Constitutional asylum in France

One unexpected side-effect of the French constitutional reform of November 1993 -and which was then seen as restrictive - is that the constitutional asylum it recognised now looks like a step forward. More than fifty rulings handed down by the CNDA or the CRR illustrate this shift. Since the constitution of June 1793 - which never actually came into force - the right of asylum has eventually acquired a constitutional basis. Although, in between, the preamble to the constitution of 27th October 1946 offered a strong, emblematic reminder, enshrined in constitutional texts just after the greatest war in history, its specific nature has never been clear for jurists and asylum law practitioners since no special legal scheme distinguishes it from conventional asylum (same implementation authorities, similar effect on the right to residence). And this in turn raises questions about the actual scope or meaning of this constitutional asylum. Is this the asylum "top prize" or rather an additional means of affording the "conventional" protection offered by the Geneva Convention of 28th July 1951, or was it even a subsidiary means of protection, before subsidiary protection itself came into force, as has been the case since 1st January 2004?

I) The constitutional foundations of the right of asylum in France and the 1993 crisis

1) The constitutional foundations of the right of asylum

Before the full recognition of the right of constitutional asylum, some authors did claim that the right of asylum had constitutional roots in France[1]. Professor Moderne found them in article 120 of the constitution of 24th June 1793 and in the preamble to the constitution of 27th October 1946 (paragraph 4).Pursuant to Article 120 of the 1793 Constitution: "the French people gives asylum to foreigners who, in the name of liberty, are banished from their homelands, and refuse it to tyrants." Paragraph 4 of the constitution of 27th October 1946 reads as follow: "Any man persecuted in virtue of his actions in favour of liberty has a right to asylum within the territories of the Republic." Still, the road from this asserted principle to its judicial and effective implementation was a long and winding one. As a matter of fact, during a long time, the mere reference to this "right of asylum" in the 1946 preamble in which was considered as too vague to be binding upon the legislature, government, courts and other authorities. An example of this legal conception may be found in a ruling handed down by the Council of State on 27th September 1985, France Terre d'Asile, in which the High Court considers that " sufficient precision not being provided, the principle established by the Preamble of the constitution of 1946, to which the constitution of 4th October 1958 refers, is only binding upon the regulatory authority under the conditions and limits set out by the provisions contained in laws or in international agreements contained in laws or in agreements incorporated into French law" concluding that the plaintiff associations cannot relevantly claim the independent benefit of the aforesaid provisions".

[1] See Franck Moderne, "*Les aspects constitutionnels du droit d'asile*" (The constitutional aspects of the right of asylum) in **The minutes of the symposium** held on 11th 13th June 1992, *Les réfugiés en France et en Europe, quarante ans d'application de la Convention de Genève 1952-1992 (Refugees in France and Europe, forty years of the application of the 1952-1992 Geneva Convention);*

2) The right of asylum enshrined as a positive constitutional right

However, the constitutional council has gradually recognized a constitutional principle of the right of asylum. Ruling no. 92-307 of 25th February 1992 clearly underlines the fact that the right of asylum is one of the "principles of constitutional value". This brought France along the general logic of the constitutions of democratic States in Europe, as illustrate article 16, paragraph 2 of the German constitution of 23rd May 1949, article 10, paragraph 3 of the Italian constitution of 27th December 1947, article 13, paragraph 3 of the Spanish one and article 33-6 of the constitution of 2nd April 1976 in Portugal.
The ruling of 13th August 1993 finally established the constitutional value of the right of asylum as "a fundamental right" implying that the asylum seeker was granted a provisional right of residence.

This important ruling was to lead to a constitutional revision (constitutional act of 25th November 1993) in order to conciliate France's obligations under the Shengen and Dublin agreements and the effectiveness of this fundamental right. Article 53-1 of the current constitution now states:
"The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them.
However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any Foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds."

