

Les Cartes mentales de la Corpo



Chers étudiants, ça y est, le semestre touche à sa fin. Mais pour bien profiter de l'été et éviter les rattrapages, la case des partiels semble inévitable !

Depuis maintenant 90 ans la Corpo Assas accompagne les étudiants dans tous les domaines de la vie universitaire, et pour la première fois cette année on vous propose des cartes mentales. Ces fiches sont écrites par nos membres dans le but de favoriser l'entraide étudiants ainsi que de vous aider dans l'apprentissage de certaines notions clés d'une matière.

Effectivement, ces fiches sont là pour vous orienter, elles sont faites par des étudiants et ne sont en aucun cas un substitut à ce qui a été enseigné en TD ou en cours.

Si jamais il vous venait des questions, n'hésitez pas à nous envoyer un message sur la page Facebook Corpo Assas ou à contacter *Gabrielle Manbandza* ou *Angélique Polide*.

" Comment valider votre année ? Pour les L1 :

Il faut tout d'abord rappeler que toutes vos notes se compensent. Pour valider de la manière la plus simple votre année, il vous faut valider votre bloc de matières fondamentales mais aussi votre bloc de matières complémentaires. Cependant, le calcul peut s'avérer plus complexe...

Chaque fin de semestre est marquée par des examens qui constituent l'épine dorsale de la validation de votre année. Bon nombre d'autres possibilités vous sont proposées pour engranger un maximum de points et limiter ainsi l'impact de vos partiels. Chacun de vos chargés de TD va vous attribuer une note sur 20 à l'issue du semestre. Vos TD de matières fondamentales comptent donc autant que l'examen écrit, lui aussi noté sur 20. Cet examen s'effectue en 3h et nécessite un exercice de rédaction. Sur un semestre, une matière fondamentale peut donc vous

rapporter jusqu'à 40 points. Seuls 20 points sont nécessaires à la validation de la matière. Pour valider votre bloc de fondamentales, il vous faut donc obtenir 40 points en additionnant vos notes de TD et vos notes aux partiels. Si toutefois vous n'obtenez pas ces 40 points, vous repasserez en juillet lors de la session de rattrapage, la ou les matières que vous n'auriez pas validée(s).

Attention : le passage par juillet annule votre note de TD obtenue dans la matière.

Pour les L2 :

Le principe est similaire, à la différence qu'il y a plus de matières fondamentales et plus de matières complémentaires.

Conclusion simple : travailler toutes les matières un minimum en mettant l'accent sur les TD et les matières fondamentales (les plus gros coefficients) vous permettra de maximiser vos chances de valider votre année du premier coup et ainsi éviter l'écueil des rattrapages de juillet.

Si, au sein même des unités d'enseignement, les matières se compensent, les blocs peuvent aussi se compenser entre eux à la fin de l'année. Ainsi, si vous obtenez une moyenne générale sur l'année de 10/20, votre passage est assuré.

En cas d'échec lors des sessions de janvier et de juin, une seconde chance vous est offerte en juillet.

Attention, contrairement aux idées reçues, les rattrapages ne sont pas plus faciles, ils sont connus pour être notés plus sévèrement. Toutes les matières des blocs non validés où vous n'avez pas eu la moyenne sont à repasser. S'il s'agit d'une matière à TD, la note de TD est annulée (même si vous avez été défaillant), de sorte que la note obtenue en juillet compte double (8/20 revient à 16/40). Les points d'avance acquis lors de l'année (points au-dessus de la moyenne lors de la validation d'un bloc) sont valables après les rattrapages et permettent donc la compensation finale comme décrite précédemment.

A noter que le jury peut vous accorder quelques points pour l'obtention de votre année, notamment dans le cas d'un étudiant sérieux en TD... A bon entendeur !

Pour les L1, le passage en deuxième année peut aussi se faire en conditionnel, pour cela il vous faut valider les deux unités d'enseignement fondamental et une unité d'enseignement complémentaire tout en sachant que l'autre unité complémentaire sera à repasser en L2.

AVERTISSEMENT

Il est important de rappeler que les Professeurs et Maitres de conférence ne sauraient être tenus responsables d'une erreur ou d'une omission au sein des fiches de cours proposées, puisque ces dernières sont comme dit précédemment, réalisées, relues, et mises en page par des étudiants appartenant à la Corpo Paris Assas.

