragraph worded as follows: “The law establishes the rules relating to the European arrest warrant in application of acts taken on the basis of the Treaty on European Union. This Act shall be enforced as state law”<sup>18</sup>;
- The Constitutional law of March 1, 2005<sup>19</sup> related to Revisions for the ratification of the Treaty establishing a Constitution for Europe. This law created Art. 88-5 and amended Art. 88-1 of the Constitution<sup>20</sup>. According to this law, Article 88-1 of the French Constitution is supplemented by a paragraph worded

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Journal officiel, 2008-02-05, n° 30, p. 2202). The Treaty of Lisbon was ratified following Act No. 2008-125 of 13 February 2008 authorizing the ratification of the Treaty of Lisbon amending the Treaty on European Union, the Treaty establishing the European Community and certain related acts Constitutional laws cited.

<sup>14</sup> Loi constitutionnelle no. 92-554 du 25 Juin 1992 ajoutant à la Constitution un titre : “Des Communautés européennes et de l’Union européenne” (Constitutional Law no. 92-554 of June 25, 1992 adding to the Constitution a title: “European Communities and the European Union”).

<sup>15</sup> Loi constitutionnelle no. 93-1256 du 25 Novembre 1993 relative aux accords internationaux en matière de droit d’asile (Constitutional Law No. 93-1256 of November 25, 1993, relating to international agreements on the right of asylum), Journal officiel, 1993-11-26, no. 274, p. 16296.

<sup>16</sup> The Amsterdam Treaty is ratified according to Law No. 99-229 of 23 March 1999 authorizing the ratification of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

<sup>17</sup> Loi constitutionnelle no. 2003-267 du 25 mars 2003 relative au mandat d’arrêt européen (Constitutional Law no. 2003-267 of March 25, 2003, relating to the European arrest warrant).

<sup>18</sup> Art. 88-2 of the French Constitution.

<sup>19</sup> Loi constitutionnelle n° 2005-204 du 1er mars 2005 modifiant le titre XV de la Constitution (Constitutional Law No. 2005-204 of March 1, 2005, amending Title XV of the Constitution).

<sup>20</sup> The Treaty establishing a Constitution for Europe has not been ratified by France after the “nays” won the referendum of May 29, 2005. Thus, amendments to bring the constitution into compliance with the Treaty (Article 3 of the Constitution Act) never entered into force.

as follows: “It may participate in the European Union under the conditions provided for by the Treaty establishing a Constitution for Europe signed on October 29, 2004”<sup>21</sup>;

- The Constitutional Laws of February 4, 2008<sup>22</sup> and July 23, 2008<sup>23</sup>. The amendments to the Constitution ratify the transfer of sovereignty enshrined in the Treaty of Lisbon by direct reference to the text and entered in force with the entry in force of the Treaty of Lisbon December 1, 2009<sup>24</sup>.

One of the significant amendments to the constitution was the change concerning asylum. The decision of the Constitutional Council of 1993<sup>25</sup> concerned the justification of the amendment to the Constitution of November 25, 1993<sup>26</sup>. The amendment limited constitutional asylum, which was related to the Dublin I Regulation, which allowed for the return of a foreigner seeking protection to the safe first country of his stay, without considering his application<sup>27</sup>. According to the Dublin Regulation, the country responsible for examining the application for granting protection was the first, safe EU country in which the refugee was found. Until this amendment, France considered the applications regardless of whether the person seeking protection in France had entered the territory of another Member State of the European Union before<sup>28</sup>. In practice, the implementation of the Dublin Regulation resulted in sending a significant number of asylum-seekers in France to Italy. Introduced by the above-mentioned amendment to the Constitution, Art. 53-1 stated that:

The Republic may conclude with European States bound by identical obligations in the field of asylum and the protection of human rights and fundamental freedoms, agreements defining their mutual competences with regard to the examination of asylum applications submitted to them<sup>29</sup>.

