

The Greening of the French Constitution – The Constitutional Act of 1 March 2005 on the 2004 Environmental Charter¹

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Promised by President Chirac during the 2002 campaign for the Presidential elections, the Environmental Charter has become the third pillar of the French 1958 Constitution, along side the 1789 Declaration of the Rights of Man and the Citizen and the Declaration of Economic and Social Rights as incorporated in the Preamble of the 1946 Constitution.

In his speech of 3 May 2001 in Orléans, President Chirac defined the stakes and significance of the proposed Charter. He notably stated that,

“(t)he right to a protected and preserved environment must be regarded as equal to civil liberties. It is for the State to lay down and guarantee this principle. And I wish that this public and solemn commitment be enshrined by Parliament into an environmental Charter attached to² the Constitution and which would establish fundamental principles (...)”.

Following this presidential initiative, Mrs Bachelot Narquin, the then Minister of Ecology and Sustainable Development instructed Professor Yves Coppens³ to preside over a commission, the mission of which was to analyse the economic, legal, social and environmental stakes of the proposed Charter and, on the basis of this analysis, to draft the Charter⁴.

Since its passing by both Houses of Parliament, everyone living in France “...has the right to live in an environment which is balanced and respectful of health” (Article 1).

As part of the French “*bloc de constitutionnalité*” (the block of constitutional provisions), the Charter has now become a new legal reference for the French legislator. The Charter provisions will be protected, interpreted and enforced by the Constitutional Court as well as the administrative and ordinary courts. It will apply to all persons, natural and legal, private and public and will be used as an instrument for interpretation of all international environmental treaties and conventions signed by France.

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² The term used in French is “adossé à la Constitution”. This is a rather strange and unfortunate terminology. Literally, this means that the Charter and the Constitution are back to back.

³ Yves Coppens is a paleontologist and professor at the Collège de France.

⁴ See Rapport de la Commission Coppens de Préparation de la Charte de l’Environnement (8 April 2003) (the Coppens report),

http://www.charte.environnement.gouv.fr/UPLOAD/images/157_466_rapport_coppens.pdf.

Following an analysis of the reasons underlying the adoption of the Charter, its content, its significance and effectiveness are respectively discussed.

1. Reasons for adopting an Environmental Charter

In her letter to Professor Yves Coppens, Mrs Bachelot Narquin, stated that “France has already made commitments, at international and European levels, in a number of conventions and treaties, in favour of a sustainable development which bring together in a balanced way economic, social and environmental objectives. Our national law contains numerous technical norms that contribute to the protection of the environment. But a pervasive dimension and the establishment of superior fundamental principles are lacking. It is now time to give constitutional value to principles that we want to establish so that they become imperative for all.”

1.1 The awareness of the global threat to the environment

1.1.1 The need to respond to and address the concerns of the civil society

It is undeniable that, in environmental matters, public opinion is exercising an increasing pressure on elected and non-elected decision-making bodies at international as well as domestic levels, notably through environmental associations or pressure groups, the role and influence of which over legislative and legal changes are more effective and proactive than that of political parties.

In France, there are between 10,000 and 40,000 environmental associations or groups⁵. This clearly reflects the interest that the general public has in environmental matters and its general and growing awareness of the new environmental challenges that mankind is faced with in the 21st century. The general public expect and demand an appropriate response to those challenges.

As a result of this interest in the environment, a nation-wide consultation process was conducted by way of a questionnaire sent to 55,000 regional representatives and the setting up of 14 regional conferences, 4 of which took place in French overseas territories⁶. The consultation process simply confirmed that the majority of those questioned were favourable to the proposed environmental Charter, thus clearly showing their acute awareness of the need for a major form of action to protect the environment⁷.

1.1.2 Bringing French law in line with foreign models of environmental protection

While, at international level, France has actively participated in the development of environmental protection, she was lagging behind many European⁸ and non-

⁵ See M. Prieur, *Manuel de Droit de l'Environnement* (5th ed., 2004, Dalloz, Paris) at 119.

⁶ On the consultation process and its results, see http://www.ecologie.gouv.fr/article.php3?id_article=3680

⁷ See the Coppens report, (n 4) at 14.

⁸ See Art. 20a of the German Constitution, Arts. 45 and 53 of the Spanish Constitution, Art. 24 of the Greek Constitution, Arts. 9, 32 and 41 of the Italian Constitution, Art. 21 of the Dutch Constitution, Art. 64 and 66 of the Portuguese Constitution and Art. 2 of the Swedish Constitution.

European⁹ countries whose constitutions have recognised a right to the environment since the 1970s or 1980s.

These constitutions either recognise a right to the environment backed by a duty to protect and preserve it¹⁰, or complement this general principle with more specific provisions which reflect their specific physical and geographical characteristics¹¹.

The adoption of the environmental Charter, and its incorporation into the French Constitution, elevate to constitutional level not only the right to the environment and its protection but also a whole elaborate set of principles of environmental law. In this way the French approach appears to be unique and more ambitious.

1.2 The necessary completion of French environmental law

1.2.1 The insufficiencies of French environmental law

French environmental law can be traced back as far as 1810 and 1830 and has developed into a complex body of laws since the mid-1970s¹² culminating into its codification in 2000¹³. However, the lack of reference to environmental protection in the Constitution was made all the more noticeable as environmental issues have been addressed in international and European laws.

However, despite these developments, French environmental law had two major drawbacks. Firstly none of the environmental law principles occupy the place they hold politically in the legal hierarchy of norms. While the French Constitutional Court had ruled in its decision of 27 December 2002¹⁴ that environmental protection is an objective pursued in the general interest, it did not elevate it to a principle of constitutional force. As a result, any legislation on environmental protection could be reversed by subsequent Acts of Parliament subject, of course, to France's international and European legal obligations. Furthermore, when reviewing the constitutionality of legislation under Article 61 of the Constitution, the French constitutional Court could not give the principle of environmental protection the same weight as that given to other principles or rights, such as the right to property, free movement, freedom of commerce and industry, etc.

Secondly, because environmental principles had not been sufficiently defined in legislation, their interpretation was wide open to the discretion of the French administrative courts, which could potentially undermine legal certainty¹⁵.

⁹ See Arts. 41 and 43 of the Argentinian Constitution, Art. 225 of the Brazilian Constitution and Art. 19(2) of the Ecuadorian Constitution.

¹⁰ This is the approach followed in Spain for instance.

¹¹ This is the case of Art. 225 of the Brazilian Constitution or Art. 24 of the Greek Constitution for instance.

