Developments

Book Review – Martin A. Rogoff's *French Constitutional Law: Cases and Materials* (2010)

[MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS (Carolina Academic Press, 2010); ISBN: 1594606544; 578 pp.; $47.00 Paperback]

By Riccardo de Caria[*]

Many readers will know the French story of someone who once went to the library and asked for a copy of the French constitution, but was told "I'm sorry, we don't keep periodicals!" The joke clearly aims at pointing out the vast number of constitutions that have been adopted in France since 1789: for nearly two centuries, the role of providing stability and unifying force to *la Nation* was instead played by a different legal document, the *Code Civil* of 1804.[1]

French constitutional history has changed dramatically since the entry into force of the present *Constitution*. Originally thought of as a *Constitution* drafted by and for General Charles de Gaulle, the *Constitution* of the Fifth Republic in force since October 1958[2] has transcended its origins and has provided a remarkable framework for allowing different political tendencies, often violently at odds since the Revolution of 1789, to overcome their deep divisions and animosities and to accept each other as legitimate participants in a common political process.

Besides establishing a governmental structure that combines both a strong executive and a parliamentary system (poles between which French governments have oscillated since the Revolution), the *Constitution* of 1958 "constitutionalizes" values associated with different strands of French political tradition: the liberal tradition of the *Déclaration des Droits de l'Homme et du Citoyen de 1789*[3], the social tradition best expressed in the *Préambule de la*

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[1] CODE CIVIL [C. CIV.] (Fr.), available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (last accessed: 16 June 2012).

[2] LA CONSTITUTION (1958), available at: http://www.legifrance.gouv.fr/Droit-francais/Constitution/Constitution-du-4-octobre-1958 (last accessed: 16 June 2012).

[3] *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of the Man and Citizen, 1789), available at: http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789 (last accessed: 16 June 2012).

Constitution du 27 octobre 1946 [4], and the Republican tradition, as embodied in certain laws enacted in the late 19th and early 20th centuries. The 1958 *Constitution* has also provided the framework for the steady growth of the concept and the practical application of the rule of law, understood as judicial oversight of legislative acts based on constitutional standards, thus reversing a long French tradition of the sanctity of "the law" as enacted by Parliament.

Past legal culture and practices persist, however. Implementation of new governmental structures, like the semi-presidential form for government; changed practices, like judicial review, were adopted for the first time in the 1958 *Constitution*, and significantly expanded by amendments in 2008; and a comprehensive set of (often conflicting) values (liberal, social, and Republican) require judicial interpretation, practical construction, accommodation by political actors, and understanding and acceptance by the people. These features, among others, make it particularly critical for the study of French constitutional law to always pay great attention to the political and cultural history of the country.

This is the greatest merit of Martin A. Rogoff's *French Constitutional Law: Cases and Materials*, which is the fruit of several years of work and decades of study of the French legal system by this American scholar (Rogoff is Professor of Law and Director of the French Law Program at the University of Maine School of Law). In addition, and in a genuine Tocquevillean spirit of understanding a foreign legal and political system for the light that it might shed on one's own system, Rogoff's presentation of French constitutional law is geared to an American audience. He looks at it with the eye of the American observer, and makes frequent comparative references.

The very structure of the book is particularly notable, since the subject is presented in a way that is compatible with the American way of looking at law, with its focus on the most important cases of French constitutional law and documents of French constitutional history and jurisprudence necessary to place those decisions in their historical, political, and cultural context. This method is based on the common law approach to the study of law, which looks in detail to what decision makers actually do and deemphasizes systematic theory and doctrine. The method employed in the book provides a unique picture of French constitutional law in all its nuance and complexity. The book also devotes special attention to aspects of French constitutional law which differ from the other national models: notably, the traditional hostility of French doctrine to judicial review, concern for the "indivisibility" (centralization) of the Republic (as opposed to federalism along American or German lines), the centrality and strict application of the concept of

[4] *Préambule de la Constitution* (Preamble to the Constitution, 1946), available at: http://www.legifrance.gouv.fr/Droit-francais/Constitution/Preambule-de-la-Constitution-du-27-octobre-1946 (last accessed: 16 June 2012).

equality, the importance of secularism (*la laïcité*), and the constitutional commitment to the "social Republic."

