

CONSTITUTIONAL REVIEW IN FRANCE: THE EXTENDED ROLE OF THE CONSEIL CONSTITUTIONNEL THROUGH THE NEW PRIORITY PRELIMINARY RULINGS PROCEDURE (QPC)

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I. Introduction

Constitutional review in France could be seen and perceived as the result of an ‘accident’ in French constitutional history. The creation of the *Conseil constitutionnel* by the 1958 Constitution of the 5th Republic was not really dedicated to create a ‘Constitutional court’ like it was the case in post-world war Germany or Italy.

This classical reluctance was attached to the doctrine of ‘parliamentary sovereignty’ and the idea that “*Parliament cannot do wrong*”. As Parliament was elected and regarded as the symbol of French democracy, the idea of reviewing the constitutionality of statutes by a Court staffed with appointed judges was considered as “*a cannon directed against the Parliament*”¹. However, even if the original idea of the promoters of the 1958 Constitution was not to promote directly constitutional review, the Constitutional Council succeeded to grasp - year after year - a real judicial power and to anchor the French constitutional review into the European model². This was made step by step, but really took off with the 2008 amendment of the French Constitution that created – amongst many other features – a new priority preliminary rulings procedure initiated before ordinary courts.

¹ These words are attributed to General De Gaulle, the first French President of the 5th Republic, who was with Michel Debré, who became the Prime Minister, the founding fathers of the 1958 Constitution.

² Characterized by a single Constitutional court dealing with constitutional litigation exclusively

This new mechanism – qualified as a ‘right’ by the constitutional text – was designed to allow individuals, in the framework of a Court case, to challenge the constitutionality of statutory provisions infringing fundamental rights or freedoms constitutionally protected. Known under its French acronym QPC (*Question prioritaire de constitutionnalité*)³, this new mechanism has been regarded by many French and comparative constitutional lawyers as a ‘*second revolution*’⁴ in terms of possibility to challenge an implemented statutory provision. Up to 2010 when the new proceedings came into effect, it was impossible before to challenge the constitutionality of a statutory provision once enacted and promulgated.

As a matter of fact, one can say that the evolution of French constitutional review took off gradually and started at the end of the sixties, beginning of the seventies, when the *Conseil constitutionnel* decided to review statutory provisions before their enactment not only amongst the 1958 constitutional text but also including the 1789 *Declaration of the Rights of Man and the Citizen* and the *Preamble of the 1946 Constitution*. Both texts entrenched civil and political rights and socio-economic rights⁵. Another non-written source – the Fundamental Principles recognized by the Statutes of the Republic (*Principes fondamentaux reconnus par les lois de la République*) was added to these two texts to complete what could be compared to the French *Bill of Rights*, also sometimes described as the ‘Block of constitutionality’ (*Bloc de constitutionnalité*). This approach was a cornerstone in terms of integration of substantive norms of reference into constitutional review. The progressive transformation of the *Conseil constitutionnel* was the result of a two fold change. First, there has been a tremendous case law development after 1971. Second, several constitutional amendments took place after 1974.

³ On resources on this issue in English, see the Constitutional Council website : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html>

⁴ M. GUILLAUME

⁵ The 1789 Declaration of the Rights of Man and Citizen is made of 17 articles dealing with civil and political rights meanwhile the 1946 Preamble of the 1946 Constitution is made of 18 sections dealing with socio-economic rights. In 2004, was added to the Constitution the *Charter for Environment* made of 10 articles. The French constitutional text guarantees the three generations of rights.

The real starting point of the Constitutional Council case law development in terms of human rights protection and many other issues related to major rights and freedoms – association, termination of pregnancy, education, safety etc. – including socio-economic-rights – strike, nationalization, trade unions etc. – started off during the seventies and the eighties with landmark cases. One then can say that, despite the imperfect way of dealing with these issues, it was impossible to deny that the Constitutional Council turned into a real Constitutional Court at that time, with some restrictions regarding referral procedures to the Court.

Another key element is represented by two constitutional amendments. The first one was adopted in 1974 and allowed 60 members of the National Assembly or 60 members of the Senate to refer back to the Constitutional Council an adopted statute (before its enactment) for unconstitutionality. This was first regarded as a minor change but soon the parliamentary opposition understood that this was a powerful tool to limit the power of the majority ruling parties. This way of referral became commonly used and all major pieces of legislation were referred to the Constitutional Council. This first served the left wing political parties but latter was also used by the right wing parties when they became the political opposition after 1981.

The other major amendment is represented by the 2008 Constitutional reform on '*the modernization and rebalancing of the institutions of the 5th Republic*'. This was the most ambitious reform since 1958, amending one third of the Constitutional text⁶. Amongst major changes related to the relationships and powers between the executive and the legislative power a new feature was inserted allowing the challenge by individuals of statutory provisions for violation of rights and freedoms guaranteed by the Constitution. This was the first time in French history that a statutory provision could be challenged in Court after its enactment. Despite a fairly

⁶ This amendment was the follow up of the work of the "Commission on the modernization of the institutions of the 5th Republic" (*Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions*), also known as the *Balladur Commission* (this Commission was headed by Edouard Balladur, the former French Prime Minister) and staffed with Constitutional Law experts.

The report of the Commission is available in French at <http://www.ladocumentationfrancaise.fr/rapports-publics/074000697/index.shtml>

poor debate on this specific issue during the amendment process, the change brought about in French constitutional review was a major one: first, the constitutionality of enacted statutes could be challenged undermining the doctrine of “parliamentarian sovereignty”; second, this new constitutional feature could be initiated by individuals and not by political authorities. From an outside perspective, this could be seen as a minor change and it is true that a more progressive approach could have been adopted. However, considering the opposition and difficulties to anchor constitutional review in France, this could be really seen as a ‘second revolution’.

Opening constitutional review more widely was not a new idea! It even started eighteen years before in 1990 with the first draft project - which was very close to the current adopted mechanism – but was rejected twice by the Senate⁷, as representing a major threat to the parliamentarian power. For a number of members of Parliament, the constitutional challenge of an adopted act was unthinkable as it was considered as challenging the principle under which ‘*Statutes express the general will of the People*’. It should also be said that probably such a review was culturally seen by members of Parliament as a loss of their own power.