¹² The major laws are the Act nr 76-629 of 10 July 1976 on the Protection of Nature and the Act nr 95-101 of 12 February 1995 on the Reinforcement of the Protection of Nature also known as the "Barnier Act". While the former Act lays down the general principle of protection of natural areas and lands, conservation of animal and plant species, protection of natural resources, etc..., the latter mainly establishes the four major principles underpinning environmental protection, namely the precautionary principle, preventative and remedying action, participation and the polluter pays principles.

¹³ The adoption of the Environmental Code was done by way of the *Ordonnance* of 18 September 2000 as adopted on the basis of the enacting Act nr 99-1071 of 16 December 1999 and as ratified by the Act of 2 July 2003, which authorised the Government to simplify the law.

¹⁴ Decision nr 2002-464.

¹⁵ For instance, despite the express reference in Art. L.110-1 of the Environmental Code to further legislation for the purpose of defining the conditions of application of environmental principles, the *Conseil d'Etat*, the French supreme administrative court, defined the precautionary principle as being

Finally, while the French administrative courts tend to follow the interpretation by the European Court of Justice of European environmental principles, upon which French law principles are based, the principle of the primacy of European Union law does not apply to the French Constitution as the *Conseil d'Etat* ruled in its *Sarran* decision¹⁶. This leads to a rather paradoxical situation.

1.2.2 Thirty years of failed attempts to give environmental principles constitutional value

Attempts to give constitutional force to environmental law principles are not new. In the past 30 years, many such attempts have failed.

From 1975 to 1977, the Edgar Faure commission drew up a draft constitutional law on freedoms, including the right to a healthy and balanced environment. Article 10 of the proposed legislation of 15 September 1977 notably provided that “Human beings have a right to a balanced and healthy environment and have the duty to protect it.” The draft law was discussed in Parliament but not put to the vote for political reasons. Since then, a number of routes were explored to give constitutional force to a “right of the third generation”¹⁷. None of these approaches, from an amendment of the Preamble to the Constitution or even of the 1789 Declaration of the Rights of Man and the Citizen to the insertion of a new provision in the constitution itself was successful.

1.3 The need to give constitutional force to a fundamental human right

1.3.1 Human rights of the third generation

The first Article of the Charter lays down the “right to live in an environment which is balanced and respectful of health”; that is, a high quality environment which is favourable to human health. In this respect, the Charter adopts a similar approach to many European and non-European Constitutions¹⁸. As such, the recognition of

legally binding and directly effective against the view of its *commissaire du gouvernement* (see decision of 11 December 1998 in case *Association Greenpeace France*). The court went on to extend its application to health.

¹⁶ Decision of 30 October 1998 (see D. Simon, “L’Arrêt Sarran: Dualisme Incompressible ou Monisme Inversé” (1999) *Europe* at 4) and confirmed by its decision of 18 December 1998 in the case of *Parc d’Activité de Blotzheim*. This is in line with its ruling in the case of *Syndicat national de l’industrie pharmaceutique* of 3 December 2001 in which the *Conseil* ruled that the “principle of primacy (...) could not lead, in the domestic legal order, to putting into question the primacy of the Constitution.

¹⁷ See N. Kosciusko-Morizet, Report on the Draft constitutional Law on the Environmental Charter, Report on behalf of the National Assembly Committee for Constitutional Laws, Legislation and General Administration, Parliamentary Session 2003 – 2004, Report Nr 1595, <http://www.assemblee-nat.fr/12/rapports/r1595.asp> at 16.

¹⁸ However, the Charter goes further than the European Community Treaty or the European Charter of Fundamental Rights of the Union, which do not deal with the environment in terms of human rights; see art. 37 of the Charter of Fundamental Rights (Art. II-97 of the Treaty Establishing a Constitution for Europe), which provides that “(a) high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

The right to live in a healthy environment was inferred by the European Court of Human Rights from the wording of Article 8 of the European Convention of Human Rights in its ruling of 9 December

environmental protection as a human right is not new in itself but the Charter is innovating by creating in its Article 2 a duty for every person to "...take part in the preservation and the improvement of the environment"¹⁹. This obligation, primarily of a moral nature, is imposed on all individuals, legal persons and public authorities. Inspired by a "humanist ecology"²⁰, the charter is designed primarily to protect natural persons, who are the only persons to have rights under this Charter. Flora, fauna or land have no rights as such as the Charter does not endorse the "deep ecology" philosophy, which regards nature as having legal personality and rights.

1.3.2 *A declaration of rights purposely incorporated into the Constitution*

The 1789 Declaration of the Rights of Man, the Preambles to the Constitutions of 1946 and 1958 were not originally intended by their respective draftsmen to be incorporated into positive law and subject to the supervision of the Constitutional Court. Their incorporation into the so-called "*bloc de constitutionnalité*" was effected by the Constitutional Court in the early 1970s²¹.

Given those Constitutional Court decisions, the legislator was logically invited to incorporate the Environmental Charter into positive law by attaching it to the constitution, thus giving its provisions equal constitutional status and force to those of the 1789 Declaration and the 1946 and 1958 Preambles²².

2. Content of the Charter

2.1 The preamble

The preamble has seven *considérants* or paragraphs which constitute a series of general statements.

1994 in the case of *Lopez Ostra v. Spain*. More recently, in the case of *Öneryildis v. Turkey* of 18 June 2002 (Chamber) and 30 November 2004 (Grand Chamber), the European Court relied on Article 2 (right to life) to impose on States an obligation to ensure the protection of individuals against environmental risks which are likely to affect their life or their right to life. See D. García San José, *La Protection de l'Environnement et la Convention Européenne des Droits de l'Homme* (Council of Europe 2005). See also M. Déjeant-Pons, *Le Droit de l'Homme à l'Environnement, Droit Fondamental au niveau Européen dans le Cadre du Conseil de l'Europe, et la Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales* (1993, Council of Europe) and "Les Droits de l'Homme à l'Environnement dans le Cadre du Conseil de l'Europe" 60 (2004) *Revue Trimestrielle des Droits de l'Homme*, 861.

¹⁹ The Preamble to the Constitution now refers to "the rights and duties as defined in the environmental Charter".

²⁰ See P. Gélard, Report on the Draft Constitutional Law on the Environmental Charter, Report on behalf of the French Senate Committee for Constitutional Laws, Legislation, universal Suffrage and General Administration, Parliamentary Session 2003 – 2004, Report Nr 352, <http://www.senat.fr/rap/103-352/103-3521.pdf> at 19, and N. Kosciusko-Morizet's report, *op.cit.* at 63-64.

