Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective

Otto Pfersmann*

1958: *a priori* review of parliamentary legislation to keep Parliament within its limited legislative competences – 2008: *a posteriori* review to protect citizens' rights and freedoms – Varieties of concrete review – Originality of the new French procedure – An *indirect* constitutional complaint: *raised* by a litigating party, *transmitted* by an ordinary court and *decided* by the Constitutional Council – Obstacle to transmission: declaration of conformity *in the motives* of an earlier decision by Constitutional Council – Conceptual, logical and legal reasons for a strict distinction between normative content and justificatory discourse in judgments – Setting on par of motives and operative part transforms French legal system into a specific form of *common* law and weakens the Rule of Law

France is often said to stay outside many common legal evolutions. This applied especially to constitutional review of formal legislation. It was introduced as relatively late as 1958, and then only abstract and *a priori*, thus in a very different mode than in most other European systems. In 2008, France adopted an extended constitutional reform, finally introducing review of formal parliamentary legislation *a posteriori* with regard to constitutional 'rights and freedoms'. Some will say that this new procedure brings the French legal order closer to European normality, while others may claim that it is again *sui generis,* having no real equivalent in other countries or international structures. In fact, the French system is very well suited to an extended comparison. However, some specific elements may not be easy to capture and require special analysis.

Other elements can, at first sight, be rather easily stated. On the one hand, the traditional French ideology of the 'law' as an expression of the general will induced a long-standing reservation against judicial review of parliamentary stat-

* Professor, University Paris I Panthéon Sorbonne.

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utes.[1] However, on the other hand, distrust in Parliament's ability to sustain a stable government and to provide for coherent legislation prompted de Gaulle to introduce constitutional review.[2] It was not introduced to protect rights and liberties or a distribution of competences between a centre and decentralised entities. Instead, it was conceived of as a strictly preventive check on legislation, to prevent Parliament from overstepping its limited competences (Article 34 Constitution). It left promulgated statutes completely outside the reach of any judicial challenge. Referrals could be filed only by the highest political authorities (the President of the Republic, the Prime Minister and the presidents of the chambers of Parliament), not by the addressees of the norm. With a very few exceptions,[3] the Constitution provided no 'rights' – thus rights could not be invoked as a term of constitutional reference.[4]

As is well-known, it was the Constitutional Council (*Conseil constitutionnel*) that introduced rights into the formal Constitution through a revolution in 1971, by using the Preamble as a norm of reference.[5] It should be noted that this already is

[1] French constitutional ideology mainly has been shaped by the 'revolutionary tradition' under the Third Republic, which is best expressed by Raymond Carré de Malberg in his *La loi, expression de la volonté générale. Etude sur le concept de la loi dans la Constitution de 1875* (Paris, Sirey 1931; reprint Paris Economica 1984) and his *Confrontation de la théorie de la formation du droit par degré avec les institutions et les idées consacrées par le droit positif français relativement à sa formation* (Paris, Sirey 1933). It contains the following propositions: 1) 'law is the expression of the general will' (Rousseau in the *Contrat Social* as well as Art. 6 of Declaration of the Rights of Man and of the Citizen of 1789); 2) Parliament is the organ which states the general will; 3) all other organs, hence all courts, have to apply the law.

[2] The ideology of parliamentary sovereignty coexists paradoxically with the belief that Parliament is unable to provide governmental stability. The Constitution of 1958 is designed in order to give the government the means to frame the proceedings of the Parliament. Constitutional review as intended in this design aims at guaranteeing that the legislature would not overstep its limited competences (Art. 34). Cf. Louis Favoreu, Didier Maus, Jean-Luc Parodi (eds.), *L'écriture de la Constitution de 1958* (Paris, Economica 1992); Louis Favoreu (ed.), *Le domaine de la loi et du règlement* (Paris, Economica 1981).

[3] E.g., Art. 1 guarantees the equality of citizens and religious freedom, Art. 3 the right to vote and Art. 67 entrusts personal liberty to the judiciary.

[4] That the Council was not conceived as a court and the Preamble not as a Charter of rights which could be invoked by the Council, appears clearly in the minutes of the elaboration of constitution: Comité national chargé de la publication des travaux préparatoires des institutions de la Ve République, Didier Maus (dir.), *Documents pour servir à l'histoire de l'élaboration de la constitution du 4 octobre 1958*, 4 vols. (Paris, La Documentation française 1987 squ).

