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The Dynamics of 'Interpretative Reservations' in the Jurisprudence of the French Constitutional Council

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I Introduction

France has a complicated history with judicial review. The French Revolution sought to prevent judges from reviewing the constitutionality of statutory law, as statutes were deemed to be 'the expression of the general will'.[1] During the *Ancien Regime*, the Courts of appeal (then called *Parlements*) would quash from time to time royal laws when they found them to be repugnant to the fundamental laws of the realm; absent any supreme court, only the King could overturn the Courts' decisions. The revolutionaries found this practice inconsistent both with democratic principles and with the proper role of judges. Liberals throughout the eighteenth century had denounced arbitrary judicial decisions, especially in criminal matters, as those of 'small tyrants' and they wished to reduce the role of judges to that of a 'mouthpiece of the law'.[2] Since statutes were the expression of the general will, and since they were intended to annihilate the very discretionary powers of the courts, judges had no business putting their legitimacy into question. Hence the Law of 16–24 August 1790 on the judiciary provided that '[t]he courts may not take any part, directly or indirectly, in the exercise of legislative power, nor may they prevent or suspend the execution of the decrees of the Legislative Body, sanctioned by the King, on pain of forfeiture'.[3] These provisions are, somewhat surprisingly, still in force today.

Even if some revolutionaries advocated a form of judicial review exercised by a special body,[4] they remained a minority. True, the newly created Tribunal of Cassation (the ancestor of our

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[1] Déclaration des droits de l'homme et du citoyen, art 6.

[2] Charles de Montesquieu, *The Spirit of the Laws*, first published 1748, Anne M Cohler, Basia C Miller and Harold S Stone tr (Cambridge, Cambridge University Press 1989) 163.

[3] Loi des 16–24 août 1790 sur l'organisation judiciaire, art 10.

[4] See especially Emmanuel J Sieyès, 'Discours du 2 et du 18 thermidor an III sur le jury constitutionnaire' in Paul Bastid (ed), *Les discours de Sieyès dans les débats constitutionnels de l'an III* (Paris, Hachette 1939).

Court of Cassation) reviewed from the outset the constitutionality of judicial rulings[5] given by inferior courts, and throughout the nineteenth and twentieth centuries both the Court of Cassation[6] and the Council of State (the highest administrative court) reviewed the constitutionality of rules laid down by the administration (*actes administratifs*).[7] But, except for a handful of very peculiar instances, both supreme courts declined to review the constitutionality of statutes: in a famous 1936 case,[8] the Council of State stated that 'in the current state of French public law' it had no competence to do so. This decision closed a decade-long debate on the suitability of judicial review in France sparked by Lambert's important book *Le gouvernement des juges*.[9]

France had to wait until 1958 for something like a constitutional court to be instituted: the Constitutional Council was born with the 1958 Constitution. However, at the time the Constitutional Council, for all its merits, fell short of being a genuine constitutional court in the German or Italian mould – and some critics argue that it is still the case today, given the appointment process of its members, the poorness of its reasoning and its excessive deference to the executive.

This complicated history is the reason behind most of the peculiarities of the French system of constitutional adjudication. While the Constitutional Council is by no means the most activist constitutional court in Europe (assuming it is a court in the first place), it has always been wary of its own illegitimacy, perceived or real. Among the many manifestations of this illegitimacy complex, a specific technique stands out, to wit, the use of constitutionally conforming interpretation (CCI). The Constitutional Council often interprets the statute it reviews in order to 'save' its constitutionality, thus avoiding striking it down. Interestingly, what is usually understood to be a canon of avoidance is not thus perceived in France. Far from being hailed as

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[5] See Jean-Louis Mestre, 'Les contrôles judiciaires a posteriori de constitutionnalité à partir de la Révolution' (2010) 28 *Cahiers du Conseil constitutionnel* 27.

[6] ibid.

[7] See eg CE 28 June 1918, *Heyriès*; CE 11 July 1956, *Amicale des Annamites de Paris*.

[8] CE Sect 6 November 1936, *Sieur Arrighi.*

[9] Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (Paris, Giard 1921).

a way to exercise judicial restraint[10] on the part of the Constitutional Council, conforming interpretation is often decried as an illegitimate way to rewrite what the legislature intended. In other words, one cannot understand the use of CCI in France without grasping the way it relates to the considerable illegitimacy complex surrounding French constitutional adjudication.

In the remainder of this chapter, I will proceed in three sections of unequal size. In section II I will give a brief institutional background situating the Constitutional Council within France's somewhat complex system of courts and related adjudicatory bodies. In section III, which contains the most substantial contribution of this chapter, I will expound the Council's favoured CCI technique, to wit, 'interpretative reservations': I will discuss the notion of such reservations, the forms they take and the issues surrounding their legitimacy. In section IV, I will show that the recent transformations of the constitutional adjudication system in France have raised a series of new questions surrounding the uses and the effects of interpretative reservations.

II Institutional Background

A Constitutional Adjudication in France

France has a somewhat complex court system. In a nutshell, there are two main court systems: on the one hand the judiciary (which adjudicates civil and criminal cases) and on the other hand the administrative courts. Each is headed by an apex court: the Court of Cassation and the Council of State. The Constitutional Council[11] does not sit atop these 'ordinary' courts. It is not a supreme court or a final court of appeals.

Over the course of more than 50 years, the only way to bring a statute for review before the Constitutional Council was through an a priori referral. The Council was called upon to review a statute between its adoption in Parliament and its promulgation by the President of the

[10] Of course, partisans of judicial activism also criticise conforming interpretation for being too deferential, but they are a scarce resource. Of course, anyone disagreeing with a statute would rather have it stricken down rather than just interpreted in a conforming way.

[11] In what follows, when I mention 'the Council' I will only refer to the Constitutional Council. The Council of State (the apex administrative court) will always be designated by its complete denomination.

Republic.[12] Only a handful of authorities were empowered to refer the matter to the Council: the President, the Prime minister, the Presidents of both houses of Parliament and (since 1974) 60 MPs or 60 senators. The number of cases was therefore limited (roughly 10–15 constitutional cases per year).[13] This system had its pros and cons. On the one hand, a priori review occurred before the statute entered into force, and a ruling by the Council did not disrupt existing legal situations arising from the statute; and, as far as CCI is concerned, the interpretative alteration of the meaning of the statute resulting from such interpretation could be applicable to all cases falling under the statute thus interpreted, without any problem of legal certainty.[14] On the other hand, if the statute was not deferred to the Council within the referral deadline (15 days), there was no way to put its constitutionality into question and it had to be applied by the courts until it was repealed by the legislature.

In 2008, the 1958 Constitution was extensively amended and a new procedure of a posteriori review was introduced: the *question prioritaire de constitutionnalité* (QPC). It is a kind of preliminary referral, broadly in the mould of the German *konkrete Normenkontrolle* or the Italian *giudizi in via incidentale*. In a nutshell, a party to any trial or judicial proceeding may raise a QPC plea by which they intend to show that the statutory provision applicable to their case is unconstitutional. The judge may then decide to refer the QPC plea to its own apex court (the Court of Cassation or the Council of State) which in turn will decide whether to refer it to the Constitutional Council. When the Council concludes that the provision is repugnant to the Constitution, it repeals it, but it may postpone the entry into force of its own decision in order to give the legislature some time to modify the problematic features of the statute.

The entry into force of the QPC mechanism in 2010 has considerably increased the number of cases brought before the Constitutional Council: there have now been more QPC cases in 11

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[12] For a limited range of statutes (organic laws), referral to the Council is obligatory. For ordinary statutes it is optional.

[13] I will only refer to constitutional cases decided by the Council (judicial review of the constitutionality of statutes and treaties). I will not deal in this chapter with other adjudicatory functions exercised by the Council (in electoral law matters for instance).