²¹ See Decision nr 70-39 of 19 June 1970 and Decision nr 71-44 of 16 July 1971; see Dadomo & Farran, *French Substantive Law. Key Elements* (Sweet & Maxwell London 1997) at 151-153.

²² It is important to note that the 1789 Declaration and the Preambles enjoy the same legal force and none is regarded by the Constitutional Court as superior to the others. All three rules co-exist and have their respective scope of application.

The first two paragraphs make a general statement on the interdependence of mankind and its natural environment and on the indissoluble link between the environment and the current existence and the future of the human race.

The third one re-iterates the universal dimension of environmental protection and that the environment is the common heritage of all human beings²³.

In the fourth paragraph, it is acknowledged that humans increasingly influence living conditions and their own evolution. This paragraph constitutes the basis for the principle of environmental liability laid down in Article 4 of the Charter.

The fifth one refers to the effects on the environment of consumption and production patterns and the excessive exploitation of natural resources.

The sixth one states that environmental protection is to be accorded the same importance as other national fundamental interests such as France's independence and security, the protection of its population, etc²⁴. It is therefore for public authorities to take account of the environment when defining new national policies. However, as the wording of this paragraph suggests²⁵, environmental protection takes no precedence over other national interests. It will therefore be incumbent on the legislator to find the right balance between all national fundamental interests.

Finally, the principle of sustainable development is given constitutional force in the seventh paragraph. It is defined as "the choices aimed at addressing today's needs (without) compromising the capacity of future generations and other peoples to satisfy their own needs"²⁶. The focus is therefore put on the concept of solidarity between generations and peoples. The Charter is designed to establish a balance between economic development, social progress and environment protection. A careful reading of the whole preamble shows that the principle of sustainability underlies each paragraph, thus giving the Charter its overall coherence.

2.2 The Charter provisions

The Charter consists of ten provisions. As mentioned above, while Article 1 creates a right for everyone to an environment which is balanced and respectful of health, article 2 imposes a duty to take part in its protection and improvement. Both provisions are of general character and, as such, the foundation of the Charter. Their application and effectiveness are dependent on the subsequent provisions: articles 3 (duty of prevention), 4 (duty to remedy), 5 (precautionary principle) and 7

²³ As opposed to common heritage of mankind, the international law concept applicable to Antarctica and extra-atmospheric space and which carries legal effects. Here, the concept of heritage is more of an intellectual rather than of a legal nature. This concept must be regarded as having universal value only and not one to which the courts would give legal force.

²⁴ Already Art. 410-1 of the Criminal Code already provides that "(t)he fundamental interests of the Nation comprise (...) its independence, the integrity of its territory, its security, the republican form of its institutions, its defence and diplomacy, the safeguard of its people in France and abroad, the balance of its ecology and environment and the essential elements of its scientific and economic potential and its cultural patrimony" (underlined by us).

²⁵ "(...) au meme titre que (...) i.e. "to the same extent as".

²⁶ Paragraph 8 of the Charter proposed by the Coppens Commission did not attempt to define sustainable development but referred to the "responsibility" of the French people "towards future generations" and "its will to promote a sustainable development based on solidarity between men and territories, which reconcile economic and social development with the preservation of natural resources and the improvement of the environment".

(participation and access to information) provide the means of action necessary to ensure effective environmental protection and justice.

The right to live in a balanced environment, respectful of health

The scope of Article 1 is rather broad as it covers two concepts: that of a “balanced environment” and that of an “environment respectful of health”. The first one is understood as covering not only balances of ecosystems (conservation of biodiversity, low levels of pollution, etc.) but also the balance between urban and rural areas²⁷. The second concept of “environment, respectful of health” is to be understood as an unpolluted and undamaged environment. This wording seems to be more neutral than that of “healthy environment” or that of “environment favourable to one’s health”²⁸, which was the terminology used in the draft Charter of 27 June 2003²⁹. Although the latter wording was more precise and specific than that used in the Charter, and was specifically aimed at protecting human health, it was conveying the idea that the environment had to further the health of each individual rather than health understood in its epidemiological and statistical dimension. The general term of “health” was then preferred to “one’s health”. Furthermore, it would be unreasonable to expect the environment to play a pro-active role in human health. If a damaged environment can have adverse effects on human health and living conditions, a balanced one does not necessarily have a noticeable favourable effect on health. For that reason, the idea of an environment which is respectful of health was preferred and adopted in the final draft³⁰.

The duty to protect and improve the environment

As a counterpart to the rights created under Article 1, article 2 imposes on every person a duty to take part in the protection and the improvement of the environment. Such reference to duty (devoir) is not new and can be found in the Preamble to the 1789 Declaration of Rights of man and the Citizen and in the fifth paragraph of the Preamble to the 1946 Constitution. As mentioned above, it is to be understood as a moral rather than a legal obligation imposed on all natural and legal persons³¹. However, this moral obligation has constitutional value which cannot be ignored in subsequent legislation. Each individual has a responsibility to ensure that natural resources are well managed and the environment is improved. However this responsibility can only be exercised within one’s individual limits as conveyed by the expression “take part in”. It is obvious that legal persons can play a more extensive active role in the preservation and improvement of the environment than natural

²⁷ See also Art. L.110-2 of the Environmental Code.

²⁸ Underlined by us.

²⁹ Paragraph 5 of the Coppens version of the Charter made a reference to a “healthy and balanced environment which respects one’s dignity and furthers one’s well-being”. The reference to dignity and well-being was there to convey the idea of a physiological as well as psychological tie between man and nature, contributing to man’s balance and happiness. This reference to dignity and well-being was dropped by the legislator on the ground that this could lead to litigation going far beyond the purpose and framework of the environmental Charter.

³⁰ Originally suggested by the Committee for Economic Affairs of the National Assembly, this amendment was adopted by the National Assembly on 1 June 2004 and by the Senate on 24 June 2004.

³¹ Already, Article L 110-2(2) of the Environmental Code as incorporated by the 1995 Barnier Act, provides that “everyone has a duty to ensure the safeguard and contribute to the protection of the environment”. This provision has always been interpreted as imposing only a moral obligation.

persons. What matters however is that everyone is aware that environmental protection is a shared responsibility and a matter of concern for all.

