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French Constitutionalism, Part 3

Elisabeth Zoller

Indiana University Maurer School of Law, ezoller@indiana.edu

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III – Spirit

Like all other forms of constitutionalism, the spirit of French constitutionalism is closely linked to its origins. Unlike numerous European constitutional courts, and even the US Supreme Court, with regard to the control the Constitution grants it over state law, the Constitutional Council was not created to provide protection for the rights and freedoms of the individual scorned by a State of the Union in the case of the United States, or a dictatorship in the losing states after the Second World War in the European case, in southern Europe in the 1980s, or in the countries of Central and Eastern Europe following the fall of the Berlin Wall in 1989, the model having been extended to South Africa after 1994 and the end of apartheid. From this point of view, the most sophisticated example is that of the German Constitutional Court, which was initially tasked with the educational rule of eradicating any trace of Nazi ideology from German society, and which succeeded in eradicating the authoritarian, imperial and legalist tradition that had dominated the country since the XIXth century, to make it a model example of judicial constitutionalism today. The birth of the Constitutional Council was quite different.

The Constitutional Council was created to take France out of the regime of assembly in which the country was mired and meant that there was a change of government practically every six months. This is important, since it was the intention of the authors of the constitution, which determined its status, determined its responsibilities and guided its history. Yet the intention was very clear. General de Gaulle recalled it at his press conference on 31 January 1964, when he said of the Constitution that “its spirit is based on the necessity of ensuring that the public authorities have the efficiency, stability and responsibility they inherently lacked under the third and fourth Republics” and added: “The
spirit of the new Constitution consists, while retaining a legislative Parliament, of ensuring that power is no longer a partisan issue, but is derived directly from the people’. In other words, it was not a matter of creating a constitutional court and even less a supreme court which, in countries where these exist, mean that power is no longer derived directly from the people but only indirectly, subject to the approval of the Supreme Court or Constitutional Court. This is not the spirit of the 1958 Constitution or French constitutionalism. This is clear from reading the debates between members of the Council both on the decision on the referendum act on the election of the President of the Republic by universal suffrage (1962) and the decision made 23 years later, on New Caledonia (1985). This latter decision is a useful example, based on both the conclusions of the rapporteur (G. Vedel) and each of the points made, of the spirit in which the review of the constitutionality of laws is conducted in France, and as a result merits a few brief comments.

This second decision, on New Caledonia, concerned a point of parliamentary procedure. How should the term “reopening of debate” in article 10 of the Constitution be interpreted? Does reopening the debate imply an obligation to restart the entire procedure or can it, perhaps, be satisfied by a simple reading? The Constitutional Council opted for the latter solution, relying on the clear text of the Constitution, and used the opportunity to recall in the most explicit possible terms, the purpose of the control it exercises: “The purpose of this control is not to impede or delay the exercise of legislative power but to ensure it is compliant with the Constitution and (...) its promulgation, either following the removal of the provisions declared to be contrary to the Constitution, or after these have been substituted with new provisions that bring it into compliance with the Constitution”, adding: “One of the purposes (of the review of constitutionality) is to allow a law that has been adopted, which only expresses the general will in accordance with the Constitution, to be amended immediately to this end”.

The consequence is that French constitutionalism is the exact opposite of judicial constitutionalism, the purpose of which is to slow down power and prevent a majority party from giving legislative form to its dominant opinions: in a word, to block the legislature. On the contrary, its aim is to ensure that the majority can govern in accordance with the Constitution and is there to help it achieve this as effectively as possible. The way in which the constitutionality of laws is reviewed in France is unusual, as was pointed out in very apt terms by the President of the German Federal Constitutional Court, Andreas Voβkuhle, two years ago. During an interview with President Laurent Fabius, he commented, “For the Germans, what matters most is the rule of law; for the French, it’s democracy”. Indeed, while the Germans reconnected with their history in 1949, adopting the spirit of common law by relying on judges to defend their freedoms, the French have relied on the law since the French Revolution, and have never wavered from that position. This is why reviewing the constitutionality of the law, as practised in France, follows a procedure that has nothing to do with the process used in judicial forms of constitutionalism. As Doyen Vedel explained during the debate on the case of New Caledonia:

“It is preventive and swift (one month) and, if the Council thinks it is urgent (eight days) – because it is the Council, not the Government, that assesses urgency. Moreover, the Constitutional Council’s practice has always been to make a decision as soon as the case referred to it was ready to be settled. In this spirit, it appears that the entire French mechanism for reviewing constitutionality tends to allow the promulgation of a law that has been lawfully adopted as soon as possible and it is never the intention that in the case of irregularities, the entire procedure restarts from scratch, like a game of snakes and ladders”.

The speed of procedure is always faithfully respected, with the sole exception of QPC rulings, for which the period of three months is associated with the priority nature of the examination of the law’s compliance with the rights and freedoms guaranteed by the constitution, hence the necessity of organising “a trial within the trial”, which is referred to a judge in the ordinary courts, but which in any case, cannot go on forever, since it is limited to three months. The result is that the often-quoted statement by Jean-Jacques Rousseau, which inspires all French constitutional thinking, still holds: namely, “the general will is always right and tends to the public advantage”, with the sole reservation that today, should that not be the case, the Constitutional Council is there to make sure that it is, in full. The Constitutional Council is, like the Conseil d’Etat, a great servant of the state, at an institutional rather than human or personal level. This spirit of providing the legislature with assistance and advice (rather than opposing it) explains the methods and techniques it uses to fulfil its mission.

