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Presentation of the "priority preliminary ruling". Experience of France

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In 2008, France has introduced a posteriori review alongside their existing a priori review of the constitutionality of acts. France veered away from its traditional reluctance towards judicial control of legislation, introducing the Priority Preliminary Ruling procedure (Question Prioritaire de Constitutionalité, or “QPC”). This procedure allows any individual (a citizen or a legal person) to challenge, before an ordinary judge, the constitutionality of a legislative act which allegedly restricts their rights and freedoms guaranteed by the Constitution.

The a posteriori constitutional review in France is an abstract review : the challenged provision is reviewed as a norm, notwithstanding to the particular circumstances of the case which is the source of the question raised for review.
It refers only to the infringement of the “rights and freedom” guaranteed by the Constitution. In France, many of them lie not only in the Constitution itself, but also in the Preambule and nowadays in the Charter for the protection of the environment.
There is no direct access to the Constitutional council. Six points deserve attention.

1. Anyone involved in judicial proceedings can ask for such a review.
The judge himself cannot ask for a review. It belongs only to the parties. But it belongs to the court, to decide whether or not to refer the question.

The specificity of the French system is that it provides for a two-level filter system for referring preliminary questions. The first level is the court in front of which the question is raised. This court refers necessarily to the Court of cassation or the Conseil d’Etat if it is an administrative court. Only the Supreme Court thus involved may refer the question to the Constitutional court.

This allows to escape from a risk of overburdening the Constitutional court, especially considering that there are only nine members in the Council and it would have been difficult to ask them or only part of them to decide what questions deserve a decision of the Constitutional court.

To give a measure of the risk, from the beginning in 2010, the Constitutional council made an average of 80 decisions “QPC” a year, and it is the result of the work of the second level filter, which refers only about 25% of the referrals they receive.

2. All along, the procedure is written.

On pain of inadmissibility, a party contending that a statutory provision infringes rights and freedoms guaranteed by the Constitution shall present this argument in a separate written reasoned memorandum.

This kind of separate memorandum is requested all along the procedure. It applies also for other comments put forward by the parties on the application. At every stage, to the Constitutional council, such a written memorandum is compulsory, on pain of inadmissibility.

The court is bound by the analysis made by the applicant. It is bound by the grievances.

This is made to allow the court to leave to the litigant the dispute and to oblige it to answer completely on the ground of the criteria for admitting the referral provided for by the law. It also allows to refuse to accept manifestly ill-founded, frivolous, abusive or repetitive complaints.

The law specifies that legal representation is mandatory before the Constitutional Council, but the courts have their own rules on the representation, and they are not modified for this review.

There is no appeal for challenging the refusal to transmit an application itself. But the challenge could appear as part of an appeal lodged against the decision settling all or part of litigation. A written reasoned memorandum, accompanied by a copy of the decision of refusal to transmit the application is required.

3. The law provides for criteria as grounds for referrals. Two of these criteria are common to all levels, the third is slightly different. We can put them with question marks :

Was the harm caused by the alleged unconstitutional act, and was this act the legal basis of the proceedings underway ?

Has the statutory provision already been referred to the Constitutional Council ?

As for the third one, the first level has to say whether the question appears to be serious, which means whether they detect issues that could create doubts concerning the constitutionality of a provision which they need to apply in a given case. Whereas the Cour de cassation and Conseil d'Etat have to say whether the question is a new one, and a serious one, which requires a more profound analysis.

4. The judicial proceedings are interrupted by the admissibility of the application.

If there are motives not to suspend the proceeding (for instance, when somebody is in jail), the judge can rule immediately. He can also take interim measures.

The first judge shall rule "without delay" at the first level. The second level, (we name it the filter) must give its decision within the delay of three months. If there is no decision in the time limit, the question is directly referred to the Constitutional council. And the Council itself has three months to make its decision.

These time limits are set to make sure that the proceedings which were stopped because of the preliminary ruling procedure resume in the shortest possible time. In some cases, it could take only six months from the first memorandum to the final decision.

5. Constitutional proceedings are adversarial.

Not only the Prime minister (as chief of administration) is present, but other litigants involved in similar procedures and defenders of the law can also appear before the Council. Various persons, interested in the claim, such as associations, can participate in the dispute.

It means also that if the Council finds a “useful” grievance which did not attract attention of the litigant, it has to submit it to all the parties for discussion.

The procedure is necessarily written, but oral hearings are always organized and they are public, even available on Internet on the same day.

6. Decisions of the Constitutional council have erga omnes effect. They are binding on all public authorities, as well as all courts.

Of course, there is no problem for a decision confirming the constitutionality of an act. In the court, the proceedings resume.

A decision of unconstitutionality invalidates the normative act “ ex nunc”. The provision cannot be implemented anymore. As exactly said in the Constitution, the provision is repealed as of the publication of the decision. The council may chose a subsequent date. It can also determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

There begin difficulties, even sometimes major difficulties for the Council. Many different situations and many different solutions could be on the table. The main issue is for the litigant, with this question : what will be the useful effect of the decision ?

As you have understood, the Constitutional council had to take over a complete new function ten years ago. It had to design new working methods very rapidly. It took exactly two years to build them and write the laws and decrees. The first years were intense years of work. Ten years after we asked academics to review our work and beyond some relevant critics, many valuable comments and few propositions for change, I can say that satisfaction was the overall judgement.

I wish you full success for the changes you will implement.