

## **A FRENCH LEGAL SUCCESS STORY**

### **THE “QUESTION PRIORITAIRE DE CONSTITUTIONNALITE”**

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Four years ago, in 2008, I presented to you the reform of French constitutional adjudication which had just been adopted by Parliament.

Four years later, I would like to tell you about the implementation of this reform and try to demonstrate why it may be described as “a French legal success story”.

#### **1. Today, France combines two forms of constitutional adjudication.**

##### **1.1. Since 1974, the Constitutional Council exercises a kind of constitutional review, which may be described as ex ante and abstract:**

- **ex ante**, because statutes may be referred to the Council after they have been voted by Parliament and before they are promulgated. The Council has one month to make its decision. If it rules that the statute is unconstitutional, it will never come into force. It will remain stillborn;

- **abstract**, since statutes can be referred to the Council only by political authorities: the President of the Republic, the Prime Minister, the President of each legislative chamber and, in most cases, by at least 60 deputies or 60 senators, which means a group of the opposition.

Today, all major and controversial statutes voted by Parliament are referred to the Council by the opposition, which means an average of 20 cases a year.

**1.2. While retaining the ex ante and abstract form of review, the 2008 reform added a new form of constitutional review which may be described as ex post and concrete:**

- **ex-post**, because it concerns statutes already enacted—what you refer to as "*laws on the books*";

- **concrete** -or what you call "*as applied*" review- since it opens the possibility for a citizen to whom a statute is being applied to ask for a preliminary ruling on the constitutionality of that statute by the Constitutional Council.

This is the “Question prioritaire de constitutionnalité” or QPC, which may be translated as “an application for a preliminary ruling on the conformity of a legislative provision with the Constitution”. The “priority” only refers to the fact that if there are two arguments against the same legislative provision, one about its conformity with the European Convention of Human Rights, and one about its conformity with the Constitution, the judge has to give the priority to the constitutional dispute: it just means that our Constitution remains at the top of our legal order.

## **2. The QPC has been a success both in quantity and in quality.**

### **2.1 In quantity.**

The QPC has been implemented since the 1<sup>st</sup> of March 2010.

From a procedural point of view, a QPC can only be referred to the Constitutional council by the two supreme courts, the Cour de cassation and the Conseil d'Etat. If a lower court wants a QPC to be referred to the Constitutional council, it has to transmit it to its supreme court which makes the decision.

From the 1st of march 2010 to the 1<sup>st</sup> of September 2012, i.e. during two years and a half, the two supreme courts have referred to the Constitutional council 281 QPC, i.e. 21% of the questions transmitted by lower courts or raised before them : 126 were referred by the Conseil d'Etat; 155 by the Cour de cassation, that is nearly exactly the same figure.

The Constitutional council has ruled 231 decisions: 69% of these decisions ruled that the provisions referred to the Council were constitutional or constitutional as interpreted by the Council; 26% of these decisions ruled that the provisions referred were totally (18%) or partially (8%) unconstitutional.

The two main areas concerned are criminal procedure and taxes.

The decisions were delivered within an average of 2 months.

### **2.2 In quality.**

I have been a Justice of the Constitutional council from 2001 to 2010.

I use to say that, since the implementation of the QPC on the 1<sup>st</sup> of March 2010, the Council has delivered in 9 months more great and important decisions for rights and liberties than during the 9 years during which I had the honour to sit on its bench.

I will take 3 examples.

- In this country, a Police Officer could, for the needs of an investigation, maintain at his disposal any person suspected to have committed or attempted to commit an offence, for 24 hours which could be extended to 48 hours by the Public Prosecutor. The only right of the person remanded in police

custody was to have a 30 minutes conversation with a lawyer at the beginning of the custody.

The Constitutional council ruled that these provisions were unconstitutional, first, because any person suspected of committing an offence could be remanded in police custody for 24 hours “*regardless of the seriousness of the acts warranting recourse to this measure*”, and, second, because the person undergoing questioning did not have “*the benefit of effective assistance from a lawyer*” (Decision n°2010-14/22 QPC of July 30<sup>th</sup> 2010).

- 2<sup>nd</sup> example: the Council ruled that the involuntary confinement of a person suffering from mental illness could not be maintained beyond 15 days except by a judge (Decision n° 2010-71 QPC of November 26<sup>th</sup> 2010).

-3<sup>rd</sup> example: the Council ruled that the fact to have “frozen” the pensions allocated to Algerian nationals since the independence of Algeria, whereas the pensions of those remained French were not “frozen”, was contrary to the principle of equality, a case which has been popularised by the film “Indigènes” (Decision n°2010-1 QPC of May 28<sup>th</sup> 2010).

### **3. Why was it a success ?**

For four reasons which should interest Common Lawyers in general and American lawyers in particular.

- First, the applications for the QPC are written by barristers – all kind of barristers - whereas the referrals in abstract review are written by apparatchiks, by bureaucrats. Barristers are not perfect. But they are a great help for judges : they develop arguments, they look for the case law, they make comparative law.

In the early days, referrals in abstract review were written - and are sometimes still written - by Law Professors. For example, Guy Carcassonne wrote many successful referrals for the socialist group of the National Assembly. Today, the referrals are written by lawyers of the political groups, with a loose political

control: they are often very poor, very disappointing.

- Second, the QPC is a very powerful procedure. According to article 62 of our Constitution “A *provision declared unconstitutional on the basis of article 61-1 – that is the QPC- 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*”. So a successful QPC ends by the abrogation of the statute contested. In some way, the QPC is a French form of class-action. If a company, a trade-union, or an association wants a statute to be repealed, it will build up an individual case to obtain its abrogation.

- Third, the QPC has created a dynamics between courts, all courts - civil, criminal, administrative and supreme courts - and the Constitutional council. The success of the European Court of Justice lies to a large extent on the links between its decisions and lower courts' preliminary rulings, which create, for example, a dialogue between a single judge in Milan and the ECJ on major issues. I think that the same kind of dynamics is developing with the QPC.

- Finally, the success of the QPC demonstrates the superiority of concrete review, as applied review, on abstract review.

Abstract review, which I have practiced for 9 years, is a difficult exercise. It is based on the wording of a statute, on its debates in Parliament, on its possible, theoretical, hypothetical interpretations: the law is constitutional if it means this; it's unconstitutional if it means that. And we don't really know, at that stage, what will come out of it.

Concrete review is based on real life. It is based on real cases, on the actual implementation of the law. It rules on the constitutionality of a statute as it is applied, and not as it could or should be applied.

Abstract review brings us back to Aldous Huxley: “Brave new world”.

Concrete review brings us back to Balzac: “Les Illusions perdues”.

Thank you very much.

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