This short historical perspective would not be complete if nothing was added on the evolution of the French constitutional review prior to the introduction of the new QPC mechanism. Besides reforms and constitutional amendments, the development of the *Conseil constitutionnel* case-law⁸ was such that it gradually moved from a technical and political organ (roughly between 1958 and 1970) to a court of law (from 1971 onwards). This was evidenced through two main features: the development of leading cases based on a legal reasoning and the development of constitutional interpretation; the improvement of the length and quality of decisions handled down by the Constitutional Council. As far as the first feature

⁷ The first one in 1990 was the initiative of the then President of the Constitutional Court and former Minister of Justice Robert Badinter and the second one in 1993 was the result of a preparatory commission headed by a renown French constitutional academic (G. Vedel), known as the *comité Vedel*.

⁸ The leading cases of the Constitutional Council are collected in a book with commentaries since 1975 called in French *Les grandes décisions du Conseil constitutionnel*, Dalloz, 16th ed, 2011.

is concerned, the 1971 case on *Freedom of association*⁹ or the 1973 case on *The principle of equality between taxpayers*¹⁰ created what is known as the *block of constitutionality*, that is to say an extended set of norms of references including texts related to fundamental rights and freedoms that were not *per se* formally included within the text of the 1958 Constitution like the 1789 *Declaration of the rights of Man and Citizen* or the 1946 *Preamble of the 1946 Constitution* entrenching socio-economic rights.

Thereafter, all major statutes involving political and social choices have been referred to the *Conseil constitutionnel* before enactment: termination of pregnancy, freedom of movement, nationalisations, freedom of education etc. So, it would be untrue to consider that the new QPC mechanism will work from scratch in terms of protection of rights and freedoms. Secondly, the means and methods of judgement of the Constitutional Court improved dramatically. When the first decisions were limited to half a page to explain the grounds on which the judgement was delivered, it is not unusual nowadays to find judgements with ten to fifteen pages or even more. Despite some exceptions, there has been a clear and dramatic improvement of the quality of the texts of the judgements of the Constitutional Council. It is true that still today no dissenting or concurring opinion can be delivered. However, there is a real collective debate between judges or members of the Council, sometimes explaining a certain lack of clarity regarding certain paragraphs in some decisions.

II. The French System of Constitutional Review: a quick overview

The French constitutional review system is usually presented as a complex one due to the multiplicity of missions granted to the Constitutional Council for historical reasons. This is both true and exaggerated. True because these various missions of the *Conseil constitutionnel* lead to consider it as being more than the classical ones of a constitutional court (as in electoral matters for instance) and exaggerated because there is a clear distinction between these missions – judicial and non-judicial. As

⁹ Constitutional Council 16th July 1971 - Decision n° 71-44 DC, *Freedom of Association*

¹⁰ Constitutional Council 27th December 1973 - Decision n° 73-51 DC, *Budget Law for 1974*

far as Constitutional review is concerned, there are some key features to be kept in mind.

The Constitutional Council is the only legal body able to set aside statutory provisions. An ordinary court in civil or administrative matter cannot set aside a statutory provision for unconstitutionality. The French system belongs to the group of countries having adopted a concentrated system of constitutional review – or European Model – and this is still true after the introduction of the QPC mechanism. Before its introduction, constitutional review could only take place before the enactment of adopted bills (called *a priori review mechanism*) leading to the impossibility to challenge enacted statutory provisions.

The ordinary courts (civil, criminal & administrative) can review the constitutionality of other legal texts (by-laws, regulations etc.) but not of acts of Parliament (statutes). However, they are in charge of reviewing the possible conflicts between statutes and international agreements (what is usually called *conventional review*) allowing them to set aside statutory provisions when they conflict with an international agreement which entered into force. In that regard, the Constitutional Council is only in charge of reviewing the constitutionality of statutes and international agreements (competencies are limited by the Constitution itself) but not the conventionality of statutes. This sharing of competencies, even if it seems illogical from the outside perspective, is the result of a leading case from the CC handled in 1975 on the issue of *Termination of pregnancy*¹¹. The articulation between the constitutional and conventional review is such that they are sometimes regarded as interchangeable and replaceable in terms of protection of rights and freedoms. This complicates the issue of protection from a practical perspective as there can be a kind of competition between the two reviews.

The new priority preliminary rulings set up by the 2008 amendment of the Constitution can be presented by answering two questions. First, what are the changes brought about by the 2008 amendment of the Constitution in

¹¹ Decision 74-54 DC of 15 January 1975, available in English at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a7454dc.pdf

terms of Constitutional Review? Second, what are the strengths, weaknesses and challenges that the new mechanism review will face?

III. The 2008 Amendment on Constitutional Review: The Creation of A Preliminary Rulings On Constitutional Issues Linked To Fundamental Rights And Freedoms: *The Priority Question On Constitutional Issues (Question Prioritaire de Constitutionnalité)*

III.1. Basic Principles & Features

The new mechanism offers the possibility to applicants & respondents in a court case to raise preliminary issues on constitutionality of an act which could impair their fundamental rights or freedoms guaranteed by the Constitution. According to the new article 61-1 of the 1958 Constitution:

'If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period.

An Institutional Act shall determine the conditions for the application of the present article'.

This mechanism could be summarily defined in the following manner. An application for a priority preliminary ruling on the issue of constitutionality is the right of every person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution¹².

The new provision should meet basic conditions to be applicable¹³.

¹² See Constitutional council website *12 questions to begin with (reproduced hereinafter)* also available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html>

¹³ *Section 23-1: Before Courts coming under the supervisory jurisdiction of the Conseil d'État or the Cour de cassation, the argument that a statutory provision infringes the rights and freedoms guaranteed by the Constitution shall, on pain of inadmissibility, be raised in writing and*

First and foremost, the challenged statutory provision must apply to the litigation or proceedings involved: this links the QPC to the Court case. Despite the separation between the substance of the case and the priority preliminary ruling examined in an abstract manner, the new mechanism is based on the existence of a case initiated by one of the parties.