The duty of prevention

Under Article 3, every person (natural and legal, public and private) has an obligation, within limits laid down by statute, to prevent any damage that he/she/it is likely to cause to the environment or, failing that, to limit the consequences of such damage³². The prevention principle is already recognised and well established under Article L 110-1-II(2) of the Environmental Code, which provides that environmental damage must be redressed primarily at its source³³. The Coppens draft Charter offered two alternative versions of this principle: in the first one, preventive action and remedying at source was given priority³⁴; the second version simply mirrored the version of the Code³⁵. In the Code, the prevention principle is based on three components: the distinction between preventive action and the redressing of the damage at its source, the use of the best techniques available, and the acceptable economic cost. In the Charter, preventive action can only be defined in broad terms because of the general character of constitutional provisions and could not be laid down as an absolute principle as it is in the Code or in the Charter drafted by the Coppens commission. The primary role of the Charter is to guarantee a general obligation of prevention, whose conditions of application are to be defined further in statutory law as Article 3 provides. Furthermore, the French legislator felt that, if given an absolute character, preventive action would clash with other constitutional principles such as freedom of enterprise³⁶. The principle is also defined in broad terms with regard to its object. The environmental damage need not be certain for the prevention principle to apply as the terms "...likely to cause to..." suggest. The scope of application of the prevention obligation extends beyond that of major pollution accidents or industrial pollution. Unlike the precautionary principle which applies in the case of scientific uncertainty as to the existence of a risk of damage, that of prevention covers "(...) risks the existence of which is scientifically established and for which the risk probability can be objectively assessed by statistical analysis (floods) or by logical reasoning (calculation of probabilities)." ³⁷ Defined broadly as to its object, conditions of application and its addressees, the obligation of prevention was given a realistic objective too. Article 3 imposes an obligation to prevent any damage to the environment or, failing this, to limit the consequences of the damage. This certainly could be seen as a step back in comparison with the generally accepted definition of the prevention principle as this provision may give the impression that a potential polluter has a choice between preventing damage and limiting its effects. However, it

³² Only the Swiss Constitution has a similar provision in its Article 74(2).

³³ "The principle of preventive action and of the redressing, primarily at its source, of environmental damage, including the best available techniques at an economically viable cost." It is to be noted that in the French version of this provision, the word "*correction*" (best rendered by "redressing" or "correcting") is used instead of the term "*réparation*" (best rendered by "remedying").

³⁴ "13. The preservation and improvement of the environment require, within conditions laid down by statutory law:

- to give priority to preventive action and the redressing at the source of environmental damage.(...)"

³⁵ "12. The preservation and improvement of the environment lie on the following principles:

- the principle of prevention whereby damage to the environment and health must be redressed primarily at the source; (...)"

³⁶ The Charter rights and principles must comply with other constitutional principles and values and have no precedence over them.

³⁷ Opinion of the Economic and Social Council of 12 March 2003 on the Martinaud Report at 19.

could equally be argued that, any economic activity being capable of causing, directly or indirectly, some damage to the environment, the obligation of prevention as enshrined in the Charter should have the practical effect of encouraging methods of production and consumption with limited impact on natural resources and producing limited waste. Article 3 of the Charter seems to offer a realistic definition of the duty of prevention, which, as such, cannot be deemed to be in contradiction with the principle of preventive action as laid down in Article L. 110-II(3) of the Code as the latter provision does not guarantee the prevention of environmental damage in absolute terms either. Furthermore, Article 3 does not stop Parliament from passing legislation imposing an absolute duty of prevention in certain cases.

The duty to remedy environmental damage

Going hand in hand with the obligation to prevent environmental damage, that of remedying it is specified under Article 4, which provides that “(w)ithin conditions laid down by statute, every person must contribute to the remedying of any damage that he has caused to the environment.”. While the principle of civil liability³⁸ as laid down in Article 1382 of the Civil Code³⁹, which applies to environmental damage⁴⁰, had already been given constitutional force by the Constitutional Court, there was no specific regime applicable to environmental damage⁴¹. Despite being attached to it, the “polluter-pays” principle is defined in Article L 110-1-II(3) of the Environmental Code as a principle whereby “the costs of prevention of, reduction of, and fight against pollution must be born by the polluter”. It is therefore viewed more as an obligation to prevent and reduce pollution rather than as an obligation to remedy any damage caused. The Coppens Commission itself was split on the issue as to whether or not the “polluter-pays” principle should have been included in the Charter: while some of its members were of the view that this principle was ambiguous and could be interpreted as a right to pollute and therefore should not be referred to in the Charter⁴², others believed that to exclude it would be a set back from the provisions of the Code⁴³. The first position prevailed in the Charter for the following reasons. Firstly, although this principle is one of common sense and efficiency, it is only the answer to the issue of environmental damage viewed in narrow terms; while the financial burden is born primarily by the polluter, this does not prevent the victims of pollution

³⁸ On the ground of Article 4 of the 1789 Declaration of Rights of Man and the Citizen, which provides that “freedom consists in doing whatsoever which does not cause harm to another”. See the Constitutional Court’s Decision no 82-144 DC of 22 October 1982.

³⁹ This provides that, “anyone’s act whatsoever which causes harm to another, creates an obligation by whose fault it was caused to compensate it.”

⁴⁰ Fault liability under Articles 1382 and 1383 of the Civil Code; Vicarious liability under Article 1384 of the Civil Code and strict liability, as developed by the case-law of the courts on the basis of the theory of “*troubles du voisinage*” (private nuisance).

⁴¹ With the exception of cases of dangerous activities where specific regimes of strict liability apply as a result of international obligations, such as nuclear accidents (Acts of 1968 and 1990) and maritime transport of petroleum products (Art. L. 218-1 of the Environmental Code).

⁴² The first alternative version provided that “(t)he preservation and improvement of the environment require that, within conditions defined by statute: (...);

- everyone pays towards the cost of the prevention and remedying of an environmental damage, which could be the result of one’s activity or behaviour.”

⁴³ The second proposed version read as follows: “12. The preservation and the improvement of the environment lie on the following principles: (...);

- the “polluter-pays” principle whereby it is incumbent on everyone to pay towards the costs of the prevention and remedying of environmental damage which could be the result of one’s activity or behaviour”.

from bearing the costs too, either as indirect victims or as tax-payers. As a principle of financial liability, it is not one of economic efficiency. Secondly, the principle does not necessarily provide a remedy for all environmental damage, notably for damage to natural habitats⁴⁴. Thirdly, the “polluter-pays” principle as laid down in the Code is not put into question by the Charter provisions as the latter integrates it in the wider dual dimension of prevention and remedying.

Although Article 4 establishes no specific regime of environmental liability, it gives the principle of environmental liability constitutional force.

