The constitutional review of laws in France: some historical and jurisprudential landmarks

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1. The creation of the French Constitutional Council

The French Constitutional Council is one of the most respected authorities of constitutional jurisdiction in Europe as it represents the result of the development and strengthening of constitutional values which have been brought to public attention and implemented since 1789. The mainstream of thought triggered by the French Revolution has inspired and enriched the legal culture of the entire continent.

The idea of a constitutional review of acts adopted by the legislative body has been advanced since the first French Constitution of 1790, and expected to be carried out by a Council of Elders or a Conservative Senate. Later, the Constitution of 1875 of the Second Republic was instituting a Constitutional Committee. However, none of these authorities have come into existence.

It was the 1958 Constitution that envisaged the creation of the Constitutional Council; the idea that the normative effectiveness of the Constitution should be guaranteed had finally replaced a vision deeply rooted in the French constitutional traditions, namely that the law, voted by the Parliament elected by the people and then promulgated by the Head of State represents the supreme and undeniable expression of the “general will” (la volonté générale), which no State power and no subject of law can escape, not even by invoking the Constitution.

In fact, the need to create an authority that would carry out a constitutional review has become even more obvious after World War II when the myth of sovereignty of Parliament was abandoned also in other States. This attitude of distrust towards the infallibility of legislative assemblies was generated by the dramatic experience of some countries such as Italy and Germany, and, later Spain, which have experienced the domination of fascist regimes that came to power as result of popular and apparently free elections. The tragic events that followed led to the conclusion that decisions taken by majority vote, even expressed by broad popular majorities, do not represent

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1 Law of 16-24 August 1790, Article 10.
4 Thus, in 1933, when German President Paul von Hindenburg appointed Adolf Hitler as chancellor, the National Socialist German Workers Party led by him (Nationalsozialistische Deutsche Arbeiterpartei – NSDAP) was the largest opposition party in Reichstag (German Parliament) following the elections of 30 January 1933. Likewise, in Italy, the National Fascist Party (Partito Nazionale Fascista – PNF) won the April 1924 elections, and, at the beginning of 1925, Benito Mussolini, its leader, who had become the head of the Italian government in 1922 following a forced agreement with King III, established the dictatorial authority. Similarly, the Spanish Civil War of 1936-1939, won by nationalist forces led by General Francisco Franco, who later established the so-called dictatorship of Franco, emerged as a result of political struggles within the Parliament resulted in the 1931 elections.
sufficient safeguards for constitutional democracy, unless there are legal limits to the omnipotence of the legislator and unless the laws are subject to an independent jurisdictional review in terms of their conformity with the Constitution. Illustrative for this new mentality is the fact that, at a later moment, the Constitutional Council itself stated in one of its decisions that “the voted law (...) does not express the general will unless it complies with the Constitution”. In other words, not even the sovereign people – by its elected representatives – can be an absolute sovereign, because it must observe the Constitution.

2. The jurisdiction of the French Constitutional Council

The French Constitutional Council was assigned with the power to exercise only an a priori review of laws before promulgation. This limited jurisdiction compared to that of other constitutional courts established in the same period – as, for example, the Federal Constitutional Court of Germany or the Constitutional Court of Italy, which have become, over time, landmarks of constitutional democracy – was a reflex of the “légicentrisme” (centrality of the act of the legislative assembly) of the French legal order determined by the philosophy of Jean Jacques Rousseau.

Although that moment marked the removal of the omnipotence of Parliament and of the supremacy of law, which dominated the political thinking of the Third French Republic to the detriment of the idea of supremacy of the Constitution, the Constitutional Court could not exercise a complete constitutional review of laws, being conceived as a point of balance between State powers rather than a guarantor for the Constitution. However, over time, the Council has gradually nuanced, clarified and enriched its role, by means of interpretations in its case-law of normative texts establishing its powers.