REMERCIEMENTS

La Corpo Paris Assas souhaiterait remercier sincèrement l'intégralité des professeurs ayant permis et autorisé la diffusion de ces fiches de cours et d'avoir ainsi offert aux étudiants une aide précieuse à la réussite de leur examens.

NB : For a very long time, constitutions were not perceived as true legal norms and as higher law. They were considered to be symbolic. The law was then considered as the expression of the general will (art 6 of the DDHC). Because of this status, the law was supposed to be infallible (general will cannot go wrong) then there was no need to review the law = no mechanism to review the law -> Ex in 1936 the conseil d'état quoted "under the current state of French law, the laws cannot be reviewed" Arrighi decision
But parliament can go wrong, therefore it is necessary that statutes of law could be limited by the constitution

MODIFICATION:

Flexible constitution : easy to change
Rigid constitution : hard to change

Constitutions need to adjust to correct provisions that are inadequate, to adapt to new needs of the society.
But a constitution modified too frequently undermines the integrity of the constitution.

In France —> Art 89 deals with modification of the constitution
Limits to what we can modify with art 89 : ex art 89-4 = the republican form of the state cannot be changed

1st characteristic : higher law (= harder to change than ordinary law). Rights inscribed in the constitution are then more protected

2nd : the constitution deals with certain specific issues as the organization of power, form of the state, fundamental rights

3rd : the constitution is more than a legal text, it's the embodiment of a collective and unifying project (common values)

DEFINITION :

Supreme law of a country, establishing the fundamental values of the state, the basis of its political structure and of its social life, the system of governance...
Distributes and constrains powers, protects equalities and fundamental rights

THE NOTION OF CONSTITUTION

PROTECTIONS

Constitutional justice and judicial review : the court will review a statute and analyze whether this law is in conformity with the Constitution. If not, the court will nullify the statute = prevent statutes disrespecting the Constitution from being formed.

Specific form /procedure which protects the constitution from changes and guarantees that the constitution will only be modified through specific procedures (higher law)

For a very long time, judicial review was only practiced in the US : Very famous case 1803 Marbury vs Madison US Supreme Court recognized that it had the power to modify laws adopted by the congress which are not in conformity with the constitution.
In Europe no court was doing judicial review before the XXth century : in Austria Hans Kelsen played a very important role in the development of constitutional justice. It then spread in Europe

Judicial review was adopted in France in the 4th constitution (1946) with a constitutional committee supposed to exercise judicial review. But in fact that committee had a very little power. 5th Constitution = creation of the constitutional council which evolved with time (beginning = limited and now = very important).

1985 the French constitutional court quoted : "the law is the expression of the general will ONLY when it respects the constitution"

DISTINCTION :

Formal approach : the idea that there is a specific constitutional form with certain types of norms produced by a specific entity and through a specific procedure

Substantial approach (the content) : all the norms dealing with constitutional matters = form of the state, organization of power and fundamental rights

There are states with a substantial constitution but not a formal constitution (uk : norms related to the form of the state, the organization of power and fundamental rights but no document called constitution, no specific procedure. "although the uk does not have a single document entitled the constitution, it nevertheless possesses a constitution established over the course of our history by common law, statutes, convention and practice" uk Supreme Court Miller case 2019)

In its history France has had 15 constitutions in less than 200 years
1st constitution = September 1791
Current = 5th constitution of October 1958
This shows a form of **instability** in the history of French constitutions but also **diversity** (lot of differences in the =/= constitutions)

Problems raised by judicial review :

How can we justify that 9 judges are able to modify the law adopted by the parliament ?
Tension between democracy and the rule of law since Democracy = law of the majority but Judicial review limits the power of the majority

Government by judiciary
Do we give too much power to the judges ?
Analogy Story of Ulysses and the sirens from Homer : sirens known for the beauty of their voices leading the men away, solution = wax in the sailors' ears and he ties himself to the boat
Rope = constitution = constraint
Ulysses = society / parliament which knows that it can be seduced = makes mistakes
Sailors = constitutional judges which make sure that the rope is well tied

But what if the sailors keep Ulysses tied up ? If they believe they are better than him ?