It will be noted that this wording reverses the terms of the 4th paragraph of the 1946 Preamble: from a personal right, the right of asylum becomes a State right. This constitutional right which had been preserved but had only a reduced autonomy from the Geneva Convention sees its specific nature affirmed at last in the Aliens Act of 11th May 1998, where recognition of the refugee status is granted to *"any person who is persecuted as a result of striving for freedom"*. As a result, the 1946 constitutional definition is placed on the same level as the 1951 refugee definition (as well as the definition contained in articles 6 and 7 of UNHCR's statute). The three different sources entail recognition of refugee status according to the Geneva Convention and the rights attached to this status in French legislation.

The purpose of the 1998 Aliens act (later codified in article L.711-1 of the current Code of entry and residence of aliens and of the right of asylum) was, amongst other things, to allow "freedom fighters" to be recognized as refugees, even when the persecution they suffered was neither encouraged or deliberately tolerated by the established authorities[2]. But, irrespective of the legal basis of this status (constitutional or conventional), the procedure is the same and is implemented by the same authorities or courts, i.e. the OFPRA and the CNDA (Cour Nationale Du Droit D'Asile – National Court of the Right of Asylum).
Since then, the recognition of the right of asylum has become a traditional formula in French constitutional case law as can be seen in the ruling handed down by the Constitutional Council on 4th December 2003, which borrowed the grounds used in the 13th August 1993 Act, i.e. that "although certain guarantees attached to this right were granted by domesticated

[2] Until implementation of the Qualification Directive, France favoured the "accountability" or state persecution approach in its reading of Geneva Refugee Convention provisions. As a result, persons persecuted by non-state agents, were considered as falling outside the scope of the 1951 Convention.

international agreements it is up to the legislature to ensure that all of the legal guarantees included in this constitutional requirement are provided under all circumstances".

II) French CRR/CNDA case law since 1998

Since the enforcement of 11th May 1998 Act nearly 60 decisions of the CRR or the Cour Nationale du Droit d'Asile, have granted the refugee status on this constitutional basis. It is interesting to note that while the number of court rulings granting constitutional asylum in France is relatively modest compared to Italy (200 between 1948 and 2007) and above all Germany (thousands during the period from 1949 to 1993), the right of asylum has been constitutionally sanctioned in France on the precise year, 1993, when it started decreasing in importance in Germany and when both countries passed acts designed to restrict right of asylum in the light and under the influence of the Schengen and Dublin agreements.

An outside observer might note that, from a geographical point of view, French constitutional asylum case law tallies with changes in the map of major conflicts or geopolitical upheavals. Setting aside a few cases relating to Albania or Kosovo, cases will move from Algeria from 1998 to 2003 to the Afghanistan/Pakistan or Bangladesh area for the following period, 2003 to 2011. If we include Sri Lankan[3] cases, the former British Indian Empire and its external frontiers is well represented in "constitutional" cases. Furthermore, with the exception of the Sri Lankan cases mentioned here, these are often "Islamic" cases in the sense that the developments of the Islamic world and the struggles, conflicts or wars which tear this area all involve various options about the type(s) of religion or relations between religion and politics.

1) 1998-2003: constitutional asylum protects the civilian victims of the Algerian conflict

In 1998-2004, there were many "Algerian" cases relating to fall-out from the Algerian civil war and some of them led to the granting of constitutional asylum, in most cases to people under threat from Islamists. Radical opposition to Islamist groups in the Kabylie region, especially amongst active members of the RND (Rassemblement National Démocratique - National Democratic Rally), a party which is highly influential in Kabylie and looked upon with suspicion by the Algerian authorities, was thus the archetypal situation which at the time was considered as worthy of constitutional asylum[4]. This is one of the most secular of all the Algerian parties: the situation of the Kabyles, who speak a separate language, are reluctant to bow to the authorities in Algiers, have a reputation as Francophiles and French-speakers, in spite of the exceptional role several of them played in the foundation of the FLN, probably tallies with what a French asylum judge sees as desirable, combining feelings of attachment to a secular republic and the defence of a religious, linguistic or political minority.