<sup>21</sup> Art. 1 of Constitutional Law No. 2005-204 of March 1, 2005, amending Title XV of the Constitution.

<sup>22</sup> Loi constitutionnelle n° 2008-103 du 4 février 2008 modifiant le titre XV de la Constitution (Constitutional Law No. 2008-103 of 4 February 2008 modifying Title XV of the Constitution).

<sup>23</sup> Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (Constitutional Law No. 2008-724 of 23 July 2008 to modernise institutions of the Fifth Republic).

<sup>24</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2008:115:TOC> [Accessed on: 25.05.2023].

<sup>25</sup> Decision 93-325 dc of 13 August 1993, Act on the control of immigration and conditions of entry, reception and residence for aliens in France. See more: L. Imbert, *Endorsing migration policies in constitutional terms: the case of the french constitutional council*, “European Journal of Legal Studies” 2022, vol. 14 (Special Issue), pp. 63-95.

<sup>26</sup> Convention Dublin I; See more: J-Y. Carlier, *L'Europe...*, p. 253.

<sup>27</sup> The French Constitution, art. 53-1.

<sup>28</sup> Art. 53-1 p. 2 of the French Constitution.

<sup>29</sup> *Ibidem*.

However, this requirement has been somewhat relaxed by adding that the authorities of the Republic always have the right to grant asylum to any foreigner persecuted for his liberty activities or seeking French protection for other reasons<sup>30</sup>.

As far as EU law is concerned, the constitution has been fundamentally changed, usually after the Constitutional Council concluded that the new treaty affects “the basic conditions for the exercise of national sovereignty”<sup>31</sup>.

The issue of constitutional regulation to the European Union<sup>32</sup> are included in the Title XV<sup>33</sup>. Articles 88-1 to 88-7 are devoted to this subject.

In the French doctrine it is emphasized that the French Republic has a monist Constitution with the primacy of internal law. However, it is worth noting that as for the distinction between monism and duality, French doctrine is not entirely uniform<sup>34</sup>. The supremacy of the Constitution in the internal legal order was also reaffirmed by State Council (CE, October 30, 1998, Sarran)<sup>35</sup>.

There was an ongoing discussion in the French doctrine as to the normative nature of Art. 88-1 of the Constitution<sup>36</sup>.

According to the Art. 88-1: “Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007”<sup>37</sup>.

Therefore, it should be noticed the enormous role of the Constitutional Council in the process of interpreting EU law and its impact on national law. Decision

<sup>30</sup> L. Imbert, *Endorsing migration policies in constitutional terms: the case of the french constitutional council*, “European Journal of Legal Studies” 2022, vol. 14 (Special Issue), pp. 63-95.

<sup>31</sup> L. Burgorgue-Larsen, P.-V. Astresses, V. Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved*, [in:] A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, p. 1190, [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.05.2021]. See for ex.: Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l’Union européenne et le traité instituant la Communauté européenne*, Decision No. 2007-560 DC.

<sup>32</sup> The title and articles 88-1-88-7; See: Art. 5 of the Constitutional Act No. 92-554 of June 25, 1992, Art. 1 and 2 of the Constitutional Act No. 99-49 of January 25, 1999, and Constitutional Law No. 2003-267 of March 25, 2003, <http://libr.sejm.gov.pl/tek01/txt/konst/francja.html> [Accessed on: 25.05.2023].

<sup>33</sup> Initially XIV, now XV under Art. 88-1 – 88-7.

<sup>34</sup> <https://static-curis.ku.dk/portal/files/221824449/Krunke2019.pdf>.

<sup>35</sup> <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/conseil-d-etat-assemblee-30-octobre-1998-sarran-et-levacher>, State Council, Assembly, October 30, 1998, Sarran and Levacher.