Thus, the first milestone was put in 1971 when, faced with a purely technical question, the Constitutional Council decided to exercise a review on the substantive validity of the law, asserting thus its position as guarantor for human rights and freedoms. We refer to the decision on “freedom of association”, whereby it asserted its right to examine the law subject to its review also in terms of compliance with the provisions of the Preamble to the 1958 French Constitution, the Preamble to the 1946 Constitution and the Declaration of the Rights of Man and of the Citizen of 1789. It thus established the so-called “constitutional block”, completed, at present, also by the Charter of the Environment of 2004. The mentioned decision followed a precedent that stated, on the one hand, that the provisions of the Preamble to the French Constitution have a normative value and, on the other hand, that the Constitutional Council is competent to examine the conformity of normative acts with the provisions of the Preamble to the Constitution. Thus, the Constitutional

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5 Valerio Onida, cited paper, loc.cit.
7 Valerio Onida, cited paper, loc.cit.
8 The Third French Republic is the name of the political regime in France, during 1870-1940, characterised by a parliamentary democracy.
10 Valerio Onida, cited paper, loc.cit.
12 Valerio Onida, cited paper, loc.cit.
Council found unconstitutional a statutory provision in terms of violation of an article of the Declaration of the Rights of Man and of the Citizen, nearly two centuries after its adoption. The first such decision was pronounced in 1973\textsuperscript{15}, and it has been followed by many others.

In 1974, following a revision of the Constitution\textsuperscript{16}, the number of subjects that could request the exercise of the a priori review was broadened, allowing also MPs to notify the Constitutional Council, a reform that significantly increased the real possibility of intervention of the Council.

Consequently, at present, the Constitutional Council exercises, pursuant to Article 61 (1) of the Constitution, a binding prior review, called, in the specialised literature, systematic review of organic laws, before promulgation, of certain legislative proposals approved by referendum (set forth in Article 11 of the Constitution), before being submitted to referendum, and of Parliament Standing Orders, before being implemented. The a priori review is exercised also pursuant to Article 61 (2) of the Constitution, i.e. upon request in case of ordinary laws, before promulgation, as well as in case of international agreements, before being authorised for ratification or approval. The notification may be initiated by either a public authority (President of the Republic, Prime Minister, president of the National Assembly or of the Senate), or by 60 Deputies or 60 Senators. Likewise, New-Caledonia laws with territorial status may be subject to the a priori review.

The broadened scope of subjects that could notify the Council was a breakthrough, but the constitutional review architecture remained the same, i.e. prior review of laws before promulgation. Once promulgated, laws escaped any review, and jurisdictions were forced to apply them, even if they had doubts in terms of constitutionality thereof. That due to the fact that the contrariety with the Constitution, invisible before promulgation by simple abstract examination of the text of the law in relation to that of the Constitution, carried out by means of the a priori review, was becoming obvious only after the entry into force and actual implementation. That is why it became necessary to introduce also an a posteriori review\textsuperscript{17}.

Following the suggestions made by the Committee of reflection and proposal on the modernisation and the re-balancing of the institutions of the Fifth Republic, the legislator enacted Law of 23 July 2008 for revision of the Constitution\textsuperscript{18}, a law which, besides other amendments, introduced a new article, Article 61-1. This article enshrines the power of the Constitutional Court to exercise the a posteriori constitutional review, upon notification from the State Council or the Court of Cassation.

This was followed by the Organic Law adopted at 10 December 2009\textsuperscript{19} which inserted a new chapter in the law of the Constitutional Council\textsuperscript{20} governing the procedural aspects applicable to the subsequent review of laws in force.

\textsuperscript{17} Emmanuel Piwnica, “L’appropriation de la question prioritaire de constitutionnalité par ses acteurs”, in Pouvoirs no.137/2011, p. 171.
Therefore, since 1 March 2010, the Constitutional Council exercises, by means of the preliminary question of constitutionality (question prioritaire de constitutionnalité – QPC) raised during proceedings pending before courts or administrative jurisdictions, a constitutional review on all legal provisions in force, when it is alleged that they might infringe the rights and freedoms guaranteed by the Constitution.

The concrete subsequent review of constitutionality of laws was described as a true revolution against the French legal traditions, transfiguring the hexagonal constitutionalism, and it was noted that through the preliminary question of unconstitutionality (QPC), “the constitutional review strays from a purely abstract logic in order to get acquainted not with parliamentary law but with jurisdictional law, the living law, according to the expression used in the Italian doctrine.”

It was also held that one of the important consequences arising from the introduction of the a posteriori constitutional review was that it solved a question that had been for long time the subject of doctrinal disputes: that concerning the legal nature of the Constitutional Council. In the current legislative framework, it represents, without doubt, a jurisdiction that formally must comply with the requirements of fair trial and impartial and neutral tribunal.

3. The effects of the decisions of the French Constitutional Council

According to Article 62 (1) of the Constitution of the French Republic, a law declared unconstitutional within the a priori review cannot be promulgated or implemented.