[14] In very specific instances the Council did review the constitutionality of already promulgated statutes in the course of reviewing later statutory provisions modifying them (Cons const 25 January 1985, no 85-187 DC, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*). This exceptional kind of review is called *new-caledonian review*, which refers to the aforementioned decision's title.

years than a priori cases over more than 60 years, with the Council now adjudicating roughly 80 constitutional cases per year.

B Interpretative Division of Labour Among Courts

The QPC reform has undoubtedly strengthened the position of the Constitutional Council as a constitutional court. However, one should not conclude that it nowadays enjoys the same kind of authority as eg the German *Bundesverfassungsgericht*, especially with regard to ordinary courts. As we saw earlier, the Council does not have the power to review the decisions of ordinary courts. Moreover, the Council does have a monopoly on adjudicating the constitutionality of statutes,[15] but it does not have sole interpretative power.[16] It adjudicates only on the constitutionality of statutes (as well as treaties prior to ratification). Other courts rule on the constitutionality of administrative regulations and bylaws as well as of private law instruments. This entails a sometimes uncertain division of interpretative labour between the Constitutional Council and the two apex courts, since the latter do not always have to defer to the interpretations offered by the former and they sometimes refuse to defer to the interpretations given by the Council: there is therefore no clear hierarchy between these various, potentially conflicting interpretations.

As we shall see, although the Council may review the Court of Cassation's or the Council of State's interpretation of a given statute in the course of the review of the statute itself (especially in a QPC decision, which bears on a statute which has already been applied and interpreted by

[15] This monopoly has been somewhat disputed with regard to statutes prior to 1958. The Council of State has ruled that administrative judges are empowered to review whether a pre-1958 statute has been implicitly repealed by the 1958 Constitution. See CE Ass 16 December 2005, *Syndicat national des huissiers de justice*. However, the Council has not applied this principle since 2005. Some inferior courts did so on occasion, notably the Administrative Appeals Court of Marseille (CAA Marseille 7 April 2008, no 05MA03258, *Compagnie Agricole de la Crau*); however, on appeal, the Council of State referred the matter to the Constitutional Council: see CE 15 July 2010, no 322419, *Compagnie Agricole de la Crau* and the subsequent decision by the Constitutional Council (Cons const 14 October 2010, no 2010-52 QPC, *Compagnie Agricole de la Crau*). Although the Council of State never officially reversed its 2005 decision, one may reasonably assume that the entry into force of the QPC mechanism has entailed the desuetude of that precedent.

[16] See generally Mathieu Disant, *L'Autorité de la chose interprétée par le Conseil constitutionnel* (LGDJ 2010).

ordinary courts),[17] it has no power over these ordinary court's rulings and judgments; it cannot quash or annul them. The Council's interpretations of the Constitution (eg the implicit constitutional principles it 'deducts' from the Constitution's text and other constitutional instruments)[18] have but a persuasive authority and do not enjoy precedential binding force on ordinary courts.[19] These courts can (and often do) defer to the Council's interpretations of the Constitution, but they are under no obligation to do so, and they will sometimes depart from them.

The Council's rulings do enjoy *erga omnes* authority[20] (something like absolute *res judicata*), but only insofar as they declare a given statute to be consistent or inconsistent with the Constitution. For instance, if the Constitutional Council declares a statute to be inconsistent with the Constitution, then ordinary courts are barred from applying it (unless the Council provides otherwise). But the interpretation of the Constitution which justifies its ruling does not enjoy such an authority, and ordinary judges are not obliged to defer to it in future cases: for instance, an administrative court reviewing the constitutionality of an administrative rule does not need to defer to the interpretation of the Constitution given by the Council in an earlier decision with regard to the constitutionality of a statute. And apex courts occasionally even develop constitutional principles which have never been recognised as such by the Constitutional Council, which means that there are in fact two or more sets of constitutional rules and principles in France which intersect broadly: the constitutional norms developed by the Constitutional Council, and the constitutional norms resulting from the interpretative activity of apex courts. For instance, in 1996, the Council of State ruled that a constitutional principle barred France from extraditing a foreign national when the extradition was requested

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[17] Cons const 6 October 2010, no 2010-39 QPC, *Mmes Isabelle B and Isabelle D*.

[18] The constitutional corpus (*bloc de constitutionnalité*) comprises not only the 1958 Constitution, but also the 1789 Declaration, the Preamble of the 1946 Constitution and the 2004 Environment Charter. This corpus encompasses not only institutional norms allocating powers among the various constitutional organs, but also norms pertaining to fundamental rights of all three generations: civil and political (1789 Declaration), social and economic (1946 Preamble), environmental (Charter). On top of interpreting and concretising all these norms, the Council occasionally develops constitutional principles of its own, notably the 'fundamental principles recognised by the laws of the Republic', which are referred to, but not enumerated, in the 1946 Preamble.

[19] See on this the forceful position of the Court of Cassation (Cass Ass plén 10 October 2001, *Breisacher*).

[20] French Constitution, art 62.

for political motives.[21] The Constitutional Council never recognised such a principle (although it never denied such a principle existed either).

The Constitutional Council's interpretations of the Constitution are, in sum, not binding; they only enjoy persuasive authority because the authority of the Council's decisions extends only to its particular ruling (*dispositif*) on a given statute as well as to the very reasons (the *motifs*) that strictly justify them.[22] However, its interpretation of the statute under review is authoritative and binding on lower courts, insofar as it is strictly tied to its ruling on the constitutionality of the statute. In particular, its interpretative reservations, which, as we shall soon see, are the French version of CCI, *do* enjoy *erga omnes* authority insofar as they are the very reason why the statute is declared consistent with the Constitution in the first place. *But for* this interpretation, the statute would be struck down and there would be nothing left for the courts to apply. This is why both the Council of State[23] and the Court of Cassation[24] acknowledge the authority of the Council's interpretative reservations as *res judicata*, and the Council itself has ruled that they were *res judicata*.[25]

But it happens that ordinary courts also indulge in CCI: for instance, the Council of State (the apex administrative court) has interpreted a statute in such a way as to make it compatible with the Constitution[26] and it has also interpreted a treaty proviso in such a way as to make it compatible with a constitutional principle.[27] In both cases, the Council of State had no other choice than to have recourse to a conforming interpretation, since it is not empowered to strike down unconstitutional statutes or treaties. However, it raises the question of whether these cases

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[21] CE Ass 3 July 1996, *Koné*.

[22] Cons const 16 January 1962, no 62-18 L.

[23] See notably CE 20 December 1985, *Ets. Outters;* CE Ass 11 March 1994, *SA La Cinq*; CE 15 May 2013, *Commune de Gurmençon*.

[24] See implicitly the *Breisacher* case (n 19); explicitly Cass com 25 January 2005, no 03-10.068; Cass civ (1) 22 March 2005, no 04-50024.

[25] See implicitly Cons const 12 January 2002, no 2001-455 DC, *Loi de modernisation sociale*; explicitly Cons const 2 December 2004, no 2004-506 DC, *Loi de simplification du droit*. This *res judicata* character applies not only to the courts but also to Parliament itself, which is bound by a reservation, Cons const 24 January 2008, no 2008-567 DC, *Loi relative aux contrats de partenariat.*

[26] CE Ass 14 December 2007, *Département de la Charente Maritime*.

[27] See the *Koné* case (n 21).

are compatible with the division of interpretative labour between ordinary courts and the Constitutional Council: it seems quite straightforward that only the court which is empowered to review the constitutionality of a given norm (eg a statute) should be empowered to interpret it in a constitutionally conforming way. The ordinary courts' willingness to perform CCI on statutes can be interpreted as a way to circumvent the Council, even if such cases remain rare.

In what follows I will mainly focus on the Constitutional Council's interpretative reservations. But the reader should keep in mind that ordinary courts in France have always claimed some interpretative leeway for themselves, even if they routinely defer to the authority of the Council. Since, as we shall see, the Council's interpretative reservations are primarily directed at ordinary courts, their reception by the courts is a crucial element of their operation.