A – Methods

‘Methods’ here refers to the processes used by the Constitutional Council to form a judgment. There are two kinds: procedural methods (1) and methods of interpretation (2).
Procedural methods

Until recently, the procedure was essentially based on custom and practice rather than formally established; this is still the case for the Council’s most important mission in respect of ensuring constitutionality, namely the review of laws that have been adopted prior to their being promulgated. In practice, this a priori review simply obeys the rules of Articles 18 and 19 of the order of 17 November 1958, the Institutional Act on the Constitutional Council. Formal procedures were only laid down for electoral litigation. Since the reform came into effect in 2008, a formal procedure has also been established for examining a preliminary priority ruling on constitutionality (QPC). Whether it concerns an a priori or a posteriori(QPC) review, the procedure is subject to two constraints: one relating to timing, and the other, the French conception of the separation of powers, which means that in French law, the notion of a party in disputes over the constitutionality of laws “is only relative”, or if one prefers, imperceptible.

Time frames, first of all. They are extremely brief. Everything must be settled within one month (eight days, in urgent cases) for an a priori review and three months for a QPC. The authors of the constitution wanted the public authorities to comply with an imperative of “efficiency” to ensure that legal uncertainty was removed as quickly as possible. There is therefore no question of letting things drag on and it is impossible to model the situation on the procedures found in judicial forms of constitutionalism, which can last years. This is why, in QPC rulings, the influence of third parties, which is impressive in the United States with the amicus curiaeprocedure, insofar as it allows dozens of civil society associations to mobilise their efforts for or against the cause of the claimant and gives citizens a sense of being able to take ownership of the Constitution alongside them, is simply not possible to envisage in France. The procedural regulation specific to the examination of QPCs has, admittedly, opened the doors of the Constitutional Council to third parties, notably with the concept of intervention, but this is only accepted if the intervening party can justify a “special interest” (Art. 6), noting that the “special nature” of the interest is understood particularly strictly. The influence of third parties in QPC cases has remained minimal, but this is the only way it can be.

As Olivier Schrameck commented about the a priori review, at the time when he was Secretary General of the Constitutional Council, the imperceptible nature of the notion of party is the “essential difficulty” in ensuring the publication of the procedure and guaranteeing an adversarial approach, as in any ordinary constitutional court between a claimant and defendant. In principle, this role should be played by the legislature, since the claim of unconstitutionality is directed against the law. But the legislature has refused to do so. This may be regrettable, insofar as the parties are there to inform the judge about the issues of a particular case and explain the legal arguments that may be put forward on one side or the other. President Badinter had thought this was conceivable in the case of a parliamentary referral, but the two houses, as we have seen, refused. And they were right, as how could it have been possible to justify not extending the principle of the adversarial procedure to unilateral referrals made by the President of the Republic, the President of the National Assembly or the President of the Senate. Simply referring to the breathtaking consequences of such appearance before the Constitutional Council was sufficient to dismiss them. However, the “narrow doors” practice, to use Doyen Vedel’s expression, which consists of bringing unofficial contributions or factual or legal information to the attention of the rapporteur, brings an element of contradiction to the debate.

The result is that, through force of circumstance, the procedure used to review the constitutionality of the law in the Constitutional Council is much more investigative than accusatory. The investigative nature of the procedure can be seen in the appointment of a rapporteur responsible for investigating the case and preparing a draft decision. However, it is significantly tempered by the implementation of processes that guarantee respect for the principle of adversarial proceedings as far as possible. This is not always possible in the case of an a priori review (Art. 61): this is the case when the Council receives a blank referral, i.e. with no reason given, which was often the case when the Council was asked for an opinion by one of the authorities with this power under the terms of Articles 61(2), in particular the President of the Senate, but which is very rare in the case of joint requests by 60 members of the National Assembly or 60 senators. Parliamentary requests for an opinion on unconstitutionality are now always submitted with reasons and the opposing view put forward by the government’s Secretary General, who defends the law adopted by the majority who backed the Prime Minister and the government. The Secretary General therefore produces a submission on the provisions challenged by the referrals and refutes the criticisms of those making it, and sometimes other criticisms raised during the preliminary meeting between the rapporteur and the government’s Secretary General, “the strong point of the investigative procedure for referrals” (O. Schrameck). The submission made by the government’s Secretary General is communicated to those who referred the law for an opinion, who submit a response.
As far as QPCs are concerned, the principle of respect for the adversarial nature of the procedure is codified very precisely, in writing, in Article 3 of the Internal Regulation on the procedure followed in the Constitutional Council, which stipulates that all procedural documents exchanged or tabled must be notified to all the parties. It is supplemented by the provisions of article 10(2) of the same text, which allows the representatives of the parties and people whose observations have been accepted as interventions, to present any oral observations to the hearing, which is held in public and broadcast live to a room that is open to the public, within the Constitutional Council. The parties can only express their views at the hearing through a lawyer (often, but not necessarily, lawyers at the Conseil d’État and the Court of Cassation). In 2010, explaining the way in which the first QPCs were investigated, President Jean-Louis Debré reported that the parties had chosen lawyers at the Conseil d’État or Court of Cassation in 62% of cases and barristers in 38%, who had come to the Council from the bars of Bayonne, Bordeaux, Brest, Dijon, Lille, Lyon, Nanterre, Nice, Paris, Privas, Saint-Pierre et Miquelon, Toulon, Poitiers, Tours and Toulouse. He also recalled that, as well as the lawyers, the government’s Secretary General had always presented observations on behalf of the Prime Minister, with the result that, as he emphasised forcefully: “The procedure followed in the Constitutional Council for priority preliminary rulings on constitutionality emphasises its judicial nature. As a constitutional judge, the Constitutional Council applies a fully adversarial procedure”.