The drafting of the Constitution

Initially the drafting of the new Constitution involved 2 teams :

- A committee of experts (lawyers from the conseil d'état) gathered around Michel Debré (minister of justice then)
- An interministerial committee : 4 ministers and lawyers representing the head of government (general de Gaulle)

Procedure = The second team amended the proposals drafted by the 1st team

—> new temporary draft of the Constitution which was sent to the advisory consultative committee directed by Paul Raynaud (last PM of the 3rd Republic in 1940 so symbolic) and which had to give an opinion about this draft.

= agreed with its basic structure but not on every points

Mostly concerned about the referendum : would be a tool to shortcut the parliament.

Another disagreement: the committee wanted to reinforce the conditions necessary for the activation of **art 16** (=allows the president to have full power in case of crisis).

Last disagreement about the **art 23** = incompatibility between the function of members of the parliament and members of the gov = a member of the gov cannot be at the same time a member of the parliament (members of the parliament wanted this compatibility to exist).

However the gov didn't need the approval of the committee

The adoption of the Constitution

On August 27 Michel Debré presented the draft with a very important speech = according to him the goal was to establish a rationalized parliamentary system while restoring the powers on the executive and more precisely the powers of the president.

After the speech the council of state debated on the draft and the gov adopted it on September 3rd. September 4th 1958 De Gaulle presented the draft to the people on the place de la republic (place and date symbolic to mark the republican dimension of the Constitution because September 4th 1870 = declaration of the 3rd republic).

All the major political parties were in favor of the new constitution except the communists.

The draft was approved by the people on September 28th by a very large majority (79%).

It was promulgated on October 4th 1958.

The establishment of the new institutions was progressive and done through organic laws (=laws adopted by the parliament which implement the provisions of the constitution).

However, in 1958 to go fast, these laws were adopted by the government through specific executive orders: ordinances. That specific solution was

The fall of the 4th Republic (1946-1958) :

Governmental instability in the 4th republic (new gov every 6 months). Weak executive with assembly regime (executive the most important branch) which led to its collapse.

May 1958 attempt of a coup in Algeria

June De Gaulle is invested

3 important laws adopted :

- 1st law to give special powers to the gov in Algeria
- 2nd law to give the gov full legislative powers (pass laws)
- 3rd constitutional law of June 3rd to charge the gov with the task of writing a new Constitution (modifies art 90 of the Constitution about the procedure of modification, provides conditions for the new drafting and its procedure)

THE CONSTITUTION OF THE 5TH REPUBLIC

1. Constitutional ideas of general de Gaulle

He had repeatedly expressed his views on the organization, distribution of powers.

Famous speech in June 16 1946 = Bayeux speech after the **1st referendum (in May) for the adoption of the Constitution of the 4th Republic = rejected and before the 2nd referendum of October 1946 = yes**

De Gaulle was in favor of a strong executive power and mistrusted political parties = idea that the president should be above the political parties and ensure the continuity of the state, the proper functioning of the public authorities (art 5 of the 5th Constitution).

He was also in favor of special powers for the president.

Bayeux speech —> anti Constitution and Pre Constitution (against the 4th republic Constitution but announce the ideas of the 5th)

The inspirations

Several former officials such as Raymond Janot, Guy Mollet (former PM) or Pierre Pflimlin were involved in the drafting and limited the risks of government instabilities with certain techniques.

The work of all the scholars and politicians under the 3rd and 4th republic also played a significant role :

- Raymond Carré de Malberg argued for a referendum and for judicial review = law itself should be controlled.
- Maurice Hauriou also argued for judicial review.

2. The ideas of Michel Debré

He played a very important role in the drafting of the constitution; he agrees with De Gaulle on the need to restore state authority. He brings his legal expertise to develop certain procedures in order to rationalize the parliamentary system (=a strict and clear limitation of the competence of the parliament with a strict frontier between the powers of the parliament and of the executive power).

This is found in art 44 of the new constitution, there is a list of the areas where the parliament can intervene.