III Interpretative Reservations in the Constitutional Council's Jurisprudence

A The Formalism of Interpretive Reservations

The French Constitutional Council has evolved a very specific mechanism of CCI, which is called 'interpretative reservations' (*reserves d'interprétation*). The Council declares a statute (or part of it) to be compatible with the Constitution under the reservation that it be interpreted in such-and-such a way. This tool was first used in a very informal way, as part of the Council's general reasoning, without being identified as such.[28] However, from 1984 onwards,[29] the Council has systematically identified its interpretative reservations as such in the two main parts of its decisions: the reasons or grounds (in French, *les motifs*) and the operative part of the ruling (*le dispositif*). Whenever the Council reviews a statutory provision, it basically has the choice between three kinds of decisions: a decision of conformity (the law is consistent with the Constitution and can be applied without reservations); a decision of unconstitutionality; and a

[28] See eg Cons const 30 January 1968, no 68-35 DC, *Loi relative aux évaluations servant de base à certains impôts directs locaux*.

[29] Cons const 11 October 1984, no 84-181 DC, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse.*

decision of conformity 'with reservations' (*conformité sous reserve*). These decisions are identified as such in the nomenclature of the Council's decisions.

A decision of conformity 'with reservations' is typically structured as follows. In the *motifs* (reasons, grounds) part of the decision, the Council briefly discusses the arguments put forward by the claimants as to why, according to them, the law is unconstitutional; then it usually starts a new paragraph (or a series of paragraphs) in which it explains why, unless interpreted in such-and-such way, the law would indeed be unconstitutional. It then concludes 'subject to the reservations stated in paragraph *X*, article *Y* of statute *Z* conforms to constitutional principle P'.

Then, in the operative part of the decision, in which it hands down the proper ruling (*le dispositif*), the Council sums up the various statutory provisions it reviewed in the course of its *motifs*[30] and gives them authoritative force: first, it lists the provisions which are unconstitutional; then the provisions which it declares to be in conformity with the Constitution 'with reservations' (with a reference to the specific paragraph in which these reservations were stated); and last, the provisions which it declares consistent with, or conforming to, the Constitution.

Let me take an example (among many possible others). Article 6 of the 1955[31] statute on the state of emergency allows the Minister of the Interior, when a state of emergency has been declared, to put certain individuals under house arrest, without trial or even the prior authorisation of a judge (see *infra* for more on the Council's case law on this point). The duration of such a measure cannot exceed 12 months. However, the minister may extend it beyond 12 months for a duration which cannot exceed three months. But at the end of these three months, the minister may issue another extension and so on. In a 2017 decision,[32] the Constitutional Council ruled on the constitutionality of such an extension scheme with regard to the constitutional freedom to come and go. In the *motifs* part of the decision, the Council established that on its face the renewal scheme infringes 'on the liberty to come and go' (para 14). Such an infringement is not per se unconstitutional, but it might be if the scheme does not

[30] In the a priori review, the number of provisions reviewed can be quite high, since a whole statute is referred to the Council; in the a posteriori QPC review, usually only a small number of provisions (or even only one) are submitted to the Council for review.

[31] Loi no 55-385 du 3 avril 1955 relative à l'état d'urgence. This statute has been modified many times since 1955.

[32] Cons const 16 March 2017, no 2017-624 QPC, *M. Sofiyan I.*

comprise certain guarantees to the effect that its use will be proportionate to the dangerousness of the individual placed under house arrest. These guarantees were not provided for by the statute. However, the Council went out of its way to supplement the statute with an interpretive reservation. In paragraph 17 of its decision, the Council held that 'beyond twelve months, a house arrest measure cannot, without excessively infringing on the liberty to come and go, be renewed unless: first of all, the behaviour of the individual in question constitutes a particularly serious threat to security and public order; secondly, that the administrative authority produces new or complementary elements; and finally, that in examining the situation of the individual in question, the total length of time of his or her placement under house arrest, the conditions of this placement and the complementary obligations under which this measure is issued are taken into account'. These sentences are nowhere to be found it the statute's text; they are the result of an interpretation which aims to constrain the discretionary powers of the minister.

Then, in paragraph 19, the Council explicitly identifies paragraph 17 as expressing an interpretive reservation: 'Subject to the reservations established in Paragraph 17, the contested provisions … are not contrary to the freedom to come and go'.

Finally, the decision closes on the *dispositif*, in which the decision is announced through articles. The Council, in the third article of the *dispositif*, gives formal binding force to the reservation expressed in paragraph 17 and identified as such in paragraph 19:

> Article 3. – Subject to the reservations established in Paragraph 17, the following are constitutional:
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> - the eleventh, twelfth, fourteenth Subparagraph and the other provisions of the thirteenth Subparagraph of Article 6 of Law number 55-385 of 3 April 1955 relating to states of emergency.

There is therefore a certain amount of formalism to the way interpretative reservations are formulated. Ordinary judges and other law-applying organs must be able to identify precisely the interpretative reservation as such and to ascertain its meaning and scope. There must be no room for doubt, at least in principle (even if, as we shall see in the last section of this chapter, such doubts are in practice inevitable). Judges are not expected go out of their way to look for the *ratio decidendi* of the Council's decision: this *ratio* is clearly stated in both the *motifs* (grounds) and the *dispositif* (ruling). If the interpretative reservation is not clearly stated in both parts of the decision, it has no authority and it does not bind the lower courts. This raises the question of 'implicit' reservations, and the way ordinary judges deal with them.

B Implicit Reservations

i The Authority of Implicit Reservations

It sometimes happens that in the course of its reasoning on the constitutionality of a given statutory provision, the Council gives a specific interpretation of that provision, without explicitly identifying it as an interpretative reservation, either in the grounds (*motifs*) or in the ruling (*dispositif*). Quite often it seems that this interpretation is a constitutionally conforming one, because the ensuing declaration of conformity seems (even if loosely) tied to it. However, it is not expressly identified as a reservation; given the formalism explained above, it would seem that such interpretations are not subject to *res judicata* and that ordinary courts are free to disregard them. However, in practice, ordinary courts routinely defer to these implicit reservations, thereby recognising at least their persuasive authority and even treating them occasionally as authentic reservations.

Let me give two examples. In 1997, the Constitutional Council[33] held that a statutory provision (Article 3 of statute under review) which gave police officers the right to confiscate the passports and the travel documents of illegal foreign nationals was not unconstitutional, as it was consistent with the constitutional freedom to come and go (derived from Article 2 of the 1789 Declaration). The Council nevertheless added that this provision had 'the sole purpose of ensuring that the alien in an irregular situation will be in possession of the document so that he can be made to leave the country; he may under no circumstances be prevented from exercising his right to leave the country or his other freedoms and fundamental rights'. In other terms, the Council gave a purposive interpretation of the statutory provision under review. It then added 'the passport or other travel document may be withheld solely for such time as is strictly necessary for the administrative authority, subject to review by the administrative courts, which in certain circumstances may order a stay of execution'. At no point do these conditions appear in the text of the statute; they are the mere product of the Council's creative interpretation. However, the Council does not clearly identify this interpretation as an interpretative reservation, which is all the more surprising since it expressly identifies as such other reservations concerning other provisions of the same statute. The *dispositif* does mention the existence of reservations concerning Article 3 of the statute, but nowhere are these reservations clearly identified as such in the *motifs*. And a reservation, in order to be authoritative, must, as we saw, be identified as such in both the *motifs* and the *dispositif*.