Methods of interpretation

The golden rule followed by the Constitutional Council to judge the constitutionality of a law is that the judge can only form a judgement based on a text. The starting point for constitutional interpretation in French law is always in a text, with the result that the characteristic method used for the interpretation of French constitutional law is exegesis, just as it is in legislative matters, in other branches of the law. Exegesis does not mean that the interpretation never varies, depending on the constitutional or legislative issue to which it is applied, but that a text is always the starting point.

If the Constitutional Council places such importance on producing a text of constitutional value as the basis of the interpretation work it needs to accomplish, it is in order to establish the legitimacy of the judge as effectively as possible, particularly in cases where the law is criticised. Since the Constitutional Council only has assigned powers, the first question it has to settle, before it responds to the question of constitutionality it has been asked to rule on, is whether it is competent to do so, and whether there is legislation in place that allows it to respond. Generally, it is not an issue, as the Council’s areas of competence are clearly defined in the text of the Constitution. It is only a concern if there is a doubt over competence, if the Constitution is silent on the matter, creating a situation for the Council that is even more difficult to resolve if the question of constitutionality relates to a point of fundamental importance. In such cases (although they are rare), the first question is to establish whether the gravity of the issues raised by a question of constitutionality can justify an implicit acceptance of the Council’s competence.

The problem arose in 1962, over General de Gaulle’s use of Article 11 to revise the Constitution and the Council possibly being competent, at the request of the President of the Senate, to review the constitutionality of the referendum act adopted by the sovereign people. Two theses, positive and negative, were defended at the time. The first was set out by René Cassin: “Refusing to examine a referendum act would create a gaping hole in the conduct of our review: suppose that, based on a referendum, we undermine the principle of the non–retroactivity of criminal laws, women’s equality or the guarantees contained in the Preamble. All of that could be annihilated by a referendum... If you say that the Council is not competent to make a decision, you open the door to abuse of all kinds. It would represent a terrible danger for our country”. The second was set out by Bernard Chenot in more sober terms: “I cannot find a text that states that constitutional laws shall be submitted to the Constitutional Council”. As we have seen, it was President Chenot’s view that won the day, at least in respect of the Constitutional Council’s competence for reviewing a law adopted by referendum on the basis of Article 11 of the Constitution. Subsequently, the Constitutional Council decided that it was not competent to rule on a law revising the Constitution. In doing so, it refused to sanction the thesis of the supremacy of the law over the people. Why was this the case? Simply because the spirit of the Constitution “wanted the people to be the judge”. This solution, which is based on the principle of national sovereignty, is supported by Article 2 of the Constitution, which defines “the principle of the Republic”, “government of the people, by the people and for the people”. French constitutionalism refuses government by judges; it is, in essence, fundamentally democratic, unlike judicial constitutionalism, which is found in states that do not trust their people.

The democratic spirit is the source of inspiration for the exegetic method of interpretation practised by the Constitutional Council in relation to both the Constitution and the laws referred to it. What did the people or their...
representatives intend to say or do? In terms of institutional constitutional law, the answer generally exists in the text, because this is usually clear and “clear and precise constitutional rules... do not require interpretation” or because “the exercise of the prerogative granted to the Prime Minister by the third paragraph of Article 49 is not subject to any condition than those resulting from the text itself”. But in terms of constitutional law relating to rights and freedoms, the text of the Constitution is often unclear: it can be ambiguous, lending itself to two opposing interpretations, one narrow and the other wide. In order to identify the intentions of the authors of the Constitution and understand what they were trying to achieve, the Constitutional Council will examine the preparatory work, always in the spirit of finding a solution and helping the legislature, and wherever possible, it will avoid a strict interpretation, without harming anyone and to calm the situation. As a result, in spite of the principle of secularism, the French Republic, curiously, pays the salaries of pastors in the consistorial churches in the Bas-Rhin, Haut-Rhin and Moselle departments. In response to a request for a QPC from an unhappy taxpayer, the Constitutional Council found: “It emerges... from the preparatory work... on the draft Constitution of 1958 that in proclaiming that France is a ²secular... Republic², the Constitution did not... intend to challenge the particular regulatory or legislative provisions applicable in several parts of the territory of the Republic... and relating to the organisation of certain religions and in particular, the remuneration of ministers of religion”.

But there is more. If neither the text itself, nor the preparatory work, is enough to confirm the constitutionality of the law referred to it, the Constitutional Council will do so, using a constructive and creative exegesis to draw the objective it is pursuing from a provision of the Constitution, and checking whether it complies with the law, obviously within the limits of any manifest error of assessment that might have been committed by the legislature. This is the sense that has come to apply to the notion of an objective of constitutional value, although it was initially designed to “confer an absolute value on a constitutional principle. The French Constitution is silent, for example, on the question of pluralism; it simply states in Article 11 of the Declaration of 1789 that freedom of expression is “one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.” The Constitutional Council has nonetheless held that “the pluralism of the daily political and general newspapers (...) is in itself an objective of constitutional value; indeed that the free communication of thoughts and opinions, guaranteed by Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789, would not be effective if the public at which said daily newspapers were not in a position to provide an adequate number of publications of different tendencies and characters; that ultimately, the aim was that readers, who are among the essential recipients of the freedom proclaimed by Article 11 of the Declaration of 1789, should be able to exercise their free choice, without either private interests or public authorities being able to substitute their own decisions or making them the object of a market”.

Following on from the same case law, and inspired by the desire to extract from the provisions of the Constitution everything they contain that might expand and provide more effective protection for the rights and freedoms that it guarantees, the Constitution has sanctioned a right to respect for privacy that it does not include. It began by attaching it to individual freedom, understood in a broad and extensive sense. Secondly, it made it a law that was implied by the other rights and freedoms guaranteed by the Constitution and which it is the legislature’s role to develop and protect. With this type of interpretation, it is less a question of preventing or hindering the legislature than helping it to achieve the legitimate aims wanted by the sovereign people. In addition, the number of rights and freedoms guaranteed by the Constitution has steadily increased over the years. The fact is that there are no “fundamental rights”, strictly speaking, in French constitutionalism, i.e. rights set out in a closed list that it is not impossible, but difficult, to supplement with a dynamic, living interpretation of its content.