NB.:

Specific order of the 5th Constitution

Title 1 = sovereignty

Title 2 = president

Title 3 = gov

Title 4 = parliament

Order which reflects the importance of the president (executive power)

The form reveals the substance

Maurice Duberger considered the new republic as a semi-presidential regime because :

- The PR is elected through direct elections and with significant powers
- The government is accountable to the parliament

The nature of the French regime is related to the political circumstances (cohabitation or coincidence of majority)
President + PM + NA = same political party = coincidence of majority
No alignment between the president and the NA but alignment between the PM and the NA = cohabitation
In cohabitation period the system is more a parliamentary regime
3 periods of cohabitation: 1986-1888 1993-1995 1997-2002
Nowadays weird situation

Specific elements of the 5th republic:

- articles of the Constitution giving the head of state special powers to react effectively in case of crisis (art16)
- president above the political parties
- gov has important powers in the legislative procedure (most of the time the law initiative comes from the gov = project)
- limits to the power of the national assembly : parliament cannot intervene outside the specific areas mentioned in article 34
- Creation of the constitutional council (to check if the law is conform with the Constitution)
- Power of dissolution of the parliament: existed before but never used
- Art11 = referendum = power transferred to the people

5th Republic = very specific regime

Goal = to be balanced with mutual destruction powers

However the executive has very important powers : title 2 of the Constitution = president which means it is very important
Power of the parliament reduced, weakened and power of the government increased in 1958

Roots of an imbalance that will be reinforced over the years
= the French system is a **rationalized parliamentary system with the prominence of the President**. In the beginning, the PR was not elected directly by the people. In 1962 there was a modification of the constitution to make it so = gives him more legitimacy

Parliamentary regime

= regime where the parliament is the dominant institution

Typical ex :

UK = the Westminster model

There is a transfer of sovereignty from the people to the parliament
Houses elected (house of commons/ House of Lords) but in $\neq$ ways :

The head of the gov is also the head of the political party or the political coalition which leads the lower chamber = in the UK the PM is the leader of the political party which is dominant in the House of Commons

Relationship between the 2 branches (legislative power and executive)
/ no real separation = the main powers collaborate :

- the gov is politically accountable to the parliament = the parliament (house of commons in particular) will control the gov with the censure motion
- The executive is allowed to dissolve the House of Commons in the parliament (with approval of the King)

The powers have mutual destruction powers (in theory)

In practice $\neq$ because these powers are rarely used since the head of the gov and the House of Commons belong to the same party

The separation is more a separation of parties than a separation of powers

Necessary distinction

KEY FEATURES OF THE 5TH CONSTITUTION

The main characteristics of the Constitution

In his speech in 1958, Michel Debré said “The way is narrow for us, it is that of the parliamentary regime. The government wanted to renovate the parliamentary system; I would even be tempted to say that the government wants to establish a parliamentary system because, for many reasons, the French republic has never succeeded in establishing a parliamentary regime. [...]”

He's basically saying they neither want a presidential or conventional regime (assembly regime): they want a parliamentary regime. They want to establish it for the first time because the 3rd and 4th republic weren't real parliamentary regime since the legislative was too powerful: assembly regime.

In the constitution of 1958, several objectives:

- Break with years of constitutional and political instability
- Restore a balance of the powers by reducing the power of the legislative and increasing the power of the executive
- End parliamentary sovereignty, rationalizing the parliamentary system to find a balance
- Restore the power of the state

That is why they established a parliamentary regime. But a specific form of this regime : a rationalized parliamentary regime with strong powers to the president.

In the Constitution we can find **all the elements of a parliamentary regime** :

- executive / gov (prime minister) politically accountable to the parliament and particularly to the National Assembly (art49)
- mutual destruction powers (art12)
- head of state (president) not accountable to the parliament
- a counter signature mechanism = allows for the political responsibility to be transferred from the president to the gov

The presidential regime

Key example = the US

But France has had experiences with this regime (1st République)

Strict separation of powers :

- Executive branch $\longrightarrow$ directly elected : house of representatives representing the people and senate representing the gov / or indirectly elected : presidential elections with electors
- Legislative power

The executive cannot dissolve the legislative (unlike in a parliamentary regime) and same goes around. There are **no mutual destruction powers**.

However, that is in theory, in practice there are Checks and Balances. There is a way for the parliament to take actions against the president: the impeachment. In principle it's when the president commits crimes.