Secondly, this mechanism could only be implemented if there is a *serious (i.e real) constitutional issue* linked to the substantive or procedural aspects of the case. It is not sufficient to raise a constitutional issue within the framework of a case; there should be constitutional grounds to challenge the statutory provisions. This, amongst other issues, means that the issue should never have been dealt with by the Constitutional council before¹⁴ or should be completely new¹⁵. Consequently, this legal ground to challenge the constitutionality of an act or of specific procedures is not unlimited.

Thirdly, not every issue on constitutionality can be raised in the framework of this new proceeding. The statutory provision must infringe '*fundamental rights or freedoms guaranteed by the Constitution*'. What does this mean? This obviously includes rights and freedoms entrenched within the constitutional text but also other texts having been recognized as having such a status: the 1789 Declaration of the rights of Man and Citizen, the Preamble of the 1946 Constitution dedicated to the protection of socio-economic rights and the 2004 Charter for the environment. These texts have been granted constitutional status by the Constitutional Council

accompanied by a reasoned justification of this argument. Such an argument may be raised for the first time before a Court of Appeal. It cannot be raised by the court proprio motu.

Before a Court coming under the supervisory jurisdiction of the Cour de cassation, when the Public Prosecutor is not a party to these proceedings, the matter shall be brought to his attention once the argument has been raised so that he may make his opinion known.

If such an argument is raised during a preliminary investigation into a criminal offence, the matter shall be brought before the relevant appellate court.

Such an argument may not be raised before a Cour d'assises. In the event of appeal against a decision handed down at first instance by a Cour d'assises, it may be raised in writing in a document accompanying the notice of appeal. This document shall be immediately transmitted to the Cour de cassation

¹⁴ Or if so, the issue can nevertheless be raised if there is a change of legal or factual circumstances.

¹⁵ This aspect should however only be raised for the first time before one of the two Supreme Courts (Council of State (administrative matters) or Cassation Court (civil, social, commercial or criminal matters)).

or through constitutional amendments. However, this will exclude all other provisions of the Constitution not related to fundamental rights and freedoms.

Fourthly, as already briefly mentioned, the issue should not have been dealt with before by the Constitutional Court. This is an understandable condition. As the new proceeding aims at giving individuals a chance to challenge the constitutionality of a statutory provision in the framework of a court case, judges who will transmit the case must first ensure that the provisions have not yet been declared constitutional by the Constitutional Council. If so, the Court *a quo* (i.e. the court before which the proceeding is initiated) can already decide on the case as the constitutionality issue has been dealt with. However, there are two exceptions to this key rule.

The first one lies in the possibility for an ordinary court, despite the existence of an order of the Constitutional Council declaring a statutory provision compatible with the Constitution, to refer the matter back to the Constitutional Council because the legal circumstances (i.e. the legal framework) has changed. For instance, new constitutional provisions have been adopted and the Constitutional Council decision, at the time it delivered its case on the constitutionality of the statutory provisions, was made on different grounds. This was the case for statutes related to bioethics rules for instance. In such a situation, the Institutional Act considered that the question could be raised again due to the new legal context.

The second exception is very close but related to factual grounds, i.e. the change of ‘factual circumstances’. This can be explained through an example: the Constitutional Council had to decide in 2003 on the constitutionality of the statutory provisions related to legal guarantees for people held in custody. At this time, the Council considered that the provision did not infringe the Constitution. When the matter was referred back through the new QPC mechanism, the Constitutional Council should have declined to examine the case as the issue has already been dealt with. However, the Council considered that the conditions had dramatically changed between its first examination of the issue of constitutionality and its current examination. The number of persons held in custody had

exploded and the context was not the same anymore. Consequently the Council considered that this change of circumstances was such that it could not be compared to the original situation. It accepted to reopen the examination of the statutory provision despite an earlier examination¹⁶. This obviously gives more discretionary power to the Constitutional Council.

III.2. Basic Proceedings

The original feature of this new right and mechanism lies in its openness but also on the three stages procedure that has been created to implement it. Despite the initiation of the proceeding by individuals within the framework of a court case, the ordinary courts are not in charge to deal directly with the issue on constitutionality. They must refer the matter back to the Constitutional Council under the supervision of the Supreme Courts (*Conseil d'État* or *Cour de cassation*), depending on whether administrative or judicial courts are concerned. How does this proceeding work?

There should be separate proceedings within the main trial to deal with the constitutionality issue. This means that the applicant who wants to raise a priority preliminary ruling procedure must act through a separate written referral before the judge in charge of the case. Despite this formal aspect, this is quite easy as the only requirement lies in the identification of the statutory provision infringing (or supposed to infringe) the constitutional provision related to rights and freedoms guaranteed by the Constitution. Then, it is up to the judge to decide if the question raised is sufficiently serious to be transmitted to the Supreme Court and to the Constitutional Council. It also should be noted that the question could be raised anytime within the procedure, before any court: this allows the parties to decide when they want to raise the constitutionality issue and give them a chance to do so if they realize during the proceedings that they omitted to do so in the Court of first instance, for example. There are only limited and temporary exceptions, especially before the Court of assizes, which

¹⁶ Decision n° 2010-14/22 QPC of July 30th 2010 (Mr Daniel W et al.), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en201014qpc.pdf

deals with the most serious crimes and this exception is explained by the existence of a jury system making the question of deciding on the seriousness of the issue of constitutionality more difficult.

The Court *a quo* should – without any delay – decides if the conditions set up by the institutional act are met and – if satisfied – transmit the question to the relevant Supreme Court (*Cour de Cassation* or *Conseil d'État*). This concretely means that any priority preliminary rulings procedure could not be sent directly by the Court *a quo* to the Constitutional Council and must go through the channel of the Supreme Court. The only obvious exception is where the priority preliminary ruling is raised for the first time before one of the Supreme Courts. In such a case, and provided that the conditions are met, the transmission to the Constitutional Council can be directly made. It is worthwhile to note that the Supreme Court will double check the seriousness of the question and the other conditions set forth in Article 23 of the Institutional Act on *Priority Preliminary Rulings*. They can choose to transmit or not to transmit but in the latter case, the courts must specify the grounds on which they refuse the transmission.