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[33] Cons const 22 April 1997, no 97-389 DC, *Loi portant diverses dispositions relatives à l'immigration.*

Nevertheless, the Council of State chose to treat it as an authentic reservation, on par with the other reservations clearly identified as such in the Constitutional Council's decision. In a 2006 ruling, the Council of State[34] held that 'the conformity with the Constitution of the [statutory provision resulting from article 3 of the 1997 law] was accepted by the Constitutional Council in its decision no. 97-389 DC of 22 April 1997 only insofar as the sole purpose of this text is "to guarantee that the foreigner in an irregular situation will be in possession of the document that will ensure his or her effective departure from the national territory"'. The Council of State then restated the other conditions set by the Constitutional Council in its decision, and it went out of its way to remind the reader that 'both the administrative authorities and the judge are bound by the interpretive reservations set out by the Constitutional Council'. The Council of State chose therefore to treat this implicit reservation as an authentic one.

In my second example, the Council of State deferred to an implicit reservation without even recognising it as such. In 2015, the Constitutional Council ruled[35] that when a state of emergency had been declared, the Constitution did not bar the Minister of the Interior from putting certain individuals under house arrest; the statutory provision empowering the Minister to do so was therefore constitutional. However, the Council added 'the administrative courts are charged with ensuring that such a measure is suitable, necessary and proportionate with the goal pursued'. This implicit 'directive' interpretive reservation (see *infra*) was not identified as a reservation in either the *motifs* or the *dispositif*. In 2017, the Council of State decided to 'defer' to this interpretation without treating it as a reservation: 'As the Constitutional Council took note (*a constaté*) in its decision n° 2015-527 QPC, it is up to the administrative courts to ensure that the administrative police measures prescribed pursuant to these provisions are suitable, necessary and proportionate with the goal pursued'.[36] The Council of State implies that the administrative courts, of which it is the apex court, would have exercised such a proportionality review anyway, with or without the Constitutional Council's decision – which only 'takes note' of it. However, the Council of State pays lip service to the persuasive authority of the Council's implicit reservation, even if it was under no obligation to do so.

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[34] CE ord 26 June 2006 no 294505.

[35] Cons const 22 December 2015, no 2015-527 QPC, *Cédric D.*

[36] CE ord, 25 April 2017, no 409677.

ii Ricocheting Reservations

Nothing illustrates better this ambiguity in the status of implicit reservations as the problem of 'indirect' or 'ricocheting reservations' (*réserves par ricochet*).[37] Let us suppose there is a statutory provision A which is virtually identical to (or closely resembling) an earlier provision B. Provision A is deferred to the Constitutional Council for review and it formulates an interpretative reservation regarding provision A's meaning or application. This reservation is identified as such in the *motifs* and the *dispositif*, and it is therefore binding on ordinary courts. But does it bind the courts' interpretation of provision B, which was not under review in the Council's decision?

In 2002,[38] the Council was called upon to rule on the constitutionality of a couple of statutory provisions, according to which University panels deciding on the conferral of experience-based credits to students should be 'composed in such a way as to contribute to a balanced representation of women and men' (provision A). In an earlier statute (the 9 May 2001 Law on professional equality between men and women), the legislature had used the exact same formulation with regard to the composition of boards and panels of many kinds, eg civil service entrance examination boards (provision B). In its 2002 decision, ruling on the 2002 law (provision A), it held that the provisions were constitutional,[39] with the reservation (expressed both in the *motifs* and the *dispositif*) that 'they only set an objective of balanced representation between women and men; they are not intended to, and cannot have the effect of, giving precedence to considerations of gender over those of competences, aptitudes and qualifications'. And the Council explicitly mentioned the fact that the provisions under review replicate the formulations used in the earlier 2001 statute (provision B). This raised the question whether ordinary courts were bound by the reservations *when applying* the 2001 statute (as far as the 2002 statute was concerned, the answer was beyond doubt).

In a 2007 case,[40] the Council of State had to apply the 2001 statute, and especially the statutory provisions therein included concerning the 'balanced representation' of men and women on

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[37] See on this CE Senac, 'Conseil constitutionnel et réserves d'interprétation "par ricochet"' (2007) Revue générale du droit, available at www.revuegeneraledudroit.eu/?p=1861.

[38] Cons const 12 January 2002 (n 25).

[39] Under art 6 of the 1789 Declaration.

[40] CE Sect 22 June 2007, *Lesourd.*

civil service entrance examination boards. The question was whether a jury composed of only one-third of women was contrary to this law. The Council of State ruled that it was not the case, because the law had to be interpreted as 'setting out an objective of balanced representation between women and men, which is not intended to, and cannot have the effect of, giving precedence to considerations of gender over those of competences, aptitudes and qualifications'. The astute reader will notice that this sentence is a mere copy-paste of the Constitutional Council decision regarding the 2002 statute. But nowhere in the Council of State's judgment is the Constitutional Council's 2002 decision expressly quoted or even cited. It is as if the Council of State has developed this CCI on its own.

This shows that 'ricocheting reservations' are not binding on ordinary courts. Only the *motifs* and the *dispositive with regard to the statute under review* enjoy binding authority: since the 2001 statute was never referred to the Constitutional Council, the authority of the reservation expressed concerning the 2002 statute cannot 'ricochet' onto the one of 2001. However, the fact that the Council of State replicated in its own ruling the Constitutional Council's reservation shows that it deferred to its persuasive authority. Nowadays, ordinary courts are all the more incentivised to defer to the persuasive authority of ricocheting reservations since, thanks to the new QPC mechanism, the Council can now review the courts' own statutory interpretations, which was not the case in 2007.

C Types of Interpretative Reservations

Very early on, French scholars have sought to elaborate a typology of interpretative reservations analogous to some extent to the classification of the decisions of the Italian Constitutional Court.[41] Favoreu[42] distinguished between constructive, neutralising and directive reservations. More sophisticated classifications have been proposed; for instance, Di Manno has

[41] For a very nice overview of the Italian Court's jurisprudence regarding interpretative decisions, see Vittoria Barsotti, Paolo G Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford, Oxford University Press, 2016) 84.

[42] Louis Favoreu, 'La décision de constitutionnalité' (1986) 38 *Revue internationale de droit comparé* 611, 622–24.

distinguished between seven species or subspecies of interpretative decisions.[43] But for the present purposes, Favoreu's classification will do, as it is now the most widely received and criticised.

Constructive reservations are CCIs which either add a new norm to the one issued in the statute's text or substitute it with another. The point is that the original norm lacks something in order to be constitutional, and that it needs therefore to be either supplemented or replaced with another one. Let me take an example. Article L.3341-1 of the Public Health Code provides that 'any person who is found in a state of intoxication in a public place shall be removed by the police at their own expense to the nearest police or gendarmerie station, or to a secured room where they shall be held until they have recovered their senses'. In a 2012 decision,[44] the Council ruled that these provisions were consistent with the constitutional principle prohibiting arbitrary detention as well as with the freedom to come and go. But when the intoxicated individual is suspected to have committed a felony, they must be arrested and put in custody by the police (*garde à vue*) as soon as they have recovered their senses. The duration of the custody is limited to 24 hours, but it may be extended up to 48 hours or even 144 hours depending on the type of felony or crime. The problem was that if the duration of the 'removal' of the intoxicated person was cumulated with the duration of the ensuing custody, the total duration of the deprivation of freedom could exceed the maximum provided by the law, therefore raising a problem of constitutionality. This is why the Council issued a constructive reservation by which it 'created' a new norm providing that the duration of the 'removal' of the intoxicated person should be deducted from the duration of the official custody, even if the police were unable to read them their rights before and until the person had recovered their senses.

Neutralising interpretations are CCIs which remove from the statutory norm the elements which raise an issue of constitutionality. Thereby, the norm's intended (or unintended) unconstitutional effects are made impossible by the Council's interpretation. The law is allowed to enter into force or to remain in force, but on the condition that its constitutionally problematic effects be neutralised. Here again, an example is in order. In 2017, the Constitutional Council

[43] Thierry Di Manno, *Le juge constitutionnel et la technique des décisions 'interprétatives' en France et en Italie* (Paris, Economica, 1997) 318.