[3] Two cases in 2010, No. 635454/08015920, *Miss Darshani Lilyana ArachChige*, 4/2/2010 and Mr Masleh Wijenaryana, 090135815, 2nd April 2010 and one in 2008, No. 59787, Mr *Sumith Jayana Dia*s, 5/6:2008: a television journalist fighting corruption; these cases related to men;

[4]CRR, 25/10/2001, no. 362495, Benati and 28/2/2001, no. 368193, *Amamrkkhodja*;

2) <u>Constitutional asylum protects women campaigners who fall victims to Islamists, especially in Afghanistan</u>

We note that many cases - especially after 2005 - relate to women rebelling against a more or less "Islamist" and patriarchal environment, amongst other things involving violence against women. One characteristic example is the case of *Miss Nassima Saadate* (no. 569511, 19/12006) an Afghan national of Pashtun origin, who was a "well-off, educated" woman living in the town of Nangarhar. She had been a member of a movement called *Rawa*, in the city of Jalalabad since the age of 20 and had played an active role in disseminating her organisation's ideology there. The ruling notes that *Miss Nassima Saadate* "became a target for both fundamentalists and the government, especially after having taken part in a demonstration in October 2004 condemning the attempted rape of a presidential candidate, which she considered to be a deliberate, considered action against women". The judgement notes that the authorities" harassed her, that she was exposed to sentences due to a pregnancy outside marriage and that, in spite of complaining to the United Nations office in Jalalabad, it failed to protect her. Here we have all the ingredients of a constitutional asylum worthy of "freedom fighters", i.e. powerful political activism at a young age, private behaviour out of step with dominant standards of decency, which we find, for instance, among campaigners against female circumcision in Mauritania[5] or against forced marriage[6], a repressive, hostile attitude from part of the oppressive society and the political authorities, at least at local level, and the impossibility of finding international protection *in situ*. A similar but more recent type of case[7], involved a Christian woman from Pakistan who was an active member of a number of humanitarian organisations who, "given her humanitarian commitment", was deemed to have been "persecuted due to her work campaigning for freedom". This "humanitarian" or "community" commitment"[8], especially when the case relates to persecution suffered due to action by Islamists - or supposedly so – against a woman, is gradually becoming a usual basis for constitutional asylum in France.

<u>3) Constitutional asylum protects active opponents from an elite background</u>

Other cases which have led to the granting of constitutional asylum, including the few Sri Lankan cases already mentioned, relate to individuals, usually men, occupying influential positions (journalists, magistrates, soldiers), who have broken off relations with their superiors or the powers-that-be by refusing to be complicit in censorship, torture or corruption which they were asked to get involved with, on the edges of the former Communist countries or the current "emerging" countries with authoritarian governments. For instance, the case of a Colombian magistrate forced to flee from the FARC because he was not protected by his State and considered as a "freedom fighter[9]", a Belorussian journalist campaigning for "democracy, human rights and the rights of political prisoners"[10], a politician from Kosovo who refused to become involved with the interethnic violence and was harassed by both his

5 15/10:2008, Mrs Bidia Gandega, 15/10:2008
6 No. 581868, Mrs Fatoumata Binta Sow, 14/3/2008: a campaigner against forced marriage in Guinea
7 Case no. 08004234, Miss Nazir Bushra, 1/9:2010
8 For instance, see no. 6466616, *Miss Mili Chowdhury*, 27/10/2009:
9 Case No. 602336, Mrs Clara Hermina Herndez Martinez, married name Lachman Copans, 25/2/2008
10 Mr Dimitry Ponomarenko, 22/7/2008, no. 6062293;

former political friends and his enemies[11], a Chechen who had helped foreign journalists do their jobs by putting them in touch with rebels[12], a journalist from Algerian television who agreed to the singing of a song by Enrico Macias, perceived as a Jew, a pied-noir and pro-Israeli, on Algerian television[13], a Sri Lankan soldier who refused to remain silent and get involved with torture[14], a Chadian artist who showed a commitment "to peace, criticism of the current regime, defence of deprived people and improving the social conditions of the population"[15].