In French law, the rights and freedoms guaranteed by the Constitution are not fixed, but open to any enhancement the long, universalist tradition in France can offer. The French constitutional corpus has, for example, embraced European and international law in relation to human rights, thanks to an evolving, dynamic interpretation of the Constitution by the Constitutional Council, which has incorporated rights that were not formally included in the Constitution in the beginning, but which it has extracted by implication, based on its initial principles and contextualised in light of the law today, as the Court in Strasbourg recommends. It is true that treaties, in particular, the European Convention on Human Rights, are not formally sources of constitutionality, but it is useful to be aware that the Constitutional Council has interpreted the provisions of the Declaration of the Rights of Man of 1789 or the Preamble of 1946 as including rights that are explicitly formulated in the European Convention, which it has judged possible to read between the lines in the French texts. Strictly speaking, it has not created new rights but rather discovered them, based on a contextualised reading of rights recognised in 1789 or 1946. There are numerous examples. For example, the rights
and freedoms now guaranteed by the Constitution include the “right to lead a normal family life” (based on the 10th paragraph of the Preamble to the Constitution of 1946), the “principle of the dignity of the human being” (based on the 1st paragraph of the same Preamble), the “right of respect for privacy” (guaranteed by Article 8 of the European Convention on Human Rights) on the basis of the personal freedom referred to in Article 2 of the Declaration of 1789, and the “freedom to marry” (Article 12 of the European Convention) based on both Articles 2 and 4 of the Declaration of 1789. With regard to the guarantee of rights, Article 16 of the Declaration of 1789 is interpreted in a way that is very close to Article 6 of the ECHR regarding the right to a fair trial. There is not one right or freedom recognised by a foreign law that could not be found in the French constitutional corpus if it seemed that a majority of the people aspired to it. Recently, the Constitutional Council, in the form of the right to respect for privacy and the right of ownership, sanctioned an entire set of closely related, even identical rights, to those arising from the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures and go even further, insofar as they include the right to be forgotten in the form of the destruction of the documents seized after a certain period.

B – Techniques

‘Techniques’ here refers to the processes used by the Constitutional Council achieve a tangible result. Two are essential to the fulfilment of its missions: providing an answer, based on its review of the law, to the question it has been asked, and ensuring compliance with its response based on its arguments.

Review techniques

While it is true that the Constitutional Council appears to be an “unexpected and successful institution” of the Vth Republic, this is in large part because it was “allowed to take its inspiration from the experience of the Conseil d’Etat in cases involving ultra vires actions”. Given that the parallels between ultra vires actions by the administrative and legislative authorities are undeniable, it was inevitable that constitutional litigation would be inspired by administrative cases. However, one has not become a carbon copy of the other for two reasons. The first is that the Constitutional Council does not control the sources of the law it implements; it does not have the same freedom as the Conseil d’Etat in producing its case law, given that the latter has, by starting from nothing, as it were, been able to create norms, for example, based on general legal principles, or the distinction between a serious and simple fault, or the criterion of the administrative contract. This has never been the case with the Constitutional Council which, far from starting from nothing, began with a whole raft of norms, including all those contained in the Constitution plus (after 1971), those of the Preamble, and which incorporates into the Constitution those norms that are attached to it by reference (such as the Declaration of 1789, the Preamble of 1946 and the fundamental principles recognised by the laws of the Republic) and which, unlike the United States Supreme Court, the Constitutional Council has viewed as directly applicable. The result is that it has had to provide a constructive interpretation of all the norms available to it and has not had to create norms, unlike the judges in the administrative courts. Because constitutional law is a law that defines rights and assigns competences, it has never been able examine itself where there are gaps; if there are no rules, it is because the matter does not belong to the constitutional level, but the legislative or governmental level. Gaps are therefore always apparent and judges do not have to fear a denial of justice.

The second difference between administrative and constitutional disputes cuts across the difference between the principle of constitutionality and the principle of legality. Both the legislature and the government have a certain degree of freedom in terms of decision-making, but not to the same extent in each case. This is clear from the fact that the Constitutional Council and the Conseil d’Etat use different expressions to talk about it. The “discretionary power” of the administration is one thing and the “power of appraisal and decision-making” of the legislature another; the control exercised over each by judges is necessarily different. Where does that difference lie? It rests in the fact that while the public authorities, unlike private individuals, must decide on the basis of considerations of the public or general interest, insofar as the administration is bound by this obligation, the legislature has sovereign power to assess the content of the public interest it is pursuing. The legislature can therefore make its decision on the basis of political considerations, for example, to satisfy its majority or win votes, which is not unconstitutional. A mayor can also takes decisions for the same reasons, but the decision taken must be to fulfil an objective in the public interest.