The precautionary principle

Unlike the principle of prevention which is of general application, the precautionary principle can only be triggered in exceptional cases as defined under Article 5. The Charter provides that “(w)hen the occurrence of damage, despite being uncertain in the light of scientific knowledge, could affect the environment in a serious and irreversible manner, public authorities must ensure, under the precautionary principle and within their competences, that risk assessment procedures are set out and that provisional and proportionate measures are adopted in order to avert⁴⁵ the occurrence of damage.”⁴⁶

Originally formulated in German law as the “Vorzorgeprinzip” and incorporated in European Community law under former Article 130r(2) EC (now 174(2)) by the Maastricht Treaty as one of the fundamental principles of European environmental law, the precautionary principle was formally incorporated into French law by the Barnier Act in 1995. Article L. 110-1-II(2) of the Environmental Code defines it as a principle whereby “(...), the absence of certainty, taking account of current scientific and technical knowledge, should not delay the adoption of effective and proportionate measures which aim to prevent, at an economically acceptable cost, threats of serious and irreversible environmental damage.”⁴⁷ This formulation has a few drawbacks: it principally defines it negatively; it is not clear whether it applies to private persons or public authorities and it does not clearly distinguish it from the principle of prevention. Furthermore, as the scope of application of the precautionary principle is

⁴⁴ For instance, it does not give rise to any financial support for the treatment and cleaning of birds that have been the victims of oil slicks.

⁴⁵ In the original draft, the term “éviter” (to prevent) was used but was replaced by “parer à” to distinguish more clearly precaution from prevention.

⁴⁶ This provision is the only one which expressly refers to a principle. The express reference to the precautionary principle gave rise to a debate within the Coppens commission which offered two alternative versions. The first one avoids all express reference to it on the ground that, scientific uncertainty preventing authorities from choosing the best course of action, precaution should only have a procedural dimension and be limited to taking appropriate measures following certain assessment processes. The advocates of the second version were of the view that the Charter would not be in line with European and domestic legislation, should it not expressly refer to that principle. Furthermore, only an express reference to the principle would make it fully legally binding (see the Coppens report at 39 and 40).

⁴⁷ Compare with the definition given in the resolution of the European Council of Nice of 7 December 2000 on the precautionary principle which provides that “...use should be made of the precautionary principle where the possibility of harmful effects on health or the environment has been identified and preliminary scientific evaluation, based on the available data, proves inconclusive for assessing the level of risk” (para. 7) and with principle 15 of the 1992 Declaration of Rio which reads as follows: “Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

to be defined in further Acts of Parliament, its application by ordinary and administrative courts has been fraught with difficulty and has been rather limited⁴⁸.

As M. Boutonnet and A. Guégan put it, “the legal birth and the spirit of the precautionary principle show that it cannot be understood, in a negative manner, as the instrument of an irrational requirement of a zero risk, but indisputably, in a positive manner, as a rational concern for ecological and sanitary safety”⁴⁹. Along those lines, Article 5 provides a clear and rigorous constitutional definition of the principle, based on rationality and efficiency. It strictly defines its scope of application and the procedural rules for its implementation. Precautionary measures can only be triggered if three conditions are simultaneously met. First, there must be a threat of damage to the environment. It is clear from the wording of Article 5 that the precautionary principle as established in the Charter has constitutional force only in the field of environment and does not extend to other areas, notably health⁵⁰. As a result, its scope of application cannot be restricted by an Act of Parliament when applied to the environment⁵¹. Lack of scientific certainty regarding the damage is the second condition. This allows a the line to be drawn between the scope of application of the precautionary principle and that of prevention. While the latter applies to a known or even potential threat, the former is a “principle of methodological action, the activation of which is dependent on a legitimate doubt about the existence of a threat”⁵². Finally, the threat of damage must have serious and irreversible consequences. While generally considered alternatively in international conventions⁵³, those two criteria are cumulative in the Charter. The French legislator took the view that a cumulative condition was essential to assess effectively the threat of damage in a context of scientific uncertainty.

Unlike Article L. 110-1-II of the Environmental Code, Article 5 of the Charter lays down strict procedural rules for the application of the principle. While the former provision does not specify to whom, private or public bodies, the principle applies, the latter makes it clear that it is for “public authorities (to) ensure, (...) that risk assessment procedures are set up and that provisional and proportionate measures are

⁴⁸ While ordinary courts have relied on the precautionary principle as now defined in the Charter less frequently than that of prevention, administrative courts tend to use it in the narrower context of procedural review of administrative measures and remain reluctant to assess the merits of administrative measures against it, safe in the case of *erreur manifeste d’appréciation des faits* (manifest error in the assessment of facts). Even the Constitutional Court refused to grant constitutional force to this principle (see decision DC 2001-446 of 27 June 2001 on the Act relating to abortion and contraception, notably paragraph 4: “(...) the precautionary principle is not an objective with constitutional force”).

⁴⁹ See ‘*Historique du Principe de Précaution*’ in Annex 1 to Ph. Kourilsky & G. Viney, ‘*Le Principe de Précaution. Rapport au Premier Ministre*’ (La Documentation Française, 2000).

⁵⁰ Article 5 cannot be read in conjunction with Article 1 of the Charter which refers to “an environment, respectful of health”. The Charter is not a Charter on public health and the two areas remain separate and distinct. This distinction between health and the environment had been clearly maintained by administrative courts when applying the precautionary principle. However Article 5 would apply to threats of damage to the environment having effects on health.

⁵¹ However, when applied by the courts to other areas, the precautionary principle only has the force of courts’ rulings and its conditions of application can be extended or restricted by statute at any time.

⁵² Prof. G. Martin as quoted in Kourilsky & Viney, (n 49), in fn 224 at 65.

⁵³ See Principle 15 of the Rio Declaration and Art. 3(3) of the UN Framework Convention on Climate Change; see also the two alternative versions in the Coppens report: the first one refers to “a threat of damage ...that is serious and difficult to reverse...” while the second one refers to “a serious or irreversible threat” (underlined by us).

adopted (...)”⁵⁴. Whether the principle should be applied by central government authorities only or by all public authorities was debated at length by the Coppens Commission. The second option prevailed in order to better reflect the territorial dimension of environmental protection and to maintain some coherence with the devolution process whereby powers in the area of environmental protection have been conferred upon local authorities⁵⁵.