Rogoff's book is also particularly useful for English readers who cannot access these materials in the original French. These readers will find in this book a valuable resource to get to the heart of the often unwritten assumptions, conceptions, and mechanisms that govern French law and its evolution: indeed the editor presents in English translation many cases, documents, and other materials that were previously available only in the original French version. The book deals extensively with the innovations brought about by the aforementioned constitutional amendments enacted in July 2008, which modified many Articles of the *Constitution* and added several new ones. Of utmost importance was the revolutionary adoption of a system of *ex post* judicial review, the so called *question prioritaire de constitutionnalité*, or *QPC*, namely the procedure that allows to challenge a law of the Parliament after its entry into force. Its adoption in 2008 was a complete change of paradigm because it had never been possible until then for a judicial body to strike down a law approved by the representatives of the people: after all, as Article 6 of the *Déclaration des Droits de l'Homme et du Citoyen* famously recites, "The Law is the expression of the general will,"[5] and letting a few judges undo the general will had always been taboo since the revolution. From Rogoff's book it is very clear how this change is bound to reshape the French model of democracy.

Chapter One introduces the reader to the "French model" of constitutionalism, which, historically and philosophically, is significantly different from the American model. Rogoff provides materials to allow the reader to reflect on the utility and methodology of the comparative study of constitutional systems, such as excerpts from Bruce Ackerman's classical article *The Rise of World Constitutionalism*.[6] The rest of the book provides strong evidence that the challenge of studying a foreign legal system, and comparing its most fundamental features to the key principles of one's own, can actually be won. Of course, this requires a deep knowledge of the "legal culture" of the systems that are compared. Rogoff's inclusion of excerpts from the writings and speeches of French philosophers and legal thinkers (*la doctrine*) and of historical documents provides the reader with the necessary materials to understand the key aspects of the French legal system and the way French jurists think.

Chapter Two presents the in detail materials to explore the structure and functioning of the government established by the 1958 *Constitution*.[7] Chapter Three is devoted to the role and the jurisprudence of the Constitutional Council. The editor draws attention to two

[5] *Déclaration*, *supra* note 3.

[6] Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VIR. L. REV. 771 (1997).

[7] LA CONSTITUTION, *supra* note 2.

seminal events in the 1970s. The first is the 1971 decision of the Constitutional Council in the *Liberté d'association* (*Freedom of Association*) case[8], in which the Council held that the *Préambule de la Constitution du 27 octobre 1946*[9] was legally operative and could be applied by the Council in determining whether or not a law referred to it conformed to the *Constitution*. In turn, the *Préambule* referred both to the *Déclaration des Droits de l'Homme et du Citoyen de 1789*[10] and the *Préambule de la Constitution du 27 octobre 1946*[11], the latter in turn made reference to the "fundamental principles recognized by the laws of the Republic." Giving constitutional status to these materials meant that judicial review in France henceforth involved the assessment of the compatibility of ordinary laws with civil and political rights protected by the *Déclaration des Droits de l'Homme et du Citoyen de 1789*[12], the economic and social rights protected by the *Préambule de la Constitution du 27 octobre 1946*[13], and the republican values of the Third Republic. The other crucial development came three years later, with the 1974 constitutional amendment that allowed a parliamentary minority (sixty deputies or sixty senators) to refer a question of constitutionality to the Council. This afforded the political opposition a formidable political instrument which came to be used more and more, contributing to transform the Council into a crucial institution in the day-to-day development of the legal and political system.

This trend has now been further strengthened by the 2008 amendments. As mentioned, the documents contained in Rogoff's book introduce the QPC and allow the reader to think about its implications for the role of the Constitutional Council and for constitutionalism in France more generally.

Chapter Four provides materials for an extensive consideration of "Republican Principles", or those values that enjoy constitutional status and which give substance and content to *la République* itself. For instance, the materials on secularism (*la laïcité*) (pp. 336-59) help us to understand the strong feelings of many French people for keeping religious institutions and religion more generally separate from the operations of the state, and the roots of such controversial measures as the 2004 law forbidding the wearing of conspicuous religious symbols in schools or the 2010 law banning the full-face veil in public.