In case of the a posteriori review, the provision declared unconstitutional is repealed from the publication of the decision of the Constitutional Council or from a later date established in the respective decision. Therefore, upon exercising this type of review, the Constitutional Council may delay the effects of its decision in order to allow Parliament to intervene, during this time interval, in order to correct the issue of unconstitutionality found. Upon expiry of the deadline established by the Council, if in the meantime no legal provision was enacted in order to remove the unconstitutionality found, the provision declared contrary to the Constitution is simply repealed, which means that, from legal viewpoint, it ceases to exist, that administrative authorities can no longer apply it and judicial authorities can no longer penalize its violation.

3.1. Decisions with reservations as to the interpretation

The force of the Council’s decisions is the same both when it formulates reservations as to the interpretation and when, although it declares that the legislative proposal subject to examination is conformant with the Constitution, makes some clarifications on the conditions or methods of application of the law, clarifications that the Council deems indispensable for safeguarding the constitutionality of

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22 Emmanuel Piwnica, cited paper, p. 165.
24 Guillaume Tusseau, cited paper, p. 165.
25 Concerning the concept of “living law”, see, for example, Gustavo Zagrebelski, “La doctrine du droit vivant et la QPC”, in Constitutions no.1/2010.
the impugned law. These reservations as to the interpretation are binding themselves for administrative authorities and courts in terms of application and interpretation of the law.  

The doctrine took the view that, by the technique of decisions with reservation as to the interpretation, not stipulated by the legal texts in the matter, but introduced and developed by means of interpretation, “the Constitutional Council releases itself of the constraints of the binary decisional scheme in order to act directly on the normative substance of the law in order to bring it into line with constitutional requirements”.  

These reservations, when formulated within the a priori review, have the purpose to save the law, avoiding having it declared unconstitutional and rendering possible its interpretation and application in accordance with the requirements of the Constitution. At the same time, the recipients of the law must consider that it would not have been promulgated and, therefore, would not have entered into force, if the Council hadn’t issued a certain reservation as to the interpretation thereof, which all authorities and all subjects of law must observe.  

Therefore, the reservation is incorporated into law, so that a statutory provision subject to a reservation as to the interpretation thereof within the a priori review cannot exist in the legal order unless interpreted in the meaning indicated by the Constitutional Council.  

Thus, for example, the Council established that a provision of the Road Code relating to the offence of exceeding the admitted speed limit is conformant to the Basic Law only if interpreted by the judge called to apply it in the meaning that there is no crime or offence in lack of intention to commit it. From corroborative Article 8 with Article 9 of the Declaration of the Rights of Man and of the Citizen, the Council deduced that, in the area of tort, the definition of the offence must include, besides the material element, also a moral, subjective element.  

3.2. Impact of the Constitutional Council decisions on legislation  
As in the case of the Constitutional Court of Romania, the French Constitutional Council is reluctant in replacing the legislator in the achievement of the law-making work, avoiding adjudicating on reasons of opportunity and respecting the sovereign competence of the legislative power to enact normative acts. Furthermore, the Constitutional Council itself underlines, in its case-law, that it does not have a general power of assessment and decision, comparable to that of Parliament.

However, the doctrine noted that there have been cases where the French authority of constitutional jurisdiction, by ascertaining the unconstitutionality of some statutory provisions, has

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28 According to Article 62 (3) of the Constitution of the French Republic, the Constitutional Council decisions are binding for public powers and all administrative and judicial authorities.  
30 Article L 4-1 of the French Road Code.  
32 Pursuant to Article 8 of the Declaration of the Rights of Man and of the Citizen “The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense”. Article 9 states that “As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner’s person shall be severely repressed by law”.  
33 See, in this respect, the speech by the president of the French Constitutional Council, Jean-Louis Debré, on 1 March 2011, on the occasion of the celebration of one year since the introduction of the QPC, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/actualites/2011/1er-mars-2011-premier-anniversaire-de-la-qpc.53183.html  
34 Decision 2010-14/22 QPC of 30 July 2010 (Garde à vue), paragraph 30; Decision 2010-32 QPC of 22 September 2010 (Retenue douanière), paragraph 9; Decision 2010-45 QPC of 6 October 2010 (Norme de domaine Internet), paragraph 7.
transfigured the examined provisions to such an extent that it was considered to be a real redevelopment of the concepts governed by the respective norm\textsuperscript{15}.