This procedure could appear at a first glance as being quite complex as it implies the intervention of two ordinary courts before the transmission to the Constitutional Council. After one year of implementation, the new proceeding works pretty well and the ‘double filter system’ between the Court *a quo* and the Supreme Courts has proved to be efficient without blocking major cases. It was feared before the implementation of the priority preliminary ruling that the two Supreme Courts could limit the access to the Constitutional Council by pre-judging the seriousness of the constitutional issue. This has not been the case and the transmission rate to the Constitutional Council proved to be quite high.¹⁷

¹⁷ Since the entry into force of the QPC mechanism on the 1st of March 2010, the Constitutional Council registered 1022 cases that were sent to the *Conseil d'État* and the *Cour de cassation*: 798 non-transmitted cases (i.e. 78 %) et 224 transmitted cases (i.e. 22 %). For the latter cases, 96 transmitted by the *Conseil d'État*, 128 by the *Cour de cassation*. During 2011, the Constitutional Council has been referred in 599 cases: 485 non-transmitted cases (81%) and 114 transmitted cases (19%), of which 42 from the *Conseil d'État* and 72 from the *Cour de cassation*. (source: Constitutional Council: statistics from the 1st of January 2012: available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/a-la-une/fevrier-20102-la-qpc-au-1er-janvier-2012-quelques-chiffres.104659.html>)

III.3. Stages & Length of the Procedure

The new priority preliminary ruling procedure was welcomed by lawyers and NGO's working in the field of Human Rights but a major technical question raised by this new proceeding was a question of time: will such a procedure slow down the whole trial? The question was both technical and practical. It was technical because most of the judges sitting in ordinary courts were not familiar with constitutional issues (especially in civil, trade, labour law matters) and could be dubious regarding the seriousness of the constitutionality issue. It was also practical because the new proceeding, if not dealt with speedily, could discourage applicants to use it for time constraints reasons. That is why the Institutional Act dealing with the procedure built up a quite strict timeframe creating limits to compel the courts to act quickly and diligently. The following guiding principles were set up.

Only the Parties to the conflict could raise this constitutionality issue (not the judge) before any court of law. This means that judges cannot initiate themselves the QPC procedure. Only the parties to the trial can do so; judges cannot act *ex officio* in this matter, even if they are convinced that a constitutionality issue could be raised. Two consequences can be drawn from this situation. First, this gives the parties full control over the QPC procedure; they can raise it at any time during the trial or can choose other options before doing so during the trial process. Secondly, the constitutionality issue is dealt with separately from the rest of the case. The Court *a quo* is not a constitutional judge: once the Court has decided that there could be an issue of constitutionality, the QPC goes out of his or her hands.

The Court must deliver a 'sound decision' accepting or rejecting to transmit the question to the Supreme Court. There is no precise deadline for the Court *a quo* decision. The Institutional Act related to the QPC procedure just mentions that the Court must act without delay¹⁸. Practically, the

¹⁸ Art. 23-2 al.1 Rules of proceedings before the Constitutional Council as amended by the 2009-1523 Institutional Act 10th December 2009. Section 23-2 (coming into force on March 1st 2010) *The Court shall rule without delay, giving reasons for its ruling, as to the transmission to the Conseil d'État or the Cour de cassation of the application for a priority preliminary ruling*

average time is between one and two months. This attitude perfectly respects the spirit of the procedure.

When transmitted, the Supreme Court (*Cour de Cassation* or *Conseil d'État*) should make a decision within 3 months to transmit or not to the Constitutional Council. This could be compared as a kind of 'leave to appeal' to the Constitutional Council. If the deadline is not respected, the QPC is automatically transmitted to the Constitutional Council. It should be noted that both Supreme Courts have the opportunity to transmit a QPC if the question of constitutionality raised within the Court case is completely new. This is not possible before the Courts of first instance or the Courts of appeal where the question could only be raised if it is a serious one. The second filter (as it is sometimes called) exercised by the Supreme Courts should be considered not only as a means to confirm the fulfillment of the conditions set up by the Institutional Act but also as a method used to rationalize the various QPC emanating from various inferior Courts on the same issue. Despite some original fears, the Supreme Courts played their roles correctly.

Once the transmission has been made, the Constitutional Council gets another 3 months period to deliver its decision on the constitutionality of the provision. The way in which the Council delivers its decision is dealt hereinafter. Overall, calculated from the introduction of the QPC before lower Courts, the full procedure should not exceed more than

on the issue of constitutionality. Such transmission shall require that the following conditions be met :

1° The challenged provision is applicable to the litigation or proceedings underway, or is the grounds for said proceedings;

2° Said provision has not previously been found to be constitutional in the holding of a decision of the Constitutional Council, except in the event of a change of circumstances

3° The matter is of a serious nature

In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the Conseil d'État or Cour de cassation.

The decision to transmit the application shall be sent to the Conseil d'État or the Cour de cassation within eight days of the handing down of said decision, together with the submissions of the parties. Refusal to transmit the application may only be challenged upon appeal against the decision settling all or part of the litigation involved

eight months. This is quick and simple and does not prevent the parties to raise other legal issues. It is noteworthy to mention that when the QPC is raised, the case is suspended before the Court until the decision of the Constitutional Council is delivered or until the Supreme Court refuses to transmit the question to the Council. When the Constitutional Council decision is handed down, the final decision is then made by the Court where the question was originally raised.

III.4. The Constitutional Court Decision

The decision is a preliminary ruling on the constitutional issue raised by a statutory provision applicable in a specific case. This means that the Constitutional Council will not make the final ruling itself. It will deliver a decision in an abstract manner not taking into consideration the specific case which was at the origin of the referral. In other words, there is a disconnection between the case itself based on facts and arguments and the constitutionality issue. The Constitutional Council will not pay attention to the facts or surroundings elements of the case. It will limit itself to the only question: ‘does the statutory provision referred infringe or not rights and freedoms guaranteed by the Constitution?’ That is all!