It is not by chance that the notion of “power of appraisal and decision-making” appeared in respect of the review of the Veil law, which legalised abortion. Does the legalisation of abortion satisfy a public interest? Is it in the country’s general interest to admit the possibility? It is debatable and still debated in many countries. But once the legislature has said that it is, nobody can lawfully question it: its decision applies to everyone. Appraising the general interest
pursued by the law is outside the judge’s control, as is the law that provides an amnesty for protected employees who are dismissed, and orders that they should be reinstated in the business for the purpose of calming down the political and social situation, the law that authorises the donation and use of parts and products of the human body to aid medically assisted reproduction, notably by transferring an embryo conceived with gametes from at least one of the two members of the couple, and provides that if they cannot be implanted and if they have been kept for at least five years, the embryos cannot be stored, or the law that protects the anonymity of a mother who chooses to give birth as X, for the rest of her life. As a result, reviews of the actions of the legislature or the administration cannot be identical. This is why there is no fault relating to the abuse of power in constitutional law in the way that exists in administrative law. In other words, the Constitutional Council does not review the aims of the legislature; as a result, it does not review “the (allegedly) pernicious nature of the effects of the law (which) would reveal the intentions of the legislature” on the grounds that “this criticism, which in reality relates to the appropriateness of the law, is not admissible”. That said, notwithstanding the different contexts in which they apply, the review techniques used by the Constitutional Council owe a great deal to those shaped by the Conseil d’Etat, which have served to outline the parameters of both external and internal constitutionality, which it is important to distinguish, since they are applied differently in a priori review and QPC reviews.

As far as a review of external constitutionality is concerned, the Constitutional Council only examines laws that have been adopted but not yet promulgated. In addition to checking the extent to which the legislature has complied with rules of constitutional value in relation to the legislative procedure already referred to, the review also looks at formal defects in the law. The Constitutional Council will criticise a law that has been adopted without the prior consultation required by the Constitution, for example, the law pertaining the organisation of overseas territories, which must be preceded by a process of consultation with the territorial assemblies concerned, or the law that sets qualitative and quantitative objectives for state action in the educational arena, which should have been submitted to the Economic and Social Council for an opinion but was not, or the law based on a bill containing a provision that “was not mentioned at any time during the consultation of the Conseil d’Etat’s standing committee”. Other examples criticised by the Constitutional Council on the grounds of procedural defects were the ordinary law setting out the incompatibilities regime applicable to members of Parliament, in breach of Article 25 (1st paragraph) of the Constitution, which requires an Institutional Act in this instance, or the ordinary law that impinged on the area covered by the Finance Acts, by creating a tax on certain products and allocating the revenues to a special fund. Similarly, there is a procedural defect when the Finance Act contains budget elements, or the Social Security Finance Act contains social elements, or in other words, provisions that have nothing to do with the matter concerned, which are covered by other legal documents and which, given where they are found, have managed to escape procedural formalities, in particular the consultation processes that should, in principle, apply.

The process of reviewing the internal constitutionality of the law is based in the model used to assess the internal legality of administrative acts. In principle, the review can take place at varying degrees of intensity. There is a limited review and a normal review. The distinction was established in the case law on abortion: “Article 61 of the Constitution does not confer on the Constitutional Council a general or particular discretion identical with that of Parliament, but simply empowers it to rule on the constitutionality of statutes referred to it”. This is still the case, even though the text of the Constitution, taken literally, seems to invite the judge to conduct a more in-depth review, subject to a nuance that was added at the time of the Security and Freedom decision. In this case, the Council was asked to give its opinion on the scope of Article 8 of the Declaration of the Rights of Man, which establishes the principle of proportionality for offences and penalties as follows: “The law should establish only penalties that are strictly and evidently necessary”. Following the report by Doyen Vedel, it remained faithful to the formulation of 1975: “it is not for the Constitutional Council to substitute its own appraisal for that of the legislature in respect of the necessity of the penalties attached to the offences defined by it”, subject to one reservation, which is important in the circumstances, “provided that no provision in the 1st title of the Act is manifestly contrary to the principle established by Article 8 of the Declaration of 1789”. The result of the two stages is the following ritual formula, which has been consistently repeated since:

“The Constitutional Council does not have a general power of appraisal and decision–making of the same kind as the Parliament; it is not responsible for identifying whether the objectives the legislature has set for itself could have been achieved by other means, provided the methods set out in the law are not manifestly inappropriate to the desired end”.

In concrete terms, this means that in principle, the Constitutional Council only assesses the facts within the limits of an evident error, and therefore carries out a limited review. Doyen Vedel justified this in the following terms:

“The Declaration of Rights of 1789 was never written or even intended to form the basis of a review of constitutionality. Quite the opposite: as loyal disciples of Rousseau on this point, the authors of the Constitution never imagined that the legislature could make a mistake or act unjustly. The law, as an expression of the general will, was therefore infallible in their eyes. So what weight did the Declaration of Rights carry for them? A statement of eternal and universal truths that the legislature should constantly bear in mind, but not a positive legal text designed to be implemented by an authority responsible for reviewing the decisions of the legislature.

“Let us state clearly, that the review of constitutionality established in 1958, and developed further since the revision of the Constitution in 1974, is, compared with the Declaration, a patch, and this places it in embarrassing situations whenever its duties require it to review the application of a principle that has been formulated from the perspective of a philosophical or moral statement, rather than from the perspective of a rule of positive law.

“Undoubtedly, in certain cases, a particular principle expressed in the Declaration has itself, because the matter lends itself to it, the operational nature associated with a legal rule. For example, if we take the rule that everyone is presumed innocent until they have been found guilty (Article 9 of the Declaration), there is no gap between the statement of the philosophical or moral rule and the legal rule; to take another example, the same is true of the principle of non–retroactivity. In these cases, the review by the Constitutional Council has no trouble in applying a text that was not written for the legal purpose of reviewing the law.

“In other cases, however, formulations based on a philosophical or moral principle result in a statement that is unusable, i.e. which contains no sufficiently detailed content. In spite of its apparent rigour, the formula used in Article 4, “Liberty consists of doing anything which does not harm others” is unusable, because the term “harm” assumes that it is possible to know when infringing the interests of another person is legitimate and when it is not. The text also adds that it is the law that determines the limits of freedom; far from allowing a review of the law, the 1789 Declaration refers to it.

