US-Style Judicial Review for France?

A Major Reform of French Constitutional Law: the QPC *(question prioritaire de constitutionnalité)* significantly broadens the right to contest the constitutionality of a law. Will France have a US style Supreme Court?

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As a result of constitutional reform passed in the summer of 2008, effective March 1, 2010, the argument that a law is unconstitutional may now be raised in the course of litigation and the legislation set aside by the French judge. Until this reform, it was impossible under the current French constitution (that of the Fifth Republic, adopted in 1958) to contest within the French court system the constitutionality of a law once promulgated.

Constitutionality can now be decided by the Constitutional Council *(Conseil Constitutionnel)*, a body organised under the current 1958 French constitution, and initially meant to act as an advisory body to the Executive branch. Over time, the Constitutional Council's role has evolved into a more active judicial one.

A bit of background. French constitutional law, like many European countries, does not apply the same theory of checks and balances as the United States. Although there are the three separate branches of government, Executive, Judicial and Legislative, the balance is not the same and the French system, not unlike the UK one, has, until now, been based on the theory of legislative supremacy (i.e. the law cannot be set aside by the judiciary, the parliament being an elected body having greater legitimacy than the non-elected judiciary). Thus, in France judicial review of constitutionality has been severely limited, and until this recent reform restricted principally to the judicial review of administrative acts: application of the rules of separation of authority of the branches of government, individual decisions of a public body, secondary legislation, etc.

Under the rules applicable prior to the July 23, 2008 constitutional reform, the constitutionality of a law could only be contested in the period between its vote by Parliament and prior to its promulgation and only if a certain number of members of parliament (60), the President, Prime Minister, or the President of either house of Parliament petitioned the Constitutional Council *(Conseil constitutionnel)*. As a result, provided there was sufficient consensus amongst the Legislative and Executive branches, an unconstitutional law could be passed and no recourse was available within the French judicial system. The only recourse available was before the European Court of Justice for violation of European law (which to a certain extent provides similar guarantees) and this was only available

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if all judicial recourse in France was first exhausted. In short, it was, where possible, costly and time consuming to challenge a law for violation of basic rights guaranteed by the French constitution.

In what has been characterised as a "jurisdictional big bang" by law professor Dominique Rousseau, since March 1, 2010, a constitutional challenge may now be brought directly before the Constitutional Council by any citizen. The former head of the Paris Bar, Yves Repiquet, has termed this a "revolution" and a major step forward for democracy.

The first landmark ruling of the French Constitutional Council, the new criminal law procedure for temporary pre-trial detainment *(garde à vue)* was declared unconstitutional, requiring a new set of rules to be adopted. There are many more cases (25 at the time of writing this article) to come.

The Constitutional Council was originally meant to be an advisory body. As indicated on the Constitutional Council's website (http://www.conseil-constitutionnel.fr) *"The Constitutional Council is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a Supreme Court."* In its own website (the English version of which has not been updated as a result of this reform) it is interesting to read the Council's own definition of its role as restricted to electoral disputes, apportionment of powers between the legislative and regulatory authorities, and review, prior to promulgation, ratification or approval of law, treaties or international agreements and rules of procedure of parliament.

This role has now changed significantly to include review of any law, even ones that have been in effect for years. The right is open to all parties to a lawsuit, at any time in the proceeding, provided only that the petition be made in writing (even before jurisdictions where proceedings are oral) and separate from pleadings as to jurisdiction or merits.

The petition (called a *'question prioritaire constitutionnelle'* or QPC) is heard as a matter of priority before dealing with other arguments in the case. If the judge feels that the QPC meets the relevant criteria, the QPC is sent for review to the relevant Supreme Court (*Cour de Cassation* in civil and criminal matters, *Conseil d'Etat* in administrative and public law matters) which again reviews before submitting the question to the Constitutional Council. The Constitutional Council must then render its decision within 3 months.

An organic law 2009-1523 of December 10, 2009 and implementing decrees dated February 10, 2010, n° 2010-148 and n° 2010-149 provide details of how this new right of review is implemented.

Criteria for the QPC are cumulative and are that:

- the contested provision of law must:
  - be relevant to the case or be the basis for the claim
  - not have been already reviewed by the Constitutional Council (unless there has been a change in circumstances or law)
- the QPC must not be frivolous.

Once the QPC has been submitted to the relevant Supreme Court, the lower court suspends the case (except where personal liberty is at stake or in the case of criminal investigations by a *juge d'instruction*).

The Supreme Court may refer the matter to the Constitutional Council, or reject the QPC if it considers the criteria are not met. In at least one instance already (an April 16, 2010 ruling involving an illegal immigrant arrested in Belgium by the French police), the *Cour de Cassation* has referred the matter to the European Court rather than the Constitutional Council.

If the QPC is not sent to the Constitutional Council by the *Cour de Cassation* or the *Conseil d'Etat*, as the case may be, then the lower court is required to apply the contested rule, unless it is argued that the legislation contrary to a treaty, a matter generally within the purview of the lower court. However, if the argument is that the French law is deemed contrary to European law the matter may be submitted to the European Court for interpretation of the European law.

The Constitutional Council is required to rule on the QPC within 3 months and takes the position that 'constitutionality' includes review of the contested provision of law for conformity with:

- the Declaration of Rights of Man and Citizens of 1789
- the Preamble to the 1946 Constitution
- Fundamental rights recognised by the laws of the French Republic (referred to the Preamble to the 1946 Constitution) such as liberty of association or liberty to teach
- The 2004 Environmental Charter.

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The potential for conflict of jurisdiction and between rulings of the Constitutional Council and the European Court is a matter of concern and at this early stage in the application of this constitutional reform has caused much speculation amongst professionals. The April 16, 2010 ruling of the *Cour de Cassation* is indicative of this tension. In its May 12, 2010 ruling on regulation of gambling, the Constitutional Council indicated that its role is limited to review of constitutionality (in the broad sense indicated above) and excludes review for conformity with international and European treaties.

In a commentary published in Le Monde on August 1, 2010, Cécile Prieur stated that the Constitutional Council has been "transformed into a Supreme Court".

The legal community will watch with great interest the implementation of this new rule by the traditional "Supreme Courts" (*Cour de Cassation* and *Conseil d'Etat*) in their dealings with the Constitutional Council (as they filter petitions made by the lower courts and refer them, or not, to the Constitutional Council) as well as the reaction of the Executive and Legislatives branches of government (who retain the right to request the Constitutional Council to review a law prior to promulgation, thus severely restricting the risk that it will later be ruled unconstitutional).

It is notable that the same 2008 constitutional reform also opened up legislative initiative, until now concentrated in the hands of the Executive, providing broader powers to the Legislative branch, the effects of which are only gradually becoming apparent.

This 2008 constitutional reform, voted by the presidential majority and a single socialist vote, may well in time become the main legacy of the Sarkozy administration.