If successful, the Constitutional Council decision will abrogate the unconstitutional statutory provision. This means that the effects of nullification will not be retroactive. This however will lead to the complete disappearance of the challenged unconstitutional statutory provision for the future and will automatically benefit other cases related to the same provision.

Despite a silence on this issue within the Institutional Act, the Constitutional Council can decide to grant the benefit of the unconstitutionality of the provision to the case in which the issue of unconstitutionality was raised. This seems normal but was not necessarily obvious considering the wording of the Institutional Act provisions. There were some doubts about the immediate applicability as the abrogation of the unconstitutional provision was only made for the future and not for the past. If this is logical, this would have been unfair for the applicant who generated the QPC and could have led to unfair discrimination. So, as a principle, the

Constitutional Court decided to grant the benefit of the unconstitutionality to the case in which the QPC was raised.

However, in certain cases, the Constitutional Council can decide to alter the effects of the decision of unconstitutionality by giving the Parliament a time limit to correct the unconstitutionality (usually around one year but this depends of the difficulty of the question). In such a case, the Constitutional Council will suspend the unconstitutionality of the statutory provision (meaning that it can still apply) until the unconstitutional statutory provision has been replaced. This situation is not unusual and can be found in many countries but the Constitutional Council will not grant interim measures and leave the existing unconstitutional provisions until it has been replaced by a new one.

IV. Strengths, Weaknesses And Challenges: What Are The Strengths And Weaknesses Of The New Constitutional Dispensation? What Are the Challenges The New Mechanism Of Constitutional Review Will Face?

IV.1. Strengths of the New Mechanism

Despite the apparent modest scope of the new mechanism, compared to what exist in other countries, the introduction of the new QPC is a radical psychological change: acts of Parliament are not anymore absolute forever once enacted! This means that the doctrine of absolute parliamentary sovereignty is over. This also means that the French constitutional review rejoins more closely the group of countries having a constitutional review exercised through a centralized Constitutional Court. It is difficult to say if this reform will remain as such for a long time or if new features will develop quite soon. However, the major change lies in the possibility to challenge statutory provisions after their enactment. What was culturally considered impossible before has become a reality! Here is the core of the amendment.

On a practical point of view, the QPC mechanism is relatively simple to implement: despite the existence of a double filter before the referral to

the Constitutional council, applicants and their lawyers understood the beneficial effect of the procedure. As a matter of fact, the implementation of the QPC mechanism for more than two years gave positive results. Even if statistics should be carefully interpreted, the number of QPC that have been raised in ordinary courts, the transmission rate to the Constitutional Council, the number of statutory provisions declared unconstitutional are enough elements to consider the overall mechanism as a success. The ordinary courts have (usually) fairly played the game and were keen to transmit QPCs, even if a number of them will obviously lead to a refusal or a rejection from the constitutional law expert's point of view. In case of doubt, the rationale of the reform was clearly directed towards a large interpretation of the provisions and consequently designed as an invitation for judges to privilege such a procedure when the legal conditions were met. If one compares the results of the implementation of the QPC with some other preliminary ruling procedures that were introduced before into the French legal order, such as the one before the European Court of Justice, the reform was absorbed culturally much more quickly by lawyers than the previous ones.

Strength of the priority preliminary ruling mechanism also lies within the effect of the Constitutional Council decision when the statutory provision is declared unconstitutional. The provision disappears from the legal order and will not only be set aside, as in the case of unconventional statutory provisions (i.e not compliant with binding international agreements). This is undoubtedly a key advantage not only for the applicant but also for all other persons who could be affected by the unconstitutional statutory provision. Moreover, this clarifies the situation as it cleans progressively the legal order from unconstitutional provisions. Considering that all kinds of statutory provisions could be referred through the QPC mechanism, this also includes old provisions enacted before the 1958 Constitution. They have never been in a position before to be constitutionally reviewed as no constitutional court existed before. Now, there is an opportunity to do so and some QPC decisions illustrate the usefulness of such a proceeding.

Another advantage of this new procedure is also to be found in its quickness: it will give a direct answer on the constitutionality of a statutory provision in less than 8 months. Considering the importance given by the parties to

the time frame of a case, this is an important asset. On a practical point of view, this is even more important as most of the QPCs are linked to Tax Law, Criminal Law or Commercial Law, meaning that the speediness of the process is regarded as a key element.

IV.2. Weaknesses of the new mechanism

Despite an overall positive reception of this new QPC mechanism, there are a number of questions and weaknesses that should be acknowledged. It will be the responsibility of the Constitutional Council to waive them through its case-law, and also the one of the Constitution-making body to evaluate in a couple of years if the mechanism should be left like it is now or if it should be amended and refined.

Firstly, on a legal point of view, there are a number of limitations that will restrict the constitutional review through the QPC mechanism. The QPC can only challenge the unconstitutionality of statutory provisions affecting rights and freedoms constitutionally guaranteed. This means that all other provisions of the Constitution that are not linked to rights and freedoms cannot be challenged in QPC procedures. The Constitutional Council stressed this limit in several cases¹⁹, despite some interpretations through which the indirect effect of some provisions on rights and freedoms could be used to bypass the limits set up by Article 61-1 of the Constitution.

Another difficulty, from a legal point of view, is related to the knowledge of constitutional case-law, indispensable for any lawyer to lodge such a question before a court. Even if the case-law of the Constitutional Council is widely published and commented on by academics, very few legal practitioners were acquainted with the various aspects of the already existing case-law. This will obviously change over the years, but one has to remind that in France, there was no tradition of studying deeply rights and freedoms from a constitutional law perspective and in a practical manner. The first QPCs evidenced a lack of clear understanding of the content and limit of the Constitutional Council case-law. Even after two

¹⁹ See for instance Decision n° 2010-5 QPC of June 18th 2010, SNC KIMBERLY CLARK, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en-20105qpc.pdf

years of existence, QPC referrals still lack of deep analysis of the existing constitutional case-law without speaking of comparative constitutional case-law, which is inexistent.