+ the president have a veto power

The elements not included in the block :

The block included the whole Constitution and nothing but the Constitution
Elements which might be superior to statutes might still not be included in the block

- **internal treaties** which are superior to the law (art 55 of the Constitution) but are not part of the block
The CC cannot say that a statute is not constitutional just because it violates an international treaty
So 2 $\neq$ controls
One to see if a statute respect a treaty and another to see if the treaties respect the Constitution
Decision of the 15 January 1975 = CC competent to do constitutional review but not conventional review
All the judges can do a conventional review
Most important treaty = European convention of the human rights in 1953 (France in 1974) which created the procedure for the European court of human rights in Strasbourg
Same for the Europeans treaties in the EU which are not part of the block
Difficulty = for those treaties the court is in Luxembourg (court of justice of the EU) and this court says that European treaties are superior to national constitutions which is contested, in France the courts have ruled the opposite

- **Organic laws** = specific category of laws $\neq$ from ordinary law
Purpose = detail certain provisions of the Constitution
Procedure for adoption more complex than ordinary laws
Still not part of the block

- **Rules governing the National Assembly and the senate** (règlements d'assemblées) = establish the functioning of the legislative procedure

In **January 1982**, the CC had to decide how to resolve the tensions inside elements of the bloc. It said that there is no hierarchy between the elements of the bloc. They all have the same constitutional value. Which means that when there's a tension between two elements, the CC cannot say that one is superior to the other. It will reconcile them.

In practice however some texts seem to be more protected than other (1st generation rights more than 2nd generation rights or 3rd generation for example which cannot be all invoked in the a posteriori review)

The declaration of 1789 that declares civil rights might be in clash with preamble of the constitution of 1946 that states social rights.

The unity of the block :

6 elements in the block = huge diversity
There are tensions between elements of the bloc, because of their adoptions at different times with different philosophies. They may clash.

The constitutional block

July 16 1971 decision "freedom of liberty" = the constitutional council said the texts mentioned in the preamble of the Constitution have constitutional value

THE CONTENT OF THE CONSTITUTION

Modifications of the Constitution :

Constitution of 1793 (never really applied) art28 "the people always have the right to review , to reform and to change the Constitution. One generation cannot subject future generations to its laws"
"The earth belongs to the living not to the dead" Thomas Jefferson

Art89 of the Constitution for the revision (normal procedure)
Voir cour droit constitutionnel partie sur la révision avec général de Gaulle 1962 art 11 et procédure art89

Certain periods when the Constitution cannot be modified
Certain contents which cannot be modified:
Art89.4 = the republican form of the gov cannot be changed (in reality possible by just changing the art89.4 and then change the form of the government)
This article can also be seen as more substantial (concerns more than just the form) and that certain values and principles cannot be modified either even with a constitutional amendment

Limits to the Constitution changes
But who controls those limits ?
In 2003 the constitutional court declared that it was not competent to examine constitutional modifications

1- **October 4th 1958 Constitution** = preamble and around 90 articles

- Text focusing on **institutional and normative aspects**

- **Very few provisions on fundamental rights or freedoms** :
principle of equality in **art1**, notion of secularism, **art4** statutes shall guarantee the expression of diverse opinions and the equal participation of political parties and groups in the democratic life of the nation, **art 66** individual liberty = freedom from arbitrary detention, **art66.1** prohibition of the death penalty, **art3** = the principle of the republic shall be " the government of the people by the people and for the people"

2- The declaration of the right of men and citizens of 1789

Not formally included in the Constitution of 1958 but there is a reference to this document in the preamble of 1958

3- **The preamble of the 1946 Constitution** (4th Republic) :
protects economic and social rights = 2nd generation rights = positive rights (*right to education, right to employment, to housing...*) those rights imply that the individuals have a claim to the state. 1st application by the CC in January 15 1975 about abortion

4- **The fundamental principles recognized by the laws of the republic** : mentioned in the preamble of 1946. The CC declared that certain principles was fundamental principles recognized by the laws of the republic

5- **the charter for the environment** : Adopted in 2004 and added in the Constitution by a constitutional revision in 2005 which modified the preamble of 1958 and added a reference to the charter

6- certain constitutional principals of the CC
Continuity of public service = 1979 the CC declared it as a constitutional principle ($\neq$ fundamental principle)

Shows the power of the CC which can create constitutional principles