“It is clear that the principle of proportionality of offences and penalties is not really a legal matter: an authority ruling on the law can take nothing from it, except in very marginal cases. Formulated as a moral or philosophical instruction, it has no substance that could form the basis of a legal rule in the strict sense of the word, i.e. as a prescription to act in a particular way, or not. The Council cannot implement it, not because of any refusal to apply it but because its content is too vague... The only option is therefore to adopt the solution you used in relation to the Abortion Act, recalling that the powers of the Constitutional Council are different from those of the Parliament”.

There was therefore no question, at the time (i.e. in 1982) of carrying out a review of proportionality as in Germany, where the constitutional judge conducts a complete review of proportionality (suitability, necessity and proportionality in the strict sense of the term). Although French constitutional law contained some elements of proportionality, they emerged mainly, and in some cases exclusively, in respect of criminal penalties and sanctions. The Constitutional Council therefore practised more of a balance of interests than a review of proportionality in the strict sense of the term, in order to exclude evidently excessive “disproportionate penalties”. In the same vein, the Constitutional Council has never hesitated to follow the rule according to which, the more severe the sanction is, the harsher the penalty and the tighter and more detailed the review must be. It freely admits that “its role is to ensure the absence of any evident disproportion between the offence and the penalty imposed” but states that “the necessity of the penalties attached to offences falls within the discretion of the legislature”. The focus of the review is therefore only the relationship between penalty and sanction, avoiding necessity, which is the distinguishing mark of proportionality in the strict sense of the term. Thus, in respect of the ²proportionality²that the Council requires when the offence is punished by a combination of criminal and administrative sanctions:“Should the fact that two sets of proceedings are underway result in a combination of sanctions, the principle of proportionality implies that in any event the total amount of any sanctions imposed cannot exceed the higher amount of the two”. This decision, which appeared for a time to have been subject to challenge, following a decision by the European Court of Human Rights, has now been permanently established.

Nonetheless, the German–style full principle of proportionality is gaining ground. In 2008, the Council applied this principle to judge the constitutionality of the law on post–sentence preventive detention (the aim of which is to prevent a further offence by people suffering from a serious personality disorder, but which can lead to someone being locked up indefinitely), given that it is neither a penalty nor a sanction. Basing its decision not on Article 8 (on the proportionality of criminal sanctions to the offence committed) but Article 9 of the Declaration of 1789 and Article 66 of the Constitution, it stated that “It is indeed the task of Parliament to ensure the conciliation between the
necessary maintenance of law and order to ensure the safeguarding of rights and principles of constitutional value and the exercising of constitutionally guaranteed freedoms; The latter include the freedom to come and go and the right to privacy, protected by Articles 2 and 4 of the Declaration of 1789 and the freedom of the individual of which Article 66 entrusts the protection to the Judicial Authority; Any infringement of the exercising of these freedoms should be tailored, necessary and proportionate to the aims of preventing the commission of offences it is sought to attain”. President Genevois asked at the time “whether the application of the three components of proportionality (suitability; necessity; proportionality in the strict sense of the term) can be explained first and foremost by the gravity of preventive detention, which can lead to a total deprivation of liberty, or if it is general in scope”.

It appears today that, although the Council did not choose the second option, it was at least attracted by its advantages. In 2015, it applied a strict review of proportionality to “breaches of the right to privacy (which) must be proportionate to the aim pursued”. In 2017, it extended the full review of proportionality to include freedom of expression: “Freedom of expression and communication is all the more precious since the exercising thereof is a condition of democracy and one of the guarantees of respect for other rights and freedoms. It follows that infringement of the exercising of these freedoms should be tailored, necessary and proportionate to the aim it seeks to attain”. But we should be cautious. These advances are not the general rule and in many cases, the limited review remains. The question is knowing which ones.

Insofar as it is possible to follow it in a dense series of cases unencumbered with details, the line that separates a normal review from a limited one relates to the content of the applicable constitutional principle. The more general the principle, the freer the interpretation, but the freer the interpretation, the more dangerous it is for the judge. On what basis would it have “the formidable honour”, as Georges Vedel put it, of reviewing the legislature’s appraisal of the principle concerned and claiming that its own is better? This enigma is not exclusive to French constitutionalism. All constitutional judges face the problem of the extremely general nature of the texts of declarations of rights or constitutions. It is clear that because it is based on the common law tradition, which views judges as the “living oracles” of the law, the Supreme Court is in a much more comfortable position than the Constitutional Council. Similarly, the German Constitutional Court, thanks to the values that the Basic Law requires it to defend (German democracy is a “militant democracy”, safeguarding which is entrusted to the court in Karlsruhe), can boldly allow itself to conduct a review of proportionality as part of a normal review. This is not yet the case with the Constitutional Council, which addresses proportionality differently, depending on whether it is being used to measure an attack on freedom of expression or the right of ownership. The situation may evolve, however, towards the case law of the European Court of Human Rights. In respect of validations, for example, having previously required an adequate level of general interest, the Constitutional Council now requires a compelling general interest in line with the case law of the Strasbourg court, to which it has finally come round.

Techniques of persuasion

Provided this capacity is applicable to them, the recipients of the decisions made by the Constitutional Council are not ordinary parties to legal proceedings. Because it only issues an opinion in response to a referral from the constitutional public authorities (the President of the Republic, the Government and Parliament) or from the Conseil d'Etat or the Court of Cassation, it addresses its decisions to these bodies. In terms of ensuring respect for them, it cannot make use of the magic formula that assures a judge in the courts that they will be obeyed and authorises them to “summon and order all bailiffs, on this request, to execute (their judgment), all public prosecutors and state prosecutors attached to the tribunaux de grande instance to uphold it and all commanders and officers of the forces of law and order to help and assist whenever required to do so by the law” (Decree no. 47–1047 of 12 June 1947 on the writ of execution). It is like Glendover who, thanks to the exceptional circumstances of his birth during a night of thunderstorms and lightning, boasts that he can bring forth ghosts from the depths of the shadows, and whom Hotspur asks: “But will they come when you do call for them?”.