Another interrogation lies in the understanding of some conditions which are still unclearly defined and will impose some clarification from the Constitutional Council. Despite a political will to promote the QPC mechanism, the Constitutional Council cannot enlarge the interpretation of the framework and the features of the new procedure. Therefore, there is a risk of strict interpretation, which is understandable but could also lead to limit the approach to constitutional issues in terms of practical implementation. As constitutional review remains an abstract review within the framework of the QPC, no official attention will be brought to the context that led the case to the Constitutional Council. The unconstitutionality of a statutory provision can only be derived from the text and not from the implementation of the text. This could leave some critical issues of constitutionality out of the scope of the new constitutional review.

On a practical point of view, there are also a number of questions to be raised. Leave to appeal to the Constitutional Court could raise some questions of uniformity of interpretation between the courts. This could be the case from lower courts as the knowledge of constitutional issues and constitutional case-law is uneven. However, this fear is not really justified as lower courts have a tendency in case of doubts to transmit the QPC to the Supreme Court. The double filter system is even here efficient as it gives the lower court the feeling that there is a safety net. The question has however been raised with the two Supreme Courts (the *Conseil d'État* and the *Cour de cassation*). If the *Conseil d'État* fully played the role that was expected, the *Cour de cassation* proved to be more reluctant to transmit some QPCs and gave few explanations on the grounds why it refused to transmit these QPCs. There is one possible reason lying in the capacity of the Supreme Courts (as any other court) to directly apply the protection granted by international agreements in terms of protection of rights and freedoms. For instance, any court can directly enforce the European Convention on Human Rights in case of conflict with a statutory provision. As a consequence, the ordinary court could be tempted to first

use the Convention rather than the constitutional protection (provided that the issue is raised by the parties). This is why the QPC has been named the *'Priority preliminary ruling on constitutional issue related to rights and freedoms protected by the Constitution'* because the promoters of the constitutional amendment and the Institutional Act wanted to give priority to the constitutional issue over the conventional issue. It should also be stated that some attitudes of the Courts were driven by 'cultural reluctance' to have a superior court of law in constitutional matters that did not exist before.

Finally, it must also be mentioned that some lawyers are still skeptical about the efficiency of the procedure and some of them usually lack of constitutional law background. This is probably a temporary problem as the reform is still new for many of them who worked for years without such a constitutional review. The changes brought by the arrival of new generations of lawyers and judges will probably make this problem disappear. Then, what are the challenges ahead?

IV.3. Challenges

As already mentioned, the success of the QPC mechanism anchored into the French legal system much more quickly than scheduled. If optimistic prognostics were around 20 to 25 QPC decisions per year delivered by the Constitutional Council, it was far from the nearly five times bigger figure that was reported at the end of the first year. However, some challenges still lie ahead: the QPC mechanism will have to face to transform this success into a triumph.

Firstly, this mechanism has not been created into an empty legal environment regarding the protection of rights and freedoms. Before the introduction of the QPC review, ordinary courts took the habit – as the Constitutional Council invited them to do so since the 1970s – to review the compatibility of statutory provisions with 'rights and freedoms protected by international conventions' and especially those protected by the European Convention on Human Rights and the Law of the European Union. As a matter of fact, these Conventions contain a number of rights and freedoms similar to those included in the Constitution. Some rights

and freedoms are protected twice, once by international agreements and once by Constitutional texts. On a substantive point of view, it is up to the parties to decide which text of reference they want to invoke! Logically, they should rather prefer the constitutional review over the conventional review as the effects of the first one are more radical. But at the same time, applicants could give priority to an immediate answer to their question. As for conventional issues, the ordinary judge in charge of the case can decide herself or himself upon the issue, there will be a unique decision dealing with the compatibility of the statutory provision with the right or freedom guaranteed by the international convention and with the final answer to be delivered on the substance of the case. There is no need for transmission to another Court. This could be an option that will play in disfavor of the QPC mechanism.

Moreover, on a legal cultural point of view, lawyers and judges are keener to use what they know rather than embarking on new procedures that cannot fully meet their expectations. In that regard, a risk of conflict exists and it would be unfair not to recognize it! This is more the result of a conjunction of historical changes in international and constitutional law. The direct application of treaty provisions and a possibility for individuals to refer a matter – directly or indirectly – to the *European Court of Human Rights* or the *Court of Justice of the European Union* changed the perspective that existed before. It is true that Constitutional review is regarded as being more effective on a hierarchical point of view due to his normative position. However, for a number of applicants this does not necessarily mean efficiency and quick release of judicial decisions. There could be a tendency for parties to the conflict to prefer ‘conventional review’ to ‘constitutional review’ in terms of efficiency. This becomes a question of judicial strategy.

Another key element of this discussion lies in the level of protection offered by constitutional review. This latter should be at least better or higher than the protection under conventional review. If there is no difference – or even worse if constitutional protection is lower than the protection offered by international conventions (and this includes the texts interpreted by the courts), there is a high chance that the best practical protection will be preferred, regardless of the hierarchy of norms. To this situation, the

multiplicity of judges (national & supranational) increases the risks of different approaches and interpretation. This is classically represented by what is called the ‘dialogue between judges’ meaning that judges try to avoid conflicts between their decisions. This is easily regulated between national courts as they must comply with the decisions of their supreme courts from which they depend. This could however be more problematic between national courts and supra-national courts where their relationships are not placed into the same hierarchy.

Secondly, the Constitutional Council should be very careful in its decisions – especially those delivered under the QPC procedure – to give clear and complete explanatory reasons on the chosen ruling. This is not only a question of legal reasoning! Individuals who initiated the proceedings through a priority preliminary ruling procedure want to know the reasons why their application failed. They would barely accept assertions without explanations. The *Common Law* motto providing that *Justice has not only to be done but has to be seen to be done* fully applies in this framework. The French legal tradition of writing decisions in a short and concise manner (understandable in the past) cannot be used anymore when it comes to give reasons on the constitutionality of a challenged statutory provision dealing with constitutional rights and freedoms. There is a need for explanation to understand how the Constitutional council delivered its case. This constitutes a major change and challenge for the future of the QPC mechanism that should not be underestimated. This is a need for decision of refusal to declare unconstitutional statutory provisions but also for decisions declaring unconstitutional some statutory provisions but with a postponed effect. Explanations are as important as the final decision itself.