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[8] Liberté d'association (Freedom of Association), CC decision no. 71-44DC, Jul. 16, 1971, Rec. 29.

[9] *Préambule*, *supra* note 4.

[10] *Déclaration*, *supra* note 3.

[11] *Préambule*, *supra* note 4.

[12] *Déclaration*, *supra* note 3.

[13] *Préambule*, *supra* note 4.

Another interesting theme is the way French constitutional history has posed obstacles to the protection of minority rights, to assisting disadvantaged groups and persons, and to political and administrative decentralization. The Revolution and the subsequent French law strongly embraced the principle of the indivisibility of *la République* (pp. 359-76) and also that of strict legal equality (pp. 313 and ff.). These principles led to difficulty in legislating in favor of discrete groups, be they linguistic minorities or the economically disadvantaged. Although these principles have not prevented France from eventually acknowledging that "Regional languages are part of France's heritage"[14], or from passing a law on the "enforceable right to housing"[15], or more generally from implementing a full-fledged welfare state, they have created constitutional barriers to implementing affirmative action policies for women and for the economically and socially disadvantaged (pp. 333-6).

For instance, even after the approval of the new Article 75-1, France has not yet ratified the 1992 *European Charter for Regional or Minority Languages*[16] (to which it signed on only in 1999), finding it difficult to reconcile its provisions with the strong statement in the current first paragraph of Article 2 that "The language of the Republic shall be French" (a provision added by the constitutional law no. 92-554 of 25 June 1992, ratifying the Maastricht Treaty, only a few months before the signature of the *European Charter for Regional or Minority Languages*).[17]

Another example can be found in the policies to increase the number of female representatives in political bodies (pp. 324-9): in 1982, the Constitutional Council struck down[18] a law to promote equality of women on municipal councils[19], even though the law

[14] Created by *LOI constitutionnelle* no. 2008-724 (Jul. 20, 2008) as part of the 2008 reforms, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256 (last accessed: 16 June 2012); LA CONSTITUTION (1958), *supra*note 2, art. 75-1." [I believe LA CONSTITUTION is in small capital, with a capital C]

[15] Law. No. 2007-290 of Mar. 5, 2007, *Instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale* (Establishing the right to housing and various measures to promote social cohesion), May 14, 2009, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000271094 (last accessed: 16 June 2012).

[16] European Charter for Regional or Minority Languages, May 11, 1992, C.E.T.S. 148.

[17] This paragraph was originally the second of Article 2, but it became the first one pursuant to the amendment brought about by LOI constitutionnelle n° 95-880, Art. 8 (Aug. 4, 1995), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000188958&dateTexte=&categorieLien=id (last accessed: 16 June 2012); LA CONSTITUTION (1958), *supra* note 2, art. 2 (last accessed: 16 June 2012).

[18] CC decision no. 82-146DC, Nov. 18, 1982, Rec. 66.

[19] *Modifiant le code électoral et le code des communes relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales* (amending the electoral code and the code of municipalities relative to the election of the municipal councilors and to the condition for including the French people established outside France in the electoral lists

was approved by a vote of 476-4-3 by the National Assembly; at the beginning of 1999, it reached the same conclusion[20] with regard to regional elections.[21] On both occasions, the Council held that treating men and women differently by favoring women violated the principle of equality. The Constitution had then to be amended later in 1999 to allow Parliament to "promote equal access by women and men to elective offices and posts"[22], for the Council to uphold in 2000 a new set of measures meant to promote women's representation.[23]

But in 2001, the Council struck down[24] a new law designed to favor women in elections among judges for representation in the High Council of the Judiciary[25], on the grounds that this was not an elective office or post, and in 2006 it did the same[26] with a law favoring women in elections to boards of directors of private companies[27], again interpreting "equality" strictly. The *Constitution* was then amended again (with the 2008 reform) to extend Parliament's power to promote equality of women and men "to professional and social positions."[28]

Law. No. 82-74 of Nov. 19, 1982, http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000880397 (last accessed: 16 June 2012).

[20] CC decision no. 98-407DC, Jan. 14, 1999, Rec. 21.