That was, for example, the case of the composition of the departmental committees of social aid (CDAS). The Constitutional Council noted\textsuperscript{36} that they have the legal nature of specialised administrative jurisdictions, but that the department, as a specific territorial-administrative unit in the organisation of the French Republic, is the main responsible territorial authority. The impugned regulation provided that these committees consist of three general councillors and three state officials, under the authority of a magistrate. This is because social aid is the responsibility of both the state and the department, reason why the legislator has established an equal number of representatives from each of the two areas.

Given the independence and impartiality that must characterize all jurisdictions, the Council considered, however, that Article 134-6 of the Code of Social Action and Family, examined in the case, infringes Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 on guaranteeing of rights and separation of powers. Consequently, it repealed it with immediate effect and decided that these committees must carry out their activity without the three state officials – who are not independent given that they must respect the principle of hierarchical subordination, and their impartiality is not accompanied by safeguards – and without the three general councillors, when the department is party in the proceedings, i.e. the most frequently encountered case. Even when the three departmental councillors participate, the Council noted that the unconstitutionality is maintained, because the committees comprise four members, and thus the magistrate may be isolated in front of a departmental block, losing his essential role to decide between two equal groups.

Following the Council’s decision, “this parity was annihilated, and the collegiality was buried”\textsuperscript{37}. This is because the Committees remained improperly called so, since they consist of just one member, i.e. the president. The Council underlined that the reconfiguration of CDAS Committees – which represents an obvious rewriting of the law voted by Parliament\textsuperscript{38} – is realized under the reservation of further interventions of Parliament.

The French doctrine stated that from this reasoning “it becomes clear the function of co-legislator of the Constitutional Council”\textsuperscript{39}, given that, if Parliament does not enact a regulation that would ensure safeguards in terms of impartiality of these committees, their new composition, established by decision of the Constitutional Council, becomes permanent, the solution imposed by the latter gaining normative value.

Also in the case concerning the commercial maritime courts\textsuperscript{40} the Council modified the will of the legislator and replaced the rule declared unconstitutional with another one. We refer to Article 90 of the Disciplinary and Criminal Code on Commercial Marine, repealed by the Council with immediate effect, specifying at the same time that the composition of the commercial maritime courts shall be that established by the general rules.

\textsuperscript{37} Julien Boudon, cited paper, loc.cit.
\textsuperscript{38} Ibidem.
\textsuperscript{39} Michel Troper, “Justice constitutionnelle et démocratie”, in Pour une théorie juridique de l’État, Paris, PUF, 1994, pp. 335-337.
3.3. Delayed effects of decisions of the Constitutional Council

The French Constitutional Council has adopted a less intrusive attitude in the attributes of Parliament, replacing, sometimes, the immediate repeal with a repeal having delayed effects, giving the legislator a time to correct the flaws of unconstitutionality found.

In response to decisions handed down by the Constitutional Council with delayed effects, Parliament adopted laws conformant with those stated by the Council. These represent illustrations of what has been called “legislative co-production”\(^{41}\). Therefore, the Constitutional Council contributes to the shaping of the French normative system, as the legislation evolves as result of the decisions declaring unconstitutional certain statutory provisions challenged within the concrete subsequent review, by means of the preliminary question of unconstitutionality (QPC).

The most well-known examples for illustrating this role of the Council are those concerning the crystallization of pensions of military, the measure of police custody\(^{42}\) (garde à vue) or the extension *ex officio* of psychiatric hospitalization in criminal cases.

Thus, on 28 May 2010, the Constitutional Council delivered its first decision\(^{43}\) on the preliminary question of constitutionality (QPC) and, for the first time, it annulled a law in force. More specifically, three articles of the Finance Laws of 1981, 2002 and 2007. Those referred to the pensions of former combatants and military in the former colonies. The pensions of the French militaries had been re-calculated according to the evolutions in the cost of living. The others – blocked, “crystallized”. Consequently, a former Moroccan or Algerian sergeant had a pension of up to 642 Euro per year, whilst a former French sergeant, who had served the French army in exactly the same manner and had paid the same taxes, had a pension of up to 7512 Euro per year. The Constitutional Council found that the principle of equal rights had been violated.

In response to those stated by the Constitutional Council, Parliament adopted a law that removed the unconstitutionality found in the matter of military pensions\(^{44}\), unconstitutionality originating from the violation of the principle of equal rights between former combatants according to their nationality, French or foreign (in particular, Moroccan and Algerian). The legislator put an end to this discrimination before 1 January 2012 – the deadline established for this purpose by the Constitutional Council – stating\(^{45}\) that the pension point-value and pensions index, as indicators used in pensions calculation, shall be aligned with those used for French nationals.