The introduction of *a posteriori* mechanism in French constitutional review has been qualified as a ‘*second revolution*’ and is probably to have more consequences than expected. A number of these consequences are still unknown and will show up through the further case-law of the Constitutional Council. It will have consequences on the pre-existing *a priori* review mechanism that played a key-role on the development of the constitutional case-law. This mechanism still exists but now in a different

environment. It will give the French constitutional review a new start but will also probably constitute the beginning of a new era.

Texts of Article 61-1 / Article 62 of the 1958 French Constitution (consolidated version after the 2008 amendment)

ARTICLE 61-1

If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period. .

An Institutional Act shall determine the conditions for the application of the present article.

ARTICLE 62

A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

(Source: Constitutional Council website – reproduced with the authorization of the Constitutional Council – available at : <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html>)

12 questions to begin with

- 1- What is an “application for a priority preliminary ruling on the issue of constitutionality”?
- 2- What is meant by “statutory provision”?
- 3- What is meant by “rights and freedoms guaranteed by the Constitution”?
- 4- Why is this ruling said to be “priority preliminary”?
- 5- Does one need to have recourse to a lawyer to make an application for a priority preliminary ruling on the issue of constitutionality?
- 6- When can an application for a priority preliminary ruling on the issue of constitutionality be made?
- 7- What are the conditions governing the making of such an application?
- 8- Can a person involved in legal proceedings make such an application directly to the Constitutional Council?
- 9- What conditions must be met for an application to be referred to the Constitutional Council?
- 10- Can one challenge a refusal by a court to refer an application to the Constitutional Council?
- 11- What are the consequences of a decision of the Constitutional Council?
- 12- When this reform came into force?

1- What is an “application for a priority preliminary ruling on the issue of constitutionality”?

An application for a priority preliminary ruling on the issue of constitutionality is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution.

The priority preliminary ruling on the issue of constitutionality is provided for by Article 61-1 of the Constitution under the constitutional reform of July 23rd 2008.

Prior to this reform, it was impossible to challenge the constitutionality of a statute which had come into force. From now on, persons involved in legal proceedings will be vested with this new right.

2- What is meant by “statutory provision”?

This means a provision in a law passed by the body entitled to legislate. It is therefore basically a law enacted by Parliament (statute, Institutional Act or Ordinance ratified by Parliament). It may also be a law of the land of New Caledonia.

Ordinances which have not been ratified, Decrees, Government Orders or individual decisions cannot therefore be the object of an application for a priority preliminary ruling on the issue of constitutionality. (These are administrative acts which come under the jurisdiction of Administrative courts).

3- What is meant by “rights and freedoms guaranteed by the Constitution”?

The rights and freedoms guaranteed by the Constitution are the rights and freedoms found in:

- The Constitution of October 4th 1958 as amended on several occasions: for example, the judicial authority which is the guardian of the freedom of the individual (Article 66);
- The texts referred to by the Preamble to the Constitution of October 4th 1958, namely:
 - The Declaration of the Rights of Man and the Citizen of 1789,
 - The Preamble to the Constitution of 1946,
 - The fundamental principles recognized by the laws of the Republic (to which the Preamble to the Constitution of 1946 refers) ; for instance freedom of association or freedom of education,
- The Charter for the Environment of 2004.

4- Why is this ruling said to be “priority preliminary”?

Institutional Act n° 2009-1523 of December 10th 2009 concerning the application of Article 61-1 of the Constitution has given priority status to the issue of constitutionality.

This means firstly that, when it is raised before a court of first instance or a court of appeal, the issue must be addressed without delay. The time devoted to dealing with the priority preliminary ruling on the issue of constitutionality will be part of the time given to the proceedings overall and must not delay the latter.

Secondly, when the court is asked to rule on arguments which challenge both the constitutionality of a statute (priority preliminary ruling on the issue of constitutionality) and the failure of said statute to comply with international treaties and agreements (plea of failure to comply with international obligations) the court shall be required to address the issue of constitutionality in priority.

5- Does one need to have recourse to a lawyer to make an application for a priority preliminary ruling on the issue of constitutionality?

The rules governing the making of an application for a priority preliminary ruling on the issue of constitutionality comply with the rules applicable before the court hearing the case. When the presence of a lawyer is required before the court, the application for a priority preliminary ruling on the issue on constitutionality can only be made by a lawyer.

However, in courts where a party is allowed to defend himself without a lawyer, it is possible for this party to directly apply for a priority preliminary ruling on the issue of constitutionality.

NB: The application for a priority preliminary ruling on the issue of constitutionality must always be made in a separate written document containing the reasons for this application (even in courts where proceedings are oral).

6- When can an application for a priority preliminary ruling on the issue of constitutionality be made?

It may be made during any court proceedings before a normal court of law (coming under the supervisory jurisdiction of the Cour de cassation) or Administrative court (coming under the supervisory jurisdiction of the Conseil d'État).

The application may be made at first instance, before a court of appeal or before the Cour de cassation.

7- What are the conditions governing the making of such an application?

Any court under the supervisory jurisdiction of the Conseil d'État or the Cour de cassation may be asked to rule on an application for a priority preliminary ruling on the issue of constitutionality. Only the Cour d'assises cannot be asked to make such a ruling. However, in criminal matters, this application may be made prior to trial, at the level of the Investigating

Magistrate during the preliminary investigation, or after trial before the Cour d'assises, on appeal or before the Cour de cassation.

The application for a priority preliminary ruling on the issue of constitutionality must be made in writing and reasons given for this application. It must always be separate from any other submissions put to the court in the proceedings in question.

8- Can a person involved in legal proceedings make such an application directly to the Constitutional Council?

No. An application for a priority preliminary ruling on the issue of constitutionality must be made during court proceedings.