[44] Cons const 8 June 2012, no 2012-253 QPC, *M.Mikael D.*

struck down[45] – twice – a law which created a crime of 'habitually accessing terrorist websites'; it found that this statutory provision infringed the freedom of expression and communication in a way which was neither necessary, suitable, nor proportionate. In 2020, the Council was confronted with a very similar issue, but framed in different terms. Article 321-1 of the French Criminal Code provides that 'receiving', which is defined as the 'concealment, retention or transfer of a thing which is obtained from a crime or a felony', is itself a criminal offence. Article 421-2-5 of the same code provides that 'the act of directly provoking terrorist acts or publicly endorsing these acts' is a criminal offence. Taken separately, both provisions are constitutional (indeed, the latter had explicitly been held constitutional by the Council in an earlier decision).[46] However, taken together, they had been interpreted by the Court of Cassation as creating an offence of 'receiving (or concealment) of acts endorsing terrorism'. For instance, if you had on your laptop or on a USB stick a video with a message glorifying Al-Qaeda, you could be charged with such an offence, since you would be concealing a 'thing' (a video) obtained from a crime (the very act of glorifying Al-Qaeda). One can easily spot the paradox: watching that video online was permitted per the 2017 decisions mentioned above; but downloading it on your computer was illegal. Unsurprisingly the Council declared in 2020[47] that this offence was unconstitutional. However, it could not strike down the laws under review (as it had done in 2017) because taken separately both laws were perfectly constitutional. The unconstitutional criminal offence was the result of the Court of Cassation's interpretation of the combination of both laws. The Council issued a neutralising reservation: after stating that the offence of receiving of acts endorsing terrorism 'infringes freedom of expression and communication in a way that is not necessary, appropriate and proportionate', in line with the 2017 precedents, it added that the Article 421-2-5 'cannot therefore, without infringing this freedom, be interpreted as punishing such an offence'. With this reservation (identified as such in the decision), the Council removes in effect an entire criminal offence from the legal order. One interesting thing about that decision is that the removed norm does not immediately

[45] Cons const 10 February 2017, no 2016-611 QPC, *M. David P.*; Cons const 15 December 2017, no 2017-682 QPC, *M. David P.*

[46] Cons const 18 May 2018, no 2018-706 QPC, *M. Jean-Marc R.*

[47] Cons const 19 June 2020, no 2020-845 QPC, *M. Théo S.*

originate from the text of the statutory provision; it is the result of the interpretation by ordinary criminal courts (and notably the Court of Cassation).

Directive reservations prescribe a certain behaviour or conduct to the authorities tasked with the application of the statute. Such reservations may be directed at judges of course, but also at administrative authorities, or even the legislature. An interesting example is a 2018 decision[48] concerning a 2017 statute expanding the powers of administrative authorities in order to fight terrorism. This decision contains several directive reservations. For instance, the law authorises police authorities to establish 'secure perimeters'; in order to enter these perimeters (for instance a square, a couple of streets or blocks, etc), showing a photo ID can be required, and citizens are required to submit to security frisking, visual inspections and luggage and vehicle search. One problematic aspect of this provision (among many others) was that it gave police officers the possibility of being assisted by private security agents working for private companies. This was problematic with regard to Article 12 of the 1789 Declaration, which the Council interpreted as prohibiting the 'delegation to private individuals of the competence of the administrative policing powers inherent in the exercising of "law enforcement" necessary to guarantee rights'.[49] In order to avoid striking down the law insofar as it seemed to provide for such a delegation, the Council issued an interpretative reservation by which it directed the police authorities 'to take measures to ensure that effective checks over these [private security agents] shall be ensured by… police officers'. The Council intended to ensure that the private security agents would be closely monitored by the police, so that they remain mere assistants and never exercise the police powers on their own. This is why its directive reservation is chiefly directed at police authorities, and only indirectly at the administrative courts which may be called upon to review their actions.

This typology of interpretative reservations has been criticised. For instance, Viala has pointed out that many interpretative reservations cannot be neatly classified under any of these categories. Some reservations may be described as both constructive and neutralising.[50]

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[48] Cons const 29 March 2018, no 2017-695 QPC, *M. Rouchdi B. et autre.*

[49] Cons const 10 March 2011, no 2011-625 DC, *LOPPSI II*.

[50] See the examples given by Alexandre Viala, *Les reserves d'interprétation dans la jurisprudence du Conseil constitutionnel* (Paris, LGDJ, 1999) 74–76.

Moreover, as Viala pointed out, all interpretative reservations can be described as 'directive'.[51] Since the Council is not a supreme court and since it does not adjudicate concrete cases, interpretative reservations are the only way for the Council to control the way courts apply the statute under review. Therefore, Viala argues, all reservations are to some extent directive, since they prescribe the correct interpretation of the statute to be made by ordinary courts (as well as administrative authorities, and the legislature itself). Viala's book on reservations was written before the QPC mechanism existed, when constitutional review was exercised a priori, before the statute under review was promulgated; reservations were therefore a way to fixate the meaning, scope and/or application of a yet-to-be-applied statute. The new QPC referral mechanism has, if anything, reinforced this directive nature of reservations. Since QPC cases – like all preliminary referrals – arise out of 'real cases' (with real litigants, before real judges), the Council is uniquely positioned to check (and modify) the way judges interpret and apply statutory provisions, which, *ex hypothesi*, are already in force. The use of interpretative reservations is not only that of a 'canon of avoidance' designed to allow the Council to avoid striking down a statute; it increases the authority of the Council over judicial interpretations, even more so since, as we saw earlier, reservations can be used to give a CCI not only of the statute, but of an already existing judicial interpretation of the statute (see above the case about 'receiving of acts endorsing terrorism'). By enhancing the collaboration and the dialogue between ordinary courts and the Council, the QPC referral mechanism has strengthened the Council's interpretative authority, and the directive nature of its reservations.

D The Legitimacy of Interpretative Reservations

As I hinted at in the introduction, ever since the Revolution the French version of constitutionalism has not been very friendly to judges and to judicial law-making. It rests on what may be called a 'mouthpiece ideology', according to which judges may never create law, as they must always be the mouthpiece of existing law. This resulted in Article 5 of the French Civil code, which prohibits judges 'to pronounce judgment by way of general and regulatory dispositions'. Even if this 'mouthpiece ideology' has been widely challenged for a long time

[51] ibid 84.

now,[52] it still remains commonplace both in legal teaching and among legal practitioners. In sum, almost everybody knows that judges make law to some extent, but many still pretend they don't.

As for constitutional adjudication, the issue ought to be framed in slightly different terms. From the very outset, the Constitutional Council was not considered to be a real court in the first place. Its progressive, yet incomplete, transformation into a court is quite recent, partly thanks to the entry into force of the new QPC referral. Therefore, its legitimacy was always understood in very narrow terms. Constitutional review of statutes was not conceived as a way for the Council to enforce a set of superior principles and values against the will of the legislature. As Kelsen-inspired scholars Eisenmann[53] and Favoreu[54] argued, the role of the Council was one of a railroad switch, indicating which statutes could go ahead (on the statutory track so to say) and which should take the form of a constitutional amendment. An unconstitutional statute was nothing but a statute that needed to be adopted as, or preceded by, a constitutional amendment and thereby eliminating the constitutional obstacle.[55] Indeed, on at least two occasions,[56] constitutional amendments were passed to overrule a decision by the Council.