In its relationship with the President of the Republic, the Constitutional Council issues opinions or decisions. The authority of opinions (Articles 11 and 16 of the Constitution) is fragile. General de Gaulle took no account of the unofficial opinion it gave on the use of a referendum to change the arrangements for the election of the President of the Republic. With regard to its decisions on the constitutionality of adopted laws, the situation is simpler, insofar as it is regulated by the Constitution: “A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented”. The President of the Republic has the choice either to promulgate the law without the provision that has been cancelled, or to request a new reading in Parliament.
In respect of the Government, the Constitutional Council provides assistance through its reports, in preparing any reforms of electoral law that prove necessary following the reviews of presidential and parliamentary elections that it conducts, for example, about the sponsorships required to a candidate to stand for election to the Presidency or the allocation of equal amounts of time to candidates in the media (introduction of the principle of fairness). With regard to the Council’s decisions on the constitutionality of the law, it is important to distinguish whether the provision deemed unconstitutional is part of a law that has been simply adopted or has already been promulgated. If the law has been adopted, a provision that is declared unconstitutional “cannot be implemented” (article 62). If the law has been promulgated, the provision is repealed. In general terms, the Government plays an essential role in the authority of the Constitutional Council over all government activity and the influence of its decisions on the administration. As the Constitution clearly states: “They (the decisions of the Constitutional Council) shall be binding on public authorities and on all administrative authorities and all courts” (Article 62) but it is important to be aware that in practical terms, it is most often the Government that makes this authority effective in practice.

In this respect, an important circular from the Prime Minister of 25 May 1988, signed by Michel Rocard, Prime Minister, and prepared by Guy Carcassonne, brought about a fundamental change in the spirit and working method of the Government. This text, which is still in effect, is split into five chapters (respect for the rule of law, respect for the legislature, respect for civil society, respect for the consistency of government action and respect for the administration) and is described as a “code of ethics for government action”. Its importance derives from the leading role and fundamental place it assigns to respect for the Constitution or in other words, respect for the rule of law in the work of the government: “It is important to make every effort to identify and eliminate the risks of unconstitutionality that can mar bills, amendments and proposals for legislation included on the agenda. We must be concerned about this even in situations where a referral to the Constitutional Council is relatively unlikely”. In response to this, the Prime Minister asked all administrative authorities “to have their departments examine carefully all questions of constitutionality that could be raised by a text during the drafting stage and to refer them to the government’s Secretary General sufficiently far in advance to allow them to carry out their own investigation (and) set out a timetable for the preparatory work, giving the Conseil d’État time to conduct a detailed examination of the draft”. These instructions, which have been systematically followed by all governments, have given the case law of the Constitutional Council decisive authority over government departments from top to bottom. In addition, all circulars relating to the implementation of laws incorporate the reservations in respect of interpretation that the Council has attached to its decisions. This is particularly true of the circulars implementing laws aimed at the state prosecution service.

The Parliament is obliged to apply the decisions of the Constitutional Council since they “are binding on public authorities”, of which it obviously forms part (Article 62). The question was asked, at the start of the Vth Republic, whether in respect of the Parliament, this authority applied to both the grounds and the decision, or only the latter. In 1962, the Council adopted a very broad view of its authority in respect of the Parliament. In light of Article 62 of the Constitution, it took the view that “the authority of the decisions referred to in this provision related not only to the decision but also the grounds”, which are the necessary support for the decision and indeed constitute its very foundation”. The same opinion was reiterated in 1988 with regard to a law that sought to reinstate staff representative or trade-union leaders who had been dismissed from Renault for serious misconduct, in addition to the amnesty that had already been achieved. This shows the importance of grounds for the legislature.

As the President of the Senate said in 1971, to explain his blank referral of the law against violent demonstrators, which led to the Freedom of association decision, the Constitutional Council is there to “enlighten the legislature”. Its case law today, which is much more extensive than in 1971, underpins the laws being debated by the two houses of Parliament and it is the grounds for its decisions that determine the framework and limits on the freedom to establish the law that they enjoy with the Government. It is from this perspective that the recent reform of the reasons for the Council’s decisions, which it wanted to be “simpler and easier to understand” should be understood. It is clear, of course, that the reasons for the decisions made by the Constitutional Council are important for citizens and that the controversies in public opinion that the laws have prompted should be calmed by the explanations given for the Council’s decisions. Hence the criticism by legal authors about their excessive brevity. But it is important to realise that a decision is aimed primarily at the legislature, that it is intended to inform the laws it will adopt in the future and that there is no question of sending it decisions that are 80 or 100 pages long. It is the duty of the Constitutional Council to give it simple, clear instructions. In this respect, the recent formulation of constitutional requirements with regard to freedom of expression “any infringement of the exercising of this freedom should be tailored, necessary and
proportionate to the aim it seeks to attain” – tell the legislature much more than the formula of 1982 – “It is the role of the legislature to reconcile... the exercise of freedom of communication as it results from Article 11 of the Declaration of the Rights of Man, with, on the one hand, the technical constraints inherent in audiovisual communications methods and on the other, the objectives of constitutional value, of safeguarding law and order, respect for the freedom of others and maintaining the pluralist nature of sociocultural currents of expression, which these methods of communication, because of their considerable influence, are likely to infringe”. Moreover, in reality, apart from the various formulations of the limits likely to be placed on freedom of expression, there is an increase in control that means the decision will also inform the courts.