In order to avert the occurrence of damage, public authorities have a dual obligation under Article 5: setting up risk assessment procedures and adopting precautionary measures⁵⁶. Risk assessment involves research programmes⁵⁷ aimed at reducing scientific uncertainty, dissemination of information regarding the means of preventing damage, the setting up of environmental control procedures and, above all, scientific expertise. In France, the latter has been given insufficient weight in most sectors⁵⁸. Pluralistic and diverse, scientific expertise should be regarded as the “keystone which gives reliability to the decision-making process and ensures that litigation arising from it in the more or less long term is dealt with fairly.”⁵⁹ Not only should the precautionary principle encourage interdisciplinary research - other than research based on a mere logic of economic profitability - and advances in scientific knowledge, but it should also help promote and reinforce the status of scientific experts⁶⁰.

Following an adequate risk assessment, public authorities can then adopt provisional and proportionate precautionary measures. Their provisional character is inherent to the principle of precaution. Unlike preventive measures which usually are definitive, precautionary measures must be regularly reviewed, amended or reversed in the light of new scientific knowledge and information on threats to the environment. They must also be proportionate to the seriousness of the threat of damage and to the duration of the research on that threat. Although Article 5 does not refer specifically to “an economically acceptable cost”, it is implied that the proportionality of the precautionary measures must also be measured in those terms. To verify that the cost of precautionary measures does not exceed their expected benefit, courts will have to apply the technique of “*bilan coûts-avantages*” which is widely used by French administrative courts and the European Court of Justice. However, its use will be made all the more difficult by the uncertainty of the threat of damage and therefore of the expected advantage derived from the precautionary measures, not only in the short term but also in the long run as the purpose of the precautionary principle is to protect future generations.

⁵⁴ Unlike Arts 2 to 4, Art. 5 does not impose obligations on private individuals. However these would have to comply with administrative or legislative measures implementing the precautionary principle.

⁵⁵ Furthermore, the term “public authorities” can only be interpreted in the same way as in Article 7 of the Charter on the right of information and participation in reference to the 1998 Aarhus Convention.

⁵⁶ Following an amendment to the draft Charter by the Legislation Committee of the National Assembly, risk assessment procedures are mentioned before precautionary measures, since risk assessment is more logically the first step in the application of the precautionary principle.

⁵⁷ The second alternative version in the Coppens report actually referred to “research programmes” instead of “assessment procedures”. This version was preferred by a number of scientific experts for being more specific. However, the wording of Article 5 should be interpreted as widely as possible and should notably be read in conjunction with Article 9 of the Charter on research and innovation in the field of environment.

⁵⁸ See Kourilsky & Viney, (n 49) at 96.

⁵⁹ *Ibidem* at 95.

⁶⁰ A step in that direction has already been taken with the creation of the French Agency of Environmental Health Safety under the Act of 9 May 2001.

As rightly summed up by N. Kosciusko-Morizet, Article 5 has set out a “dense web of obligations and requirements which turn the precautionary principle into a bastion of legal certainty in domains where safety is the condition for action”⁶¹.

Promoting sustainable development and integration

Article 6 provides that sustainable development must be promoted by public policies, which, to this end, “shall reconcile environmental protection and improvement, economic development and social progress”. Both principles of sustainable development and integration which are recognised in French environmental statutory laws⁶² are therefore given constitutional force under this provision. Far from being innovative, this provision merely lays down two principles that are widely recognised in the international, European and French legal orders.

It requires that environmental protection and improvement, economic development and social progress, the three pillars of sustainable development, are equitably taken into account in public policies. In its original version, Article 6 provided that public policies “shall take into consideration environmental protection and improvement and reconcile them with economic and social development”. This could have been interpreted as not regarding environmental protection as the priority. During the parliamentary committee hearings, it was argued by some experts, rightly in our view, that the wording of Article 6 seemed to subordinate environmental protection to economic and social development, and as such was not reflecting the spirit of the principle of sustainable development. Professor M. Prieur, in particular, even suggested that Article 6 should provide that public policies “...shall reconcile economic and social development with environmental protection and improvement”. On the other hand, other experts took the view that, by mentioning environmental protection before economic and social development, Article 6 gave the former more consideration. Ultimately, adopting the view that the original wording of Article 6 was not fully satisfactory as it could be interpreted either way, the National Assembly amended it so as to remove any ambiguity and to guarantee that equal consideration is given to all three components of sustainable development.

In order to ensure that the objective of sustainable development has the widest possible impact, Article 6 also provides that it shall be integrated not only in policies on territories and the environment but also in all public policies as defined in statutory laws and regulations. It therefore extends the scope of application of the principle of integration beyond the limits laid down in Article L. 110-1 of the Environmental Code, and provides a constitutional foundation to existing laws⁶³ which incorporate the integration principle.

Under this Charter provision, Parliament has now the constitutional obligation to assess more carefully, and give more consideration to, the impact that any public policy may have on the environment and find the right balance between all three components of sustainable development. Consequently, failing to meet those new

⁶¹ *Op. cit.* (n 17) 108.

⁶² The principle of sustainable development is referred to in the “Barnier” Act and Art. L-110-1 of the Environmental Code; that of integration is indirectly mentioned in legislation by reference to the former (see for instance, the Act of 1999 on national and regional development and the Act of 2000 on solidarity and town redevelopment).

⁶³ See, for instance, Art. L. 123-1 of the Urban Planning Code, Art. 14 of the new Public Procurement Code or even Art. L. 225-102-1 of the Commercial Code.

criteria, any newly adopted legislation could be reviewed and declared unconstitutional by the Constitutional Court on the ground of “manifest error of assessment”.

The right to information and participation

Subject to conditions and restrictions as defined by law, Article 7 gives “(e)very person (...), the right to access information relating to the environment held by public authorities and to participate in the drawing up of public decisions which have an effect on the environment.” It gives additional constitutional status to two rights that are already fully guaranteed under the 1998 Aarhus Convention, the two European Directives of 2003 on Public Access to Environmental Information and on Public Participation in respect of the Drawing up of certain Plans and Programmes relating to the Environment, and in domestic law under Article L 110-1(4)⁶⁴ and L.124-1 of the Environmental Code. As such, it should provide parliament with sufficient guidelines for the purpose of transposing the Aarhus Convention rules⁶⁵ as filtered by the European Directives into an already abounding and diverse domestic law on the matter⁶⁶.

Unlike Article 1 which creates a right to a balanced environment for the benefit of individuals only (“*chacun*”), Article 7 is the only provision of the Charter that extends the benefit of a right to “every person” (“*toute personne*”). Like in Articles 2 to 4, this expression has to be understood as including all natural and legal public and private persons. In doing so, the provisions of Article 7 recognise the well-established case-law of the Constitutional Court and administrative courts extending the benefit of constitutional fundamental rights to legal private⁶⁷ and public⁶⁸ persons.