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[52] See the classic article by Marcel Waline, 'Le pouvoir normatif de la jurisprudence' in Charles Rousseau (ed), *La Technique et les principes du droit public. Etudes en l'honneur de Georges Scelle* (Paris, LGDJ 1950). Even judges do acknowledge their own normative powers. For instance, the Court of Cassation devoted its 2018 Annual Report to the 'normative role of the Court of Cassation': Cour de cassation, 'Le Rôle normatif de la Cour de cassation' (Etude annuelle 2018), available at www.courdecassation.fr/files/files/Publications/Etude%20annuelle/Etude%20annuelle%202018%20-%20Le%20r%C3%B4le%20normatif%20de%20la%20Cour%20de%20cassation.pdf.

[53] Charles Eisenmann, *La justice constitutionnelle et la Haute Cour constitutionnelle en Autriche* (Paris, Economica, 1986) 17.

[54] Louis Favoreu, 'Les décisions du Conseil constitutionnel dans l'affaire des nationalisations' (1982) *Revue du droit public*, 377, 419–20. See also Louis Favoreu, 'La légitimité du juge constitutionnel' (1994) 46 *Revue internationale de droit comparé*, 557, 578–79.

[55] Georges Vedel equated this to a 'lit de justice' on the part of the constituent power (Georges Vedel, 'Schengen et Maastricht' (1992) *Revue française de droit administratif*, 173). This in turn raises the question of judicial review of constitutional amendments themselves, which I will not delve into here.

[56] See Cons const 13 August 1993, no 93-325 DC, *Loi relative à la maîtrise de l'immigration*, overruled by the following constitutional amendment: Loi constitutionnelle no 93-1256 du 25 novembre 1993 relative aux accords internationaux en matière de droit d'asile. See also Cons const, 14 January 1999, no 98-407 DC, *Loi relative au*

Of course, declaring a statute unconstitutional, and repealing it or preventing it from being promulgated is far from insignificant. As Kelsen himself argued, constitutional courts do take part in the legislative power, since repealing a statute is as politically loaded as making a new one. However, Kelsen insisted that constitutional courts are only *negative* legislatures:[57] they cannot enact new laws; they can only remove existing laws.[58] In the apocryphal words of law professor and once member of the Council Vedel, 'the Council holds an eraser, it does not hold a pencil'.[59] From that point of view, CCI, in the form of interpretative reservations, proves to be highly problematic legitimacy-wise, because it seems that in issuing reservations, the Council precisely uses a pencil, in that it re-writes to some extent the statutory provision under review. In altering the meaning of the text, the Council changes the content of the norm this text expresses. Of course, the Council has always held it is not vested 'with any general power of appraisal and decision-making similar to that vested in Parliament'.[60] But it sometimes seems that it exercises something close to such a power whenever it issues a reservation[61] – and therefore that it acts as some kind of 'positive' legislature.[62] This raises the question of the

mode d'élection des conseillers régionaux, overruled by the Loi constitutionnelle no 99-569 du 8 juillet 1999 relative à l'égalité entre les femmes et les hommes.

[57] Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit. 2. Mitbericht von Professor Dr. Hans Kelsen in Wien' (1929) 5 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 30, 55–56.

[58] I have argued that Kelsen's theory of the negative legislature is far more subversive and far-reaching than what the eraser-and-pencil metaphor implies, but I will not rehearse my arguments here, see Mathieu Carpentier, 'Le juge constitutionnel et la pertinence de la théorie du législateur négatif' in Stéphane Mouton (ed), *Le juge dans le constitutionnalisme moderne* (Paris, Varenne/LGDJ 2023).

[59] This apocryphal formula has been attributed to Vedel by the former president of the Council Robert Badinter. See Badinter, 'Du côté du Conseil constitutionnel' (2002) *Revue française de droit administratif* 207, 209.

[60] Cons const 15 January 1975, no 74-54 DC, *Loi relative à l'interruption volontaire de la grossesse*; Cons const 11 June 2020, no 2010-2 QPC, *Mme Vivianne L.*

[61] See Philippe Blachér, 'Le Conseil constitutionnel en fait-il trop?' (2003) 105 *Pouvoirs* 17, 21–23; Bertrand Mathieu, 'Le Conseil constitutionnel "législateur positif"' (2010) 62 *Revue internationale de droit comparé* 520; Antoine Basset, 'Question prioritaire de constitutionnalité et risque de conflits d'interprétation' (2012) 82 *Droit et société* 713, 725.

[62] For a nice presentation in English, see Julien Mouchette, 'The French Constitutional Council as a Law-Maker' in Monika Florczak-Wator (ed), *Judicial Law-Making in European Constitutional Courts* (Abingdon, Routledge 2020) 17–20.

democratic legitimacy of such judicial law-making by which the Council seems to substitute the democratically enacted norm with another norm of its preference.

This has an air of paradox: one would think that 'striking down' a democratically enacted statute would be considered more problematic than issuing a conforming interpretation. And sure enough, in many recent instances, the alleged 'activism' of the Council in striking down various statutes has been decried, some even calling for a French notwithstanding clause in the Canadian mould.[63] But it still remains that the 'railroad tracks' theory makes it, somewhat paradoxically, more acceptable to strike down a statute – insofar as the constituent power can still reverse the Council's decision – than to alter the statute's meaning in order to make it express another norm than the one intended by the legislature (or resulting from the ordinary meaning of the text). In other words, the canon of avoidance seems to be more problematic than the very thing it aims to avoid.

One of the key features which explains this suspicion surrounding interpretative reservations is the Council's very loose reasoning both in general, and in the specific case of reservations. One would usually expect a constitutional court which wishes to engage in CCI to proceed the following way: first, explain why the 'ordinary' interpretation of the statute is constitutionally problematic, for instance because applying the 'triple test'[64] shows that it disproportionately infringes on a constitutionally protected right; then, show how another interpretation is able to salvage the constitutionality of the statute (eg by making such infringement proportionate). The Council does proceed this way most of the time, as we saw earlier. However, it happens quite often that the Council goes the other way around. First it establishes that the statute *is* constitutional, then it goes on to indicate that it ought to be interpreted in such-and-such way. Such was the case of the *Mikaël D.* decision referred to above, about intoxicated people being kept in 'secure rooms': first the Council established that this was not unconstitutional, given the short duration of time during which the person is kept in such a secure room; then the Council went on to give a reservation about the overall time of the custody (see above). And

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[63] See Jean-Eric Schoettl, 'Pour une clause constitutionnelle de "dernier mot" au profit du Parlement' in Jean-Philippe Derosier (ed), *Contrôle de constitutionnalité: débat autour d'une clause de dernier mot au profit du Parlement* (Paris, L'Hétairie 2019).

[64] The Council has applied since 2008 a somewhat watered-down version of the German-inspired triple test of proportionality, see Cons const 21 February 2008, n 2008-562 DC, *Loi relative à la rétention de sûreté*; Cons const 10 June 2009, no 2009-580 DC, *Loi favorisant la diffusion et la protection de la création sur internet*.

even when the Council uses the 'natural' order in its reasoning, it does so in a somewhat muddled way. Rather than stating explicitly *why* the statute would be unconstitutional but for its interpretive reservation, it just states *that* the statute would be unconstitutional but for the reservation. The reasons are usually not given, or at least not in a complete and detailed way.[65] This raises the question whether interpretative reservations are really an instance of CCI or rather a way for the Council to 'enact' its preferred interpretation under the guise of the Constitution.