III) Specificities of Constitutional Asylum

As we have seen, the right of asylum is part of French constitutional tradition (article 120 of the 1793 constitution), and, as we have mentioned, both Italy and Germany have also made constitutional asylum part of their constitutions (article 10. 3 of the 1948 Italian constitution and article 16 of the 1949 German constitution). However, the definitions of those constitutional asylums do differ a lot. In Italy, for instance the constitution does not require a fear of persecution, in Germany, the text of the constitution refers to political persecution, whereas in France, the standard reference is to "freedom fighters". Besides, the historical evolution of the asylum question in each of these countries has created very specific conditions for their own form of constitutional asylum[16]. We will limit ourselves here to the description of its main characteristics according to French judicial practice.

French constitutional law has a number of specific features. First of all - and in any case since 1993 - it is both a subjective right of the asylum seeker and a right of the State to grant refugee status. Secondly, the constitutional asylum beneficiary must be involved in freedom fighting and be persecuted for that reason. Its scope is thus, *rationae materiae*, of a more restricted nature than the "conventional" protection afforded by the Geneva Convention, which only requires to be grounds to fear being persecuted for the five reasons set out in the Convention even if nothing particular has been done to attract persecution. The fact that we have to interpret the Convention grounds according to the imputed characteristics theory can only make this difference wider.
In other words, the asylum seekers protected by the Geneva Convention are often actual or potential victims not so much of their actual opinions or actions but rather of those attributed to them because of their objective belonging to such or such human group, whereas the French constitutional asylum is aimed at people playing an active part in their political destinies. **In an age of victims, "freedom fighters" pose as active participants.**

Another difference is that constitutional asylum does not involve any limitation such as a time limit in the event of a change in the situation in the country of origin (article 1 C of the Geneva Convention), or even though the exclusion of "tyrants" (in 1793) and, due to recent anti-terrorist legislation, the case of "terrorists", is indeed an exclusion or a limitation of the scope of constitutional asylum. Constitutional asylum is therefore more restricted *rationae materiae* than conventional asylum but is potentially larger r*ationare temporis*, i.e. a "freedom

11 Mr Skender Hoti, No. 6233667, 26/2/2009;
12 No. 629612 , 2/7/2009, Mr Rusan Viskhaev,
13 No. 475316, Mr Rachid Bellache, 2:7:2004;
14 Mr Masleh Wijenaryana, 090135815, 2nd April 2010
15 No. 452931, Mr Abdallah Abdel Moustalib, 25/5/2004:
16 See: "C*omparative perspectives of constitutional asylum in France, Italy and Germany, Resquiescat in Pace?"* Hélène Lambert, Fransesco Mesineo and Paul Tiedemann, Refugee Survey Quarterly, volume 27, no 3., Oxford, 2008;

fighter" does not lose his or her status due to any improvement in the situation in relation to freedoms in his or her country of origin.
However, since the 11th May 1998 Act, those subtle distinctions in scope have had only limited effects. The procedural schemes for the types of asylum have been unified and the OFPRA (French Office for the Protection of Refugees and Stateless Persons) doesn't even specify in its decisions whether asylum is granted on the basis of the French constitution or the Geneva Convention.
It is presently the exclusive privilege of the asylum judge to expressly make this distinction and to rule on the substance of what is constitutional asylum. The scarce number of decisions based on this ground doesn't preclude future developments and the examples given show a genuine affirmation of this type of asylum. In French judicial practice, constitutional asylum keeps a high symbolic value. By choosing to grant refugee status on the constitutional ground, the asylum judge wishes to prize courageous actions as well as to express his adhesion to principles deeply rooted in the universalistic ideals lying at the core of the asylum idea.

Martine Denis-Linton
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