In the Environmental Code, the two principles of access to information and of participation were not sufficiently and clearly distinguished⁶⁹. Article 7 remedies this undesirable situation and defines them more neatly. In line with Article 4 and 5 of the Aarhus convention, the right of access to information applies to “information relating to the environment held by public authorities⁷⁰”. The interpretation of the concept of “environmental information” which has been traditionally based on the concept of access to administrative documents and, consequently, that of public service, had to

⁶⁴ Originally the principle of participation was strangely defined under the 1995 Barnier Act as a right “...whereby every person has access to information relating to the environment...”. The 2002 Act on *Démocratie de proximité* (bringing democracy closer to the citizens) amended this provision by adding the right of the “...public (to be) involved in the drawing up process of projects which have an important effect on the environment or town and country planning”.

⁶⁵ France is bound by the Convention both, as a contracting and ratifying party and as an EU Member State.

⁶⁶ This is the result of successive layers of legislative intervention since the 1978 Act relating to various measures aimed at improving the relations between administrative authorities and the public.

⁶⁷ See Decision 80-117 of 22 July 1980 relating to the Act on the Control of Nuclear Materials, in which the Constitutional Court recognised the rights of the defence of trade-unions; see also decisions on the application of the principle of equality to companies in Decision 81-132 of 16 January 1982 on nationalisations; to private and state schools in Decision 93-329 of 13 January 1994 on the Act relating to local government investment aids to private schools, etc...

⁶⁸ On the application of the principle of equality to *établissements publics* (public corporations in charge of a public service), see Decision 79-112 of 9 January 1980 on the alleged fiscal discrimination against *Electricité de France*; to *collectivités territoriales* (devolved public authorities), see Decision 82-138 of 25 February 1982 on the Act relating to the specific status of the region of Corsica; and to political parties, see Decision 89-271 of 11 January 1980 on the Act relating to electoral expenditures and transparency of the funding of political activities.

⁶⁹ See footnote 64.

⁷⁰ As defined under new Art. L. 124-3 of the Environmental Code implementing EC Directive 2003/4.

be broadened⁷¹ to comply with Directive 2003/4 on Public Access to Environmental Information as implemented by Chapter II of the Act of 26 October 2005⁷².

With respect to the right of participation in the drawing up of public environmental decisions, Article 7 simply creates a procedural right for the public to be appropriately consulted during the decision-making process itself, the final decision being taken by the public authority. Here, the wording of Article 7 is significantly different from that of Article L.110-1(4) of the Environmental Code: every person can participate in the drawing up of public decisions rather than “the drawing up process of projects”, and the effect of such decisions need no longer be “important”⁷³.

In order to give this right more substance and clarity, some of the detailed provisions contained in Article 6 and 8 of the Aarhus Convention could have been inserted in Article 7. Unfortunately, the French legislator did not deem necessary to do so for stylistic reasons and on the assumption that further legislation implementing Article 7 will have to be Convention-compliant. The principle of participation as enshrined in the Charter could gradually be applied to all sectoral policies, including economic policy, so long as any public decision has an impact on the environment.

It should be noted that it was not deemed essential to insert the right to access to justice in the Charter in compliance with Article 9 of the Aarhus Convention. Although it is true to say that this right is already protected under the Constitution, as a right derived notably from Article 6 (equality before the law) and 9 (presumption of innocence and rights of the defence) of the 1789 Declaration of the Rights of Man and the Citizen, it would not have been superfluous to establish this right more firmly in the domain of environmental protection.

The role of education and training in environmental protection

In his speech of 3 May 2001, President Chirac stressed that “(...)Because ecology is at the heart of citizenship, it must be a part of teaching programmes right from primary education, to teach our children the laws of nature and the actions to protect it”. Equally, the Coppens Commission emphasized that, one must learn and understand the consequences of one’s actions and choices, so that one’s behaviour does not harm the environment,. “A well-informed person can take measures to change his behaviour, his consumption and production habits so as to ensure the safeguard and the improvement of the quality of his living environment and that of future generations”⁷⁴.

By providing that “education and training must contribute to the exercise of the rights and duties provided for in the Charter”, Article 8 establishes a direct link between education and the rights and obligations that every person has under this Charter. French law had no provision on environmental education and awareness similar to those of Article 3(3) of the Aarhus Convention. Article 8 fills this legal gap. However, it does not impose a strict obligation to change the content of the school curriculum but provides a general objective to include environmental education into school and university programmes as well as in continuing education.

⁷¹ See new Art. L. 124-2 of the Environmental Code.

⁷² Act nr 2005-1319 relating to various provisions for compliance with Community law in the domain of the environment (OJFR, 27 October 2005). Chapter II of the Act amends Chapter IV of the Environmental Code on Freedom of Access to Information relating the Environment (see new Arts. L. 124-1 to L. 124-8).

⁷³ See n 64.

⁷⁴ See *op. cit.* (n 4) 22.

Research and innovation

As stressed in the Coppens report, research and innovation in the context of environmental protection and sustainable development are the basis for an enlightened opinion and responsible governmental decision-making, and the source of remedies and new means to reconcile development and environmental protection⁷⁵. Like the 1972 Stockholm Declaration, Article 9 of the Charter takes account of those two characteristics of research and innovation by providing that they “...must contribute to the protection and improvement of the environment”. By moving research and innovation in environmental matters into the constitutional sphere, Article 9 reinforces the role of existing legislation which already encourages research aimed at improving the environment⁷⁶. The objective of Article 9 is not, as it might be feared⁷⁷, to restrict all research to environmental research programmes only. Its general wording rather seems to emphasize the pervasive nature of environmental research which too often suffers from a sectoral approach unsuitable for dealing with environmental problems in an effective and global way.

The European and international policy of France

Article 10 provides that “the present Charter shall inspire the European and international action of France”. This primarily stresses the fact that environment protection is meaningless without international action, and that France must play a leading role at international and European levels.

3. The constitutionalisation of the Charter

3.1 The process of constitutionalisation

Once it had been agreed in 2004, the Charter had to be incorporated into the constitution by means of *loi constitutionnelle* (constitutional Act). This is an Act of constitutional amendment which must be adopted according to a special procedure under Article 89 of the Constitution. Article 89 provides that the amending Act must be approved in identical terms by both houses of Parliament and then approved and adopted by referendum, or, as in this case – because the proposed Act originated from the Government - by a majority of three fifth of the votes cast in both houses of Parliament convened in a Congress.