[21] Law. No. 99-36 of Jan. 20, 1999, *Relative au mode d'élection des conseillers régionaux et des conseillers à l'Assemblée de Corse et au fonctionnement des conseils régionaux* (On the mode of election of regional councilors and advisors to the Corsican Assembly and operation of regional councils), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000759094 (last accessed: 16 June 2012).

[22] Created by LOI constitutionnelle n° 2008-724, Art. 1 (Jul. 23, 2008); LA CONSTITUTION (1958), art. 1, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194 (last accessed: 16 June 2012).

[23] Law No. 2000-493 of June 6, 2000, *tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives* (for the promotion of equal access of women and men to elective offices and posts), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000400185&fastPos=1&fastReqId=1005812508&categorieLien=id&oldAction=rechTexte (last accessed: 16 June 2012).

[24] CC decision no. 2000-429DC, May 30, 2000, Rec. 84.

[25] LOI organique n° 2001-539 Jun. 25, 2001, *Relative au statut des magistrats et au Conseil supérieur de la magistratur* (Relating to the Status of Judges and the Council of the Judiciary), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005631106 (last accessed: 16 June 2012).

[26] CC decision no. 2006-533DC, Mar. 16, 2006, Rec. 39.

[27] Law. No. 2006-340 of Mar. 23, 2006, *Relative à l'égalité salariale entre les femmes et les hommes)*(On equal pay between women and men (1)), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000816849 (last accessed: 16 June 2012).

[28] LA CONSTITUTION, *supra* note 2, art. 1.

Therefore, while the French have managed to adopt some affirmative action policies, the legal hurdles have been significant, and it was necessary to amend the *Constitution* twice with two specifically-crafted changes to the original *Constitution* of 1958. To understand the difficulties, like the ones just mentioned, that French judges have with almost any sort of differentiation by law between people (pp. 266-79, 313 and ff.), it is necessary to understand the critical importance the French attribute to legal equality, dating back to the writing of Jean-Jacques Rousseau and to the Revolution of 1789. Rogoff's book offers very helpful materials in making one's way into such a body of literature (on top of excerpts from *The Social Contract*, pp. 168-75, others from a scholarly article comparing the American and French views on equality, pp. 314-5, but also the more general writings included in the previous chapters, among which classics like Descartes's *Discourse on Method*, pp. 11-13, and Montesquieu's *The Spirit of Laws*, pp. 35-7).

The relationship between French law and European and international law is the subject of Chapter Five. This part is again useful to better understand, in retrospective, some choices that France made within the last decades, and that have had a major influence on European integration and geopolitics more generally: for instance, the decision not to participate in the European Defense Community in 1954 (after first having proposed it in order to counteract American plans to allow Western Germany to rearm), the "empty chair" crisis of President De Gaulle, and more recently two resounding French "NOs" – NO to the American war in Iraq and NO to the ratification of the European constitution in 2005. The materials in the book on the notion of sovereignty, first elaborated by Jean Bodin, and the cases excerpted by Rogoff, help us make sense of such choices from the French perspective, greatly enhancing our level of understanding of the internal dynamics of the French political system.

Scholarly works on a foreign system fulfill their goal if they bring us closer to understanding how that system works, and what are the unwritten guiding principles that govern it. Rogoff's book does that. But it arguably does something more, which is more uncommon: it also tells the French something they themselves may not be fully aware of, by inquiring into their system using a comparative method of analysis. In a somehow similar vein, more than one century ago, the Austro-German scholar Georg Jellinek, in his 1895 work on *The Declaration of the Rights of Man and the Citizen*, presented his interpretation of the historical origins of that document, which contrasted with the one generally accepted by French scholars at the time.[29] But Jellinek's thesis that the origins of the *Déclaration des Droits de l'Homme et du Citoyen de 1789* had to be traced back to the individual bills of rights from American states, rather than to Rousseau's *Social Contract*, was proven right by subsequent studies, demonstrating how a foreign observer can sometimes see more deeply than domestic scholars who are often impeded by their own cultural and political assumptions and attitudes. The book here under review is arguably another such example.

[29] GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS: A CONTRIBUTION TO MODERN CONSTITUTIONAL HISTORY (1901).