<sup>36</sup> B. Genevois, *Le Conseil constitutionnel et le droit communautaire dérivé*, RFDA, 2004, p. 653; X. Magnon, *Le chemin communautaire du Conseil constitutionnel: entre ombres et lumière, principe et conséquence de la spécificité constitutionnelle du droit Communautaire*, “Europe” 2004, no. 9.

<sup>37</sup> Art. 88-1 of the French Constitution.

no. 2004-505 DC of Constitutional Council, concerning the Treaty establishing a Constitution for Europe, states that “the treaty establishing a Constitution for Europe of November 19, 2004, enabled the Constitutional Council to find that, pursuant to Article 88-1, European law is incorporated into French law and is separate from international law”<sup>38</sup>.

In accordance with points 10, 11 and 13 of this decision of the Constitutional Council, on the principle of primacy of European Union law, it was stated that “that in fact, it results in particular from its article I-5, relating to relations between the Union and the Member States, that this name has no impact on the existence of the French Constitution and its place at the top of the order internal legal” and “Considering, that under the terms of article 88-1 of the Constitution [...] that the constituent thus established the existence of a community legal order integrated into the internal legal order and distinct from the international legal order”<sup>39</sup>. According to above-mentioned decision:

[...] if Article I-1 of the Treaty replaces the organizations established by previous treaties with a single organization, the European Union, endowed under Article I-7 with legal personality, it appears from all the stipulations of this Treaty, and in particular the approximation of its Articles I-5 and I-6, that it modifies neither the nature of the European Union nor the scope of the principle of primacy of Union law as it results, as ruled by the Constitutional Council in its above-mentioned decisions, of article 88-1 of the Constitution; that, therefore, Article I-6 of the treaty submitted for examination by the Council does not imply a revision of the Constitution<sup>40</sup>.

Thus, the Constitutional Council managed, on the basis of Art. 88-1, to come out of the irresolvable conflict between the primacy of European Union law and the constitutional primacy in order to reconcile these two normative realities in the constitutional rule of the primacy of European Union law, thus preserving both constitutional supremacy (the Constitution remains the source of sources from the point of view of the internal legal order), and the primacy of EU law (to

<sup>38</sup> Decision no. 2004-505 DC, November 19, 2004. See more; L. Burgorgue-Larsen, P.-V. Asstresses, V. Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved*, [in:] A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.05.2021]. See also: Judgements of Court of Cassation in this subject, ex.: Court of Cassation, 24 May 1975, Société des cafés Jacques Vabre, No. 73-13556; Council of State, 20 October 1989, Nicolo, No. 108243. 28 Council of State, 30 October 1998, Sarrazin et Levacher, No. 200286, 200287. 29 Court of Cassation, 2 June 2000, Fraisse, No. 99-60274.

<sup>39</sup> Decision no. 2004-505 DC, November 19, 2004. <https://www.conseil-constitutionnel.fr/decision/2004/2004505DC.htm> [Accessed on: 25.05.2023].

<sup>40</sup> *Ibidem*.



a very limited extent expressed by the provisions inherent in the constitutional identity of France)<sup>41</sup>.

Another key ruling regarding the relationship between national law and EU law was the decision of the Constitutional Council no. 2017-749 DC of July 31, 2017<sup>42</sup>.

In a similar position, based on Art. 88-1 in connection with Art. 55 of the French Constitution, the Council of State commented on the relationship between EU law and the Constitution, for example, in the case of Arcelor<sup>43</sup>.

Formally, as a rule, French law emphasizes the absolute primacy of the Constitution. However, the continuing practice of amending the Constitution rather than abandoning a conflicting international agreement is a sign of the primacy of international (European) law<sup>44</sup>.

In the French doctrine it is up to the monism option of French Constitution, in certain respects, validate a monism with primacy of international law particularly with regard to EU law. It appeared more useful to read the Constitution in the light of the principles resulting from EU law and thus to constitutionalize the obligations resulting from EU law<sup>45</sup>.