The Constitutional Act on the environmental Charter was adopted by the Congress on 1 March 2005. It consists of three provisions, the second of which is the Charter itself. The first Article inserts into the Preamble to the Constitution a reference to “...the rights and duties as defined in the 2004 environmental Charter”.

Under Article 3, protection of the environment is added to the legislative competence and powers of Parliament as defined in Article 34 of the Constitution.

⁷⁵ *Ibid* 23.

⁷⁶ See particularly Art. L. 321-1 of the Environmental Code which provide that policies for the protection of the coastal line shall include research and innovation into its resources and distinctive features. Equally, Art. L.331-14 states that national parks authorities must participate in research programmes aimed at the economic, social and cultural development of the parks.

⁷⁷ See M. Saddier, *Opinion on the Draft Constitutional Law relating to the Environmental Charter*, National Assembly Committee for Economic Affairs, the Environment and the Territory, (Doc. No 1593 May 2004) 120.

3.2 Legal force and effect of the Charter

3.2.1 *Legal force*

By reason of its adoption in a Constitutional Act and of a reference to it in the Preamble to the Constitution, the Charter automatically acquires constitutional force and value in French positive law.

3.2.2 *Legal effect*

3.2.2.1 *The reliance upon the Charter by individuals*

This issue is about the extent to which the Charter provisions can be relied upon by individuals in French ordinary and administrative courts either against other individuals or public authorities. According to the case-law of the Constitutional Court, a constitutional provision will have such an effect provided it satisfies three criteria: being a legal norm, a sufficiently precise one and an unconditional one i.e. not necessitating further legislative intervention. Applying those criteria, the Charter provisions could be divided into five categories:

The Preamble

As it makes general statements only, the Preamble can be deemed to be of a declaratory nature. However it will always be possible for the Constitutional Court to infer some constitutional principles from its interpretation⁷⁸.

Provisions with limited direct effect

Because the effectiveness of Articles 1 and 2 is dependent on the application of the other provisions, those can be relied upon in the Constitutional Court, albeit not by individuals, but not in ordinary or administrative courts.

Provisions with full direct effect

The only provision with direct effect is Article 5 which clearly and precisely defines the conditions of application of the precautionary principle without the requirement for further legislation as under Article L.110-1-II of the Environmental Code.

Subjecting the application of the precautionary principle to the adoption of further legislation would have contradicted its very purpose of setting up and clearly defining the procedures necessary to tackle serious situations of uncertainty. As such, Article 5 appropriately lays down those general procedural rules.

However, while it is not an absolute condition for the application of the principle, further legislation will be desirable and necessary to define in more detail certain aspects of its application such as the risk assessment procedures, the status of the experts, and general principles regarding the reviewability, reversibility and proportionality of precautionary measures to be taken by the public authorities.

⁷⁸ As it did with the principle of safeguard of the dignity of individuals which it inferred from the Preamble to the 1946 Constitution in its decision no 94-343 & 344 of 27 July 1994.

Provisions without direct effect

Articles 3, 4 and 7 all refer to, and require further legislation (“subject to conditions as defined by law”), and as such cannot have direct effect⁷⁹.

Provisions imposing a line of conduct rather than an obligation

Article 6 defines a line of conduct, that of promoting sustainable development, to be followed by public policy makers, and does not impose any imperative requirement upon them.

Equally, Article 9 does not make require that research and innovation contribute to environmental protection and improvement. The same view applies to Article 8 on education⁸⁰. Finally, under Article 10 the Charter is only supposed to be a source of inspiration for the French government at international and European levels.

3.2.2.2 The effect of the Charter on the powers of Parliament

The most innovative aspect of the Charter rests in the new constitutional requirements it now imposes on Parliament when legislating in the domain of environmental law. Parliament will only be able to pass new legislation which complies with the new constitutional principles laid down in the Charter. Although those principles are certainly guiding the making of French legislation, the constitutional value of the Charter will give them more weight and force as Parliament will have to take them into account when passing new laws that directly or indirectly concern the environment. Parliament will also be bound to make gradual amendments to any existing legislation which does not comply with the Charter principles.

Furthermore, because the Charter has no superior legal value to other constitutional principles, Parliament will also and most likely have the uneasy task of reconciling the Charter principles with other constitutional principles, such as free enterprise, free movement, etc...as well as balancing that of sustainable development with economic development and social progress which also have equal constitutional force. This balancing act will necessarily have to be done under the watchful eye of the Constitutional Court.

3.3 Effectiveness of the Charter

It could be feared that Parliament will be put in a strait-jacketed and its powers further limited by the judiciary. However, by explicitly extending the competence of Parliament to environmental matters, Article 3 of the constitutional Act of 1 March 2005 gives more incentive to Parliament to legislate in that domain. Article 34 as amended gives Parliament the power to implement the principles and rights of the Charter and make them effective. Parliament will have the power to clarify in statutory law the way a constitutional principle should be implemented without having to rely on an express provision of the Constitution.

⁷⁹ Note that, unlike Arts. 3 and 4, Art. 7 not only mentions “conditions” but also “restrictions as defined by law”.

⁸⁰ In all those provisions, the verb “doivent” (must) is used. An obligation would have been expressed by simply using the relevant verbs in the present tense, which in English, would be reflected in the use of “shall” before the verb.

Conclusions

As former Prime Minister J.-P. Raffarin rightly stated in his address to Parliament on June 27, 2003, “(t)he Environmental Charter will give a new impetus to the protection and the enhancement of the environment...” The incorporation of the Charter into the Constitution has given it the same constitutional status and force as the 1789 Declaration of Rights and the 1946 Preamble. This constitutionalisation of environmental law is a recognition that the right to a balanced environment has the same essential value as other fundamental rights recognised in the Constitution. It will also give environmental law principles greater unity and significance and an indisputable legal basis at the top of the hierarchy of French legal sources. As the Charter principles and rights will be further developed and clarified in subsequent legislation, and interpreted by the Constitutional Court, ordinary and administrative courts will get better guidance for their enforcement. As such, the Charter will provide more general coherence to French environmental law and reduce the risks of conflicts, albeit limited, between domestic and international, and notably, European laws.

Whether the French environmental Charter will serve as a model for other countries, as suggested by J.-P. Raffarin in his address to Parliament, remains to be seen but it should give France more credibility and legitimacy in international and European environmental negotiations.