The court called upon to hear such proceedings will, when such an application is made, promptly look into this matter. It will decide whether the application is admissible and if the conditions laid down by the Institutional Act have been met.

If these conditions have been met, the court will then transmit the application to the Conseil d'État or the Cour de cassation.

The Conseil d'État or the Cour de cassation will then proceed to look more closely at the issue raised and decide whether or not to transmit the application to the Constitutional Council

9- What conditions must be met for an application to be referred to the Constitutional Council?

There are three conditions set out in Article 61-1 of the Constitution:

- The challenged statutory provision must apply to the litigation or proceedings involved, or be the basis of such proceedings;
- The challenged statutory provision has not previously been found to be constitutional by the Constitutional Council;
- The issue raised is a new one or is of a serious nature.

10- Can one challenge a refusal by a court to refer an application to the Constitutional Council?

Refusal by a court of first instance or a court of appeal to transmit an application for a priority preliminary ruling on the issue of constitutionality can only be challenged when lodging an appeal (before a court of appeal, the Conseil d'État or the Cour de cassation) against the decision on the merits handed down by the court hearing the case.

No appeal may be lodged against refusal by the Conseil d'État or the Cour de cassation to refer the application to the Constitutional Council.

11- What are the consequences of a decision of the Constitutional Council?

If the Constitutional Council holds that the challenged statutory provision is constitutional, this provision will continue to exist in the national legal order. The court must apply this provision, unless it finds it to be incompatible with a provision in an international treaty or the law of the European Union.

If the Constitutional Council holds that the challenged statutory provision is unconstitutional, this decision will in effect repeal said provision. It will no longer exist in the national legal order.

12- When will this reform come into force?

It has come into force on March 1st 2010.

It has applied to proceedings underway at said date. However only those applications for a preliminary ruling on the issue of constitutionality made as from March 1st 2010 in a written, separate and reasoned memorandum have been declared admissible.

SUMMARY

Constitutional Review in France: The Extended Role of the *Conseil constitutionnel* through the New Priority Preliminary Rulings Procedure (QPC)

XAVIER PHILIPPE

This paper deals with the new mechanism of “priority preliminary rulings” in the French constitutional review, introduced by the 2008 constitutional amendment and entered into force on the 1st of March 2010. It first provides a short background on the progressive empowerment of the *Conseil constitutionnel* – the French constitutional court – which succeeded to move out from its original conception with limited powers to a Court

in charge of dealing with constitutional review, as other Constitutional courts in Europe. The article also pinpoints the role played by the Court itself through its case-law to transform its role and move to a modern Constitutional court.

Two questions are addressed: What are the changes brought about by the 2008 amendment of the Constitution in terms of Constitutional Review? What are the challenges that the new mechanism of constitutional review will have to face? With regard to the first question, the article deals with basic features and basic proceedings (as entrenched into the institutional statute adopted in December 2009), the stages and lengths of the procedure as well as the effects of the Constitutional Court decision. With regard to the second question, the article deals with the first lessons and challenges of the new proceedings. With more than 200 decisions in less than two years, the new mechanism has been successful and is regarded as a major change and progress. However, there are a number of weaknesses and challenges ahead that are also to be addressed. The existence of several review mechanisms at national and European levels can give rise to conflicts. The level of protection should be at least better under the constitutional review than under the conventional review! The Constitutional Court should also be very careful in its decision to give clear and complete explanatory reasons on the chosen ruling. The introduction of the *a posteriori* mechanism is probably to have more consequences than expected on an *a priori* mechanism.

RESÜMEE

**Prüfung der Verfassungsmäßigkeit in Frankreich:
Die Erweiterung der Rolle des Verfassungsrates
durch das Verfahren der vorrangigen Frage zur
Verfassungsmäßigkeit**

XAVIER PHILIPPE

Dieser Artikel behandelt das neue Verfahren der sogenannten vorrangigen Frage zur Verfassungsmäßigkeit der französischen Verfassungsgerichtsbarkeit, das durch die Verfassungsrevision von 2008 eingeführt, und am 1. März 2010 in Kraft getreten ist. Der Verfasser liefert zuerst ein wenig Hintergrund zu der progressiven Ermächtigung des Verfassungsrates (*Conseil constitutionnel*), der sich mit dem neuen Verfahren von seiner ursprünglichen Auffassung mit limitierten Befugnissen auf ein Gericht verschoben hat, das, wie andere europäische Verfassungsgerichte, über die Verfassungsmäßigkeit von Gesetzen entscheidet. Der Artikel beschreibt auch die Rolle, die der Verfassungsrat durch seine Rechtsprechung gespielt hat um seine Funktion zu einem modernen Verfassungsgericht zu transformieren.

Zwei Fragen werden behandelt: Was sind die Änderungen, die durch die 2008 Verfassungsreform eingeführt worden sind? Was sind die Herausforderungen des neuen Mechanismus, mit denen der Verfassungsrat zu kämpfen hat? Hinsichtlich der ersten Frage, befasst sich der Verfasser mit den grundlegenden Kennzeichen und Verfahren, die in dem in 2009 verabschiedeten Gesetz bestimmt sind, mit Rücksicht auf die Phasen, die Länge des Verfahrens, sowie die Folgen der Entscheidung des Verfassungsrates. Im Rahmen der zweiten Frage, diskutiert der Verfasser die ersten Lehren und Herausforderungen des neuen Verfahrens. Mit mehr als 200 Entscheidungen in weniger als zwei Jahren, der neue Mechanismus scheint ein großer Fortschritt zu sein. Dennoch, gibt es zahlreiche Schwächen und Herausforderungen zu überkommen. Die Existenz mehrerer verschiedenen Menschenrechtsschutz-mechanismen auf nationaler und europäischer Ebene

kann zu Konflikten führen. Dieser neue verfassungsrechtliche Grundrechtsschutz sollte sich besser als das Alte erweisen. Es ist besonders wichtig, dass der Verfassungsrat seine Entscheidungen mit eindeutiger, detaillierter Argumentation unterstützen soll. Dieser *a posteriori* Mechanismus wird erwartet mehrere Folgen als das frühere *a priori* Verfahren zu haben.