It should be concluded that the Constitutional Council and the Council of State have “profoundly renewed the framework of the relationship between constitutional law and derived community law”. It should be noticed, that Art. 88-1 of French Constitution, which now undoubtedly has a normative scope, constitutes “the cornerstone” of their recent jurisprudential development<sup>46</sup>.

<sup>41</sup> <https://www.conseil-constitutionnel.fr/publications/titre-vii/les-rapports-entre-droit-constitutionnel-et-droit-de-l-union-europeenne-de-l-art-de-l-accommodement> [Accessed on: 25.05.2023].

<sup>42</sup> B. Bonnet, *Le Conseil constitutionnel et le CET: Les compétences exclusives de l'UE au prisme des principes inhérents à l'identité constitutionnelle de la France...*, AJDA, no. 35, 2017, p. 2018, decision of the Constitutional Council no. 2017-749 DC of July 31, 2017, <https://www.conseil-constitutionnel.fr/les-decisions/decision-n-2017-749-dc-du-31-juillet-2017-saisine-par-60-deputes> [Accessed on: 25.05.2023].

<sup>43</sup> <https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/les-grandes-decisions-depuis-1873/conseil-d-etat-8-fevrier-2007-societe-arcelor-atlantique-et-lorraine-et-autres>, [Accessed on: 25.05.2023], Council of State, February 8, 2007, Société Arcelor Atlantique et Lorraine and others.

<sup>44</sup> L. Burgorgue-Larsen, P.-V. Astresses, V. Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved*, [in:] A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*. [https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6\\_25.pdf](https://link.springer.com/content/pdf/10.1007/978-94-6265-273-6_25.pdf) [Accessed on: 20.05.2021].

<sup>45</sup> <https://www.conseil-constitutionnel.fr/publications/titre-vii/les-rapports-entre-droit-constitutionnel-et-droit-de-l-union-europeenne-de-l-art-de-l-accommodement> [Accessed on: 25.05.2023].

<sup>46</sup> *Ibidem*. See more: C. Charpy, *Droit constitutionnel et droit communautaire. Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État (Contribution à l'étude des rapports de systèmes constitutionnel et communautaire)*, *Revue française de droit constitutionnel* 2009/3 (n° 79), pp. 621-647, <https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2009-3-page-621.htm> [Accessed on: 25.05.2023].

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## European Dimension of Constitution of the French Fifth Republic

**Summary:** The French doctrine assumes that the Constitution of the Fifth Republic of France is monistic in nature with the primacy of internal law over the EU one. This would mean that constitutional supremacy is indisputable, as everything derives from the constitution, including the authority of EU law in the internal legal order. Thanks to the interpretation of the Constitutional Council, in particular regarding Art. 88-1 of the Constitution, made it possible to overcome a potential conflict between the constitutional norm and EU law, making the primacy of European Union law a constitutional principle.

**Keywords:** EU law, European dimension of constitution, the Constitution of the 5<sup>th</sup> French Republic, the Constitutional Council

## Europejski wymiar Konstytucji V Republiki Francuskiej

**Streszczenie:** W doktrynie francuskiej przyjmuje się, że Konstytucja V Republiki Francji ma charakter monistyczny z prymatem prawa wewnętrznego nad unijnym. Oznaczałoby to, że supremacja konstytucyjna jest bezsporna, gdyż z konstytucji wywodzi się wszystko, w tym w wewnętrznym porządku prawnym autorytet prawa unijnego. Dzięki wykładni Rady Konstytucyjnej, w szczególności w odniesieniu do art. 88-1 Konstytucji, umożliwiła przezwyciężenie potencjalnego konfliktu między normą konstytucyjną a prawem UE, czyniąc prymat prawa Unii Europejskiej zasadą konstytucyjną.

**Słowa kluczowe:** konstytucja V Republiki Francuskiej, Rada Konstytucyjna, prawo unijne, europejski wymiar konstytucji