Finally, with regard to the administrative and ordinary courts, the Constitutional Council was initially intended to have only a distant relationship with them. Admittedly, Article 62 of the Constitution provides that “the decisions of the Constitutional Council... shall be binding on public authorities and on all administrative authorities and all courts”, which indicates, as a minimum, that the latter cannot implement a provision that has been declared unconstitutional. However, this was originally rather a hypothetical eventuality, as these were not the bodies to which its decisions were addressed. Things changed after 1975, when the Council decided in the abortion decision that “while these provisions (i.e., Articles 61 and 55 of the Constitution) confer upon treaties, in accordance with their terms, an authority superior to that of statutes, they neither require nor imply that this principle must be honoured within the framework of constitutional review as provided by Article 61”. In so doing, the Constitutional Council decided not to make itself the guarantor of the international path chosen by France and the United Kingdom after the Second World War to protect rights and freedoms, compared with the constitutional path defended by the Americans. In other words, while the United States sought to persuade the Europeans to adopt their system, by recommending the creation of constitution courts with the power of judicial review, France and the United Kingdom, which did not want and could not overturn their constitution principles (parliamentary sovereignty on the one hand, and the sovereignty of Parliament on the other), preferred to protect human rights by means of a treaty, which was more respectful of their constitutional traditions, as they proved by producing the European Convention on Human Rights (1950), which France did not ratify until 1974. After this date, and in light of Article 55 of the Constitution, a whole set of rights and freedoms became virtually applicable in French law. Some months later, in the abortion decision, the Constitutional Council ruled that it was not its responsibility to guarantee the effective application of the principle established by Article 55, and it indirectly transferred responsibility to the ordinary courts on the grounds that “decisions made under Article 61 of the Constitution are unconditional and final, (...); on the other hand, the prevalence of treaties over statutes, (...) is both relative and contingent”, a statement that the rapporteur, François Goguel, summed up during the debate in the following terms: “The superiority of treaties over statutes is not in itself a constitutional issue”.

The result of the Constitutional Council’s refusal to include treaties in the reference standards for reviewing the constitutionality of law, starting with the European Convention on Human Rights, was that as the constitutional corpus was gradually enhanced in favour of the 1974 reform, which created the parliamentary referral, two systems of protection for rights and freedoms began to run alongside each other in the French legal system: the system based on the Convention, in Strasbourg, and the system based on the Constitution, in Paris. The two systems were not identical as they drew on different sources, in particular with regard to questions of criminal and administrative procedure (the European Convention having been heavily influenced by the British approach and the spirit of the common law, with the importance it attached to procedures such as habeas corpus and a fair trial) but the former was deemed superior to the latter. Moreover, the acceptance by France, in 1981, of the right of individual recourse for a breach of the Convention before the courts in Strasbourg opened up the possibility of the European Court of Human Rights ruling against it.

Within the European context, the problem of the authority of the decisions of the Constitutional Council over the courts, which is only one aspect of the more general problem of the hierarchy of norms, had to be entirely rethought, particularly since judicial reviews of constitutionality had made the Constitution the fundamental and supreme standard for the Republic. After the 1980s, the Constitutional Council made increasing use of the technique of interpretative reservations to ensure respect for the supremacy of the Constitution. Tucked into the grounds for its decisions, reservations are declarations, or statements, if you prefer, which clarify the sense of the decision made for the future interpretation of the law. They can be interpretative, neutralising or constructive in relation to the provisions contained in the law they relate to, and are tending to increase. It is a well-established technique, which the Council used as far back as 1959, when it was examining the Regulations of the National Assembly, when they were used in the operative part of the decision. Interpretative reservations began to be found in the grounds for a decision.
after the 1980s. They were particularly criticised by members of Parliament in 1986/87, following the elections in March 1986. The limited welcome they received did not stop the Constitutional Council; the practice continued and still continues today.

The reason is that they have become inevitable, because they are necessary. Indeed, even if they have been reviewed by the Constitutional Council, laws are still bottles tossed into the sea. No-one knows which judges will hear them relied on, in which courts they will be applied or how they will be interpreted. Admittedly, the Court of Cassation exists to harmonise the interpretation of the law and ensure that laws are applied equally and that judges cannot make them say “white” in Brittany and “black” in Provence. While judges in the administrative or ordinary courts have only one system of laws against which to interpret laws, their national legal system, there is no difficulty and the problem does not arise; a single supreme court for each is sufficient to ensure the law is uniform. But where there are several systems of law, without a clear hierarchical relationship between them, although they are all applicable, such as the national system, the community system, the European system and even the international system, no-one can say which one the judge will choose to interpret the law, particularly if the constitution does not provide strict instructions on choosing one system over another. Well before legal authors developed a theory of multi-level constitutionalism, the Constitutional Council had been responding to the dilemma through the use of interpretative reservations, which the spirit of French constitutionalism had made “an inevitable corollary of French-style judicial review”.

The fact is that the aim of interpretative reservations is not, as some have claimed, to “dictate to the courts responsible for applying it, the interpretation they should put on the text concerned”, but to guide the resolution of disputes arising from the interpretation or application of the law towards a scenario setting out possible applications that comply with constitutional values, in order to respond to the criticisms levelled at the law, and above all, to remove uncertainty, spare the parties from pointless litigation, get rid of cases of aberrant implementation by state bodies, and thus ensure equal protection under the law for all. Their aim is to guarantee legal certainty, which has been described as “the fundamental justification for French-style judicial review”.

Conclusion (see part 4/4)