Nevertheless, reservations have staunch defenders. For instance, Viala[66] has claimed that interpretative reservations are legitimate in at least two respects. First, their 'conciliatory' feature, beyond the mere upholding/striking down switch, allows the Council to put an end to the political debate which presided over the passing of the law: it satisfies both the majority (and the government) and the opposition, since the law is both upheld and (sometimes radically) altered; and it elevates a political debate to a resolution of a conflict of competing constitutional principles. Second, as the French 'realist theory of interpretation'[67] teaches, judicial interpretation always entails the judicial (re-)creation of a norm. The directive feature of reservations (see above) and their character of *res judicata* allow the Council to ensure that

[65] The paucity of the Council's reasoning in general is a leitmotiv of French constitutional scholarship, see eg Wanda Mastor, 'La motivation des décisions des cours constitutionnelles' in Sylvie Caudal (ed), *La motivation en droit public* (Paris, Dalloz 2013); Thomas Delanlssays, 'La motivation des décisions relatives à la QPC au prisme de l'efficience', in Emmanuel Cartier (ed), *La QPC, le procès et ses juges* (Paris, Dalloz 2013); Denis Baranger, 'Sur la manière française de rendre la justice constitutionnelle' (2012) 7 *Jus Politicum*, available at juspoliticum.com/article/Sur-la-maniere-francaise-de-rendre-la-justice-constitutionnelle-478.html; Thomas Hochmann, 'Et si le Conseil constitutionnel était une "Cour constitutionnelle de reference"?' (2019) *Revue des droits et libertés fondamentales*, 2019, available at www.revuedlf.com/droit-constitutionnel/et-si-le-conseil-constitutionnel-etait-une-cour-constitutionnelle-de-reference; Pauline Estanguet, 'Quand le Conseil constitutionnel suggère mais ne tranche pas' (2019) *Constitutions* 66. Even former members of the Council agree that the reasoning it uses is not always convincing, see Guy Canivet, 'La motivation des décisions du conseil constitutionnel' in Caudal (ibid) 235; Nicole Belloubet, 'La motivation des décisions du Conseil constitutionnel: justifier et réformer' (2017) 55–56 *Nouveaux Cahiers du Conseil constitutionnel* 5.

[66] Viala (n 50) 155

[67] See notably Michel Troper, *La Théorie du droit, le droit, l'Etat* (Paris, Presses Universitaires de France, 2001) 69–84.

ordinary judges will interpret the statute in a coherent and objective way, as well as consistent with the Constitution.

IV New Issues

The new QPC referral system has not modified the dynamics of CCI in France. If anything, as we saw earlier, it has enhanced the efficacy of interpretative reservations – albeit not necessarily their legitimacy – in that they have been used as a way to strengthen the grip of the Council on judicial interpretations of statutes: reservations raised in a QPC decision allow the Council to substitute the ordinary courts' interpretation of the statute under review with its own interpretation.

However, the creation of the QPC mechanism has raised new issues, which were hardly foreseeable when the Council merely exercised a priori review. Like all preliminary referrals, QPC proceedings arise from concrete cases litigated before ordinary courts. The Council's decision (be it one of conformity with reservations or one of unconstitutionality) will have repercussions on these cases – and the other cases being litigated at the time of the decision. This entails a whole series of new issues surrounding the uses and effects of interpretative reservations. Although a detailed examination of these issues would be both too technical and too context-specific to be quite useful for a comparative study such as the one undertaken in this book, I will briefly sketch them out in the remainder of this chapter.

A Can the Claimant Seek an Interpretative Reservation?

The usual way to bring a constitutional case before a court is to claim that such-and-such statutory provision is repugnant to the Constitution. Such is the way in France too. For instance, litigants may attempt to bring a QPC before the Council only inasmuch as they claim that a 'statutory provision *infringes* the rights and freedoms guaranteed by the Constitution'.[68] People do not usually refer to the Council a statute with the intention of having that statute declared constitutional; one does not ask a judge to exercise judicial review on a law that one thinks conforms to the Constitution.

[68] French Constitution, art 61-1.

However, litigants might wish to raise a QPC plea in order to have the Council issue an interpretative reservation, rather than strike down the statute. This is both understandable and highly problematic. It is understandable insofar as reservations are de facto used by the Council to alter the meaning and the scope of an existing law. It may therefore be more profitable to the claimant to have the law remain in force, but with an altered meaning or scope, rather than have it repealed altogether. Sometimes a litigant prefers that a different law be applied to his case rather than there being no applicable law at all. From this point of view, it is much less costly to ask the Council to issue a reservation than to have it strike down the statute, then lobby the legislature in order to make them pass new legislation.

However, such a strategy is highly problematic. First, as a procedural matter, litigants must argue, in their QPC plea, that the statute is unconstitutional, and they must give reasons for that unconstitutional character. The claimant cannot just claim that the statute should be interpreted in such-and-such a way. Repeal of the statutory provision is the only relief that the claimant may seek before the Council. Second, as a matter of principle, to seek directly a reservation before the Council amounts to asking the Council to change the law. It amounts to treating the Council as a co-legislator, which seems to be highly incompatible with the French conception of the legitimacy of judicial review in general and of interpretative reservations in particular.

In practice, litigants who wish to have the Council issue a reservation have no choice but to claim in their written submissions that the statutory provision is unconstitutional; however, during oral proceedings, their counsels may invite the Council to issue a reservation rather than to repeal the law. In a couple of instances,[69] the Council has allowed such a move to go forward. The circumstances were highly specific. In a previous decision, the Council had issued a reservation which, on its face, did not cover the claimant's situation. However, the claimant wished to have the reservation extended so as to cover their own case. The case was especially tricky since the previous decision of the Council was *res judicata*, which, in principle, should have prevented the claimant from challenging the statute anew, since it had already been declared constitutional (albeit with a reservation). Nevertheless, the Council held that there was a difficulty in ascertaining the scope of a previously issued interpretative reservation, which

[69] Cons const 7 July 2017, no 2017-642 QPC, *M. Alain C.*; Cons const 7 July 2017, no 2017-643/650 QPC, *M. Amar H*. These intricate cases were about highly technical issues in tax law; I beg the reader's forgiveness for not getting into the specifics.

constituted a change of circumstances allowing for a new challenge; and it accepted extending the scope of its first reservation to cover the cases brought before it.

These couple of cases are somewhat exceptional. The usual way to get an interpretative reservation from the Council is, and remains, to claim that the statutory provision under dispute is repugnant to the Constitution while suggesting that a constitutionally conforming interpretation would be an acceptable satisfaction for the claimant. But we have here a good example of the ambiguity of the role of the Council with regard to CCI: the fact that a modification of the statutory provision by way of a reservation often is a desirable outcome is testimony to the quasi-legislative role that the Council is sometimes called upon to play.

B The Retroactive Effect of Reservations

In the a priori review, interpretative reservations bear on a statute which is not yet in force.[70] Therefore, their effects are necessarily *ex nunc*, since their own operation depends on the entry into force of the statute which they interpret. The same does not hold for reservations issued within the course of a QPC decision. Indeed, a CCI of a statutory provision which has already entered into force changes the meaning of the provision, and therefore, the operation of the law it interprets. Therefore, it is only natural to assume that the effect of such interpretations must be retroactive, for otherwise the past unconstitutional effects of the law would be preserved. Moreover, the 'mouthpiece ideology' studied earlier entails that when a judge *appears* to create a law (in this case: to give a certain normative meaning to a certain legislative provision), what she does in fact is declare pre-existing law. In that sense, interpretative reservations are deemed to have a declaratory function, and not a constitutive one:[71] therefore, they must be retroactive. It is as though the only norm applicable was always, and had always been, the one resulting from the Council's interpretation, and *not* the one resulting from either the ordinary meaning of the law or past judicial interpretation (on the part of ordinary courts).

The problem of course is that, as ever, the notion that judicial law-making is merely declaratory proves to be a fiction which can give rise to several intricate problems in real life. Let there be

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[70] There have been exceptions, especially in the context of new-caledonian review (n 14) which I will not delve into here. See eg Cons const 24 October 2012, no 2012-656 DC, *Loi portant création des emplois d'avenir*.