Similarly, following delivery of the decision\(^{46}\) whereby the Council reproached to the legislator that it had left to the regulatory power (administrative/executive power in France) a way too wide margin of appreciation in the allocation and withdrawal of Internet domain names, Parliament adopted Law no.2011-302 of 22 March 2011 to adapt legislation to the European Union law on health, work and electronic communication, which, by Article 19, amends the provisions of the Post and Electronic Communications Code condemned by the aforementioned decision.

A strong echo was created by the famous decision\(^{47}\) on police custody (garde à vue), whereby the Council highlighted a series of flaws of constitutionality, amongst which the fact that it could be ordered regardless of the seriousness of the offences and that it could be extended by 24 hours in all cases, and not only to certain offences that are of certain severity. Likewise, the respective

\(^{41}\) Julien Boudon, *cited paper*, loc.cit.

\(^{42}\) It refers to police custody as measure of deprivation of liberty ordered by a judicial police officer in order to conduct investigations of persons suspected of committing a crime or a felony, according to Article 62-2 et seq. of the French Code of Criminal Procedure, available at http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006151876&cidTexte=LEGITEXT000006071154.


\(^{44}\) Decision 2010-1 QPC of 28 May 2010.

\(^{45}\) By Article 211 of the 2011 Finance Law (no. 2010-1657 of 29 December 2010).

\(^{46}\) Decision 2010-45 QPC of 6 October 2010.

\(^{47}\) Decision 2010-14/22 QPC of 30 July 2010.
procedure did neither allow effective assistance by a lawyer nor the possibility that the person in custody be informed on his/her right to remain silent.

Law no.2011-392 of 14 April 2011 has introduced in the French Code of Civil Procedure a new article48 which provides that withholding someone in police custody is possible only if the offence the respective person is suspected of having committed is punishable by imprisonment. Furthermore, it also established49 that extension of the time of custody is possible only if the offence the respective person is accused of is punishable by imprisonment exceeding one year. Through other new texts50, the person held in custody was allowed to remain silent, it was enshrined the right of the lawyer to see the minutes, to take notes, to attend the hearings51 and the cross-examinations, to ask questions and to submit written observations.

Moreover, the same law amended also the Customs Code on detention at customs (rétenff350ffik2on douanière), measure that was declared unconstitutional by the French Constitutional Council by Decision QPC 2010-32 of 22 September 201052 for reasons similar to those concerning police custody, determined by the fact that they represent related legal concepts, in terms of deprivation of liberty for a hypothetically short time. Thus, the amending law established that this measure can only be applied in cases of offences punishable by imprisonment.

The authority of the decisions adopted by the French Constitutional Council is emphasized by the fact that, often, the legislator has not only amended the provisions of the law found to be unconstitutional, but intervened on legal provisions which appeared to be closely related to these. It was observed that Parliament can only legislate within the framework established by the Council, even anticipating sometimes the possible challenges of unconstitutioanlity and avoiding them. Illustrative in this respect is the amendment of the Public Health Code in terms of hospitalization with consent53, condemned by the Constitutional Council by Decision QPC 2010-71 of 26 November 201054, which delayed repeal until 1 August 2011. The amending law took into account the decision delivered by the Council, so that, at present, the judge must decide until the end of the 15th day of hospitalization on the maintenance of the measure, and then every 6 months. However, Parliament has also had in view other mechanisms meant to protect the rights of the persons that receive psychological treatments and the implementation thereof.

The authority attached to the decisions of the Constitutional Council prevents the legislator to adopt again a provision identical to that declared unconstitutional55. In case of a new notification, the Council will inevitably find that the provision is unconstitutional if it continues to preserve the flaw of unconstitutionality56.

The doctrine took the view that, in France, the Constitutional Council is, in fact, a jurisdiction which, by its decisions, has become, along with the executive and legislative, an essential body of the political regime of the rule of law, based on the law as result of the general will57.

49 By Article 63 of the French Code of Criminal Procedure.
50 Article 63-1, Article 63-4-1, 63-4-2 and Article 63-4-3 of the French Code of Criminal Procedure.
51 Moreover, the concept of “hearings” has replaced that of “interrogation”.
53 Article L. 3212-7 of the Public Health Code.
56 Decision no. 89-258 DC of 8 July 1989 concerning the Law on amnesty.