[71] See Mathieu Disant, 'Les effets dans le temps des décisions QPC' (2013) 40 *Nouveaux Cahiers du Conseil constitutionnel* 63, 68.

a provision A enacted in t_1, which has always received interpretation I_1 at the hand of ordinary courts[72] so that the norm expressed by A is N_1. Let us now suppose that in t_2 the Council rules that A is constitutional insofar as, that is, with the reservation that, it receives interpretation I_2 so that the norm it expresses is in fact N_2. Since I_2 has retroactive force, it entails that the *real* norm in force from t_1 onwards was indeed N_2 and not N_1. This in turn may entail very tricky problems in terms of legal certainty as well as in terms of legitimate expectations. What if, before t_2, people have relied on N_1 and, obviously, not on N_2? What if N_2 is the result of a constructive or neutralising reservation, whose violation would entail, for instance, the annulment of thousands of criminal proceedings?

For this reason, the Council has bent, on occasion, the retroactivity of its reservations. Let me take an example from 2010.[73] When someone has been ordered into pre-trial detention, they can at any moment ask the investigating judge to be set free; if the judge refuses, the matter is automatically brought before the '*juge des libertés et de la detention*' ('liberties and detention judge'). However, the detained person is not informed of the reasons why the investigating judge denied their motion, and they cannot respond to them. The Council found that this infringement of the adversarial principle was proportionate; however, it ruled that the liberties and detention judge can deny the detained person's motion only if this person has been informed of the reasons given by the investigating judge (as well as the opinion of the prosecutor's office). A retroactive application of this constructive reservation could have had the effect of quashing thousands of orders by the liberties and detention judges. This is why the Council ruled that this reservation should only be applicable to motions filed *after* the Council's decision was published.[74]

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[72] For the present purposes it does not matter whether this interpretation results from the ordinary understanding of the provisions or whether it is a creative interpretation on the part of judges.

[73] Cons const 17 December 2010, no 2010-62 QPC, *M. David M.* For other examples, see eg Cons const 18 November 2011, no 2011-191/194/195/196/197 QPC, *Mme Élise A. et autres* and Cons const 18 June 2012, no 2012-257 QPC, *Société OLANO CARLA et autre*.

[74] In other cases (especially in tax law matters), the Council ruled that the reservation would be applicable only to proceedings introduced *before* the Council's decision: Cons const, 26 June 2015, no 2015-473 QPC, *Epoux P.*; Cons const 15 December 2015, no 2015-503 QPC, *M. Gabor R.*

C Interim Reservations

The last issue is perhaps the most paradoxical: CCIs that are issued, albeit in an interim fashion, in the course of a decision *striking down* a statute.

There are some instances in which the statutory provision under QPC review is too unconstitutional to be interpreted in a constitutionally conforming way; in such a case, the Council declares it to be unconstitutional, and repeals it. However, it may be the case that repealing the law with immediate effect proves, in turn, not to be desirable: for instance, because the absence of *any* law on such-and-such matters would be constitutionally problematic – eg the criminal procedural laws on custody are unconstitutional insofar as they do not provide that a lawyer should be present at all times, but repealing laws on custody altogether would violate the constitutional aims of preventing breaches of the peace and seeking out offenders. It may also be the case that what makes the law unconstitutional is not that it does *too much*, but *too little*, or because it lacks something to be fully constitutional (eg think of a law that grants a benefit to person A, but not person B who is in the same situation, and, for this reason, amounts to an unlawful difference of treatment). In this sort of case, nobody, especially not the claimant, wants the statute to be repealed: they want it to be modified, in order to have the benefits, which had been granted to others, extended to them.

In such instances, the Council does issue a declaration of unconstitutionality, but crucially does not repeal the statute with immediate effect. Rather, it postpones the entry into force of its own decision to a later date. If at that date, Parliament has not legislated anew in order to 'cure' the statute from its unconstitutional character, the statutory provision disappears. The goal of this mechanism is to ensure that the legislature gets a second chance, so to speak, and has the opportunity to amend the statute in order to make it consistent with the Constitution. In the interval between the date on which the Council gives its decision and the date on which the law is amended by the Constitution or the date on which – if the legislature fails to act – the statute disappears, the operation of the statute remains intact. The law remains fully in force and may still be applied to cases arising from it.

In some cases, however, the Council does not want to leave the operation of the unconstitutional law intact. This is why it typically issues what is now called '*reserves transitoires*' (interim

reservations),[75] that is a reservation that applies to all cases arising from the operation of the law after[76] (and even sometimes prior to)[77] the Council's decision. In such cases, the Council acts as a transitional legislature: it sets down interim rules as to how the cases arising from the operation of the law must be dealt with until the legislature takes action. For instance, in 2018, in a famous case,[78] the Council reviewed a statute that made it a crime to facilitate the illegal entry, movement, or residence of a foreign national in France. This provision had an exemption built into it which covered some kinds of humanitarian assistance (regarding residence) but not others (entry and movement). The Council held that the statute was repugnant to the constitutional principle of fraternity (which the Council 'discovered' or 'invented' for the occasion) insofar as it did not provide for another exemption with regard to humanitarian facilitation of movement (but not entry), that is, insofar as it still made it a crime in all circumstances – even humanitarian ones – to help an illegal foreign national move within the French territory. So the limited scope of the exemption was the cause of its unconstitutionality. However, the Council had to postpone the entry into force of the repeal of the statute, since an immediate repeal would have the unfortunate effect of removing *all exemptions* from the statute. But the Council nevertheless issued an interim reservation which instructed criminal courts not to apply the law to people who had helped illegal foreign nationals to move within the French territory.

Interim reservations are the clearest example of the quasi-legislative role of the Council in issuing CCIs. In such cases, rather than just changing the way ordinary courts ought to interpret the statute (as is the case with 'ordinary' reservations), the Council typically issues *new* rules for the courts to apply, the same way as a legislature would do. In doing so, it also provides the *actual* legislature with a template for the legislative amendments required for the statute to be constitutional. Interim reservations are thus not only directed at ordinary judges, who will have to apply the statute in the interim, but they are also addressed to the legislature, which is called upon to amend the statute if it wants to avoid its automatic repeal at the date set by the Council in its decision.

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[75] See Cons const 6 June 2013 no 2014-400 QPC, *Société Orange SA.*

[76] Con const 2 March 2018, no 2017-694 QPC, *M. Ousmane K. et autre*

[77] Cons const 2 February 2018, no 2017-688 QPC, *M. Axel N.*

[78] Cons const 6 July 1018, no 2018-717/718 QPC, *M. Cédric H. et autre*.

V Conclusion

CCI in France owes many of its somewhat intricate features to France's complicated history with judicial review. For a long time, judicial review of statutes was non-existent. When the Constitutional Council was eventually created, it was not meant to become a fully-fledged constitutional court; rather it was a mere 'railroad switch' guarding the legislature against constitutional derailing. This resulted in a somewhat complex division of interpretative labour between the Council, which is not a supreme court, and ordinary courts, a division of which CCI is a key element. The Council's interpretative reservations being *res judicata*, allow the Council to have a grip on ordinary courts' interpretative practices that it would otherwise not ordinarily have. This entails a certain dose of formalism in the issuing of reservations, in that the courts must be able to identify without doubt which part of the Council's decision amounts to a reservation and must therefore be considered binding on them. However, this very formalism reinforces the similarities between reservations and legislative enactments, which raises delicate questions regarding the legitimacy of CCI.

At the end of the day, the issues surrounding interpretative reservations are yet another symptom of the pathologies of the French conception of constitutional adjudication. The questionable composition of the Council, its ties with the executive, the paucity of the reasoning displayed in its decisions and the procedural difficulties in ensuring impartial proceedings before it all show that the Council still falls short of being a full-fledged constitutional court in the German or the Italian mould. Despite the QPC, the Council still has a long way to go. Of course, no sensible person can deny that the Council nowadays holds a pencil as well as an eraser, but, except in a few remarkable instances, it has so far used both the pencil (reservations) and the eraser (striking down) in a very cautious – even timid – way. It is not a small paradox that the Council, one of the weakest constitutional courts of Europe, is perhaps one of those whose 'activism' is the most decried and whose legitimacy is most called into question.