[5] In its famous decision 44 DC of 16 July 1971, the Constitutional Council stated that the Preamble was part of the Constitution and hence that all the rules and principles mentioned or referred to in it were constitutional exigencies. This not only transformed the Declaration of 1789 and the Preamble of the Constitution of 1946 into formally constitutional documents, but also gave constitutional status to the 'Fundamental principles of republican legislation' (hence the law on the 'contract of association' of 1905 became a constitutional guarantee of the liberty of association). The Preamble, though, was *not* framed as a part of the normative Constitution; if it were otherwise,

a controversial statement, as a majority of scholars maintains that the Council simply 'consecrated' what was already there since the very beginning.[6] In 1974, the members of Parliament obtained the right to refer laws to the Council with 60 deputies or 60 senators. This shifted the equilibrium of the Constitution of 1958/62 in an unexpected and indeed very specific way.

When exercising *a priori* review, the Council examines an entire bill after its adoption by both chambers of Parliament within one month. Contrary to the European standard, a decision of the French constitutional court extends to an entire statute and provides it with a label of constitutionality, except for those provisions which are annulled as unconstitutional and for those subjected to a so-called 'interpretation in conformity'.[7]

Since 1975, the French system has been unexpectedly enriched by a parallel system of review of formal legislation. The French Constitution states in Article 55 that

it would not have been labelled a *Preamble,* but a catalogue of rights, and it certainly would have been more cautiously and less generously drafted. The introduction of these elements into the Constitution was not operated according to the rules governing the modification of the Constitution, and yet these elements are since then considered to be part of the Constitution. Thus the Constitutional Council modified the Constitution without having been empowered to do so. This was thus a *revolution* in the legal meaning of the term (Cf. Otto Pfersmann, in Louis Favoreu (ed.), *Droit constitutionnel* (Paris, Dalloz 1998, 1st edn.; 2008, 11th edn.).

[6] The majority opinion of today had to fight for the recognition of constitutional review as a mechanism for enforcing the Constitution. It is understandable that it presented the Preamble as part of the Constitution since the beginning. Cf. Louis Favoreu, Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (Paris, Dalloz 1975, 1st edn.); in this and all subsequent editions, the relevant passages can be found under the title 'Liberté d'association', for instance in the edition of 2009, p. 180-199.

[7] The so-called *interpretation in conformity* (*Verfassungskonforme Interpretation, decision de conformité sous reserve, sentenza interpretativa)* consists in the ruling that a legislative provision which has at least two different meanings is considered to be constitutional under one (or more) meaning(s) and not under another meaning (or meanings). This today seems to be a common European practice. It is practised by all constitutional jurisdictions and by some of them in a highly extensive and differentiated way, like in Italy (cf. e.g., Thierry di Manno, *Le juge constitutionnel et la technique des de´cisions 'interpre´tatives' en France et en Italie* (Paris, Economica 1997); Riccardo Guastini, *Il diritto come linguaggio* (Torino, Giappichelli 2006); *idem.*, 'Teoria e ideologia dell'interpretazione costituzionale', in *Giurisprudenza costituzionale* (2006), p. 743 et seq.; Giusi Sorrenti, *L'interpretazione conforme a costituzione* (Milano, Giuffrè 2006). This technique supposes indeed *interpretation* in order to identify the various meanings of the relevant provisions, but its very operation consists in a partial annulment and in certain cases the substitution by alternative provisions. It hence is not *review*, but alternative law-making. It requires thus a constitutional authorisation, which does not exist, i.e., nowhere does any constitution or treaty empower courts to 'decide which of the norms expressed by a legislative provision may be upheld, which of the norms so expressed may be annulled and which of the norms so expressed may be replaced by others, enacted by the court itself.' In this respect, France shares the European standards: the Constitutional Council, an organ which duty and mission it is to check the respect of constitutional exigencies, oversteps its constitutional competencies.

> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

According to the Council this does not mean that it itself has jurisdiction to make treaties prevail over statutes: circumstances may change and, accordingly, superiority is subject to modifications, whereas the Council states in a final manner whether a piece of legislation is constitutional or not.[8] The review of conventionality of statutory provisions has therefore been appropriated by ordinary courts, which, at least since 1989, do indeed let international treaties prevail over formal legislation, even if the legislation is subsequent to the treaty.[9] On this basis, the ordinary courts developed a rights-based jurisprudence, especially in reference to the ECHR. Although strictly opposed to any form of judicial review of promulgated legislation *with respect to the Constitution*, French law developed therefore a system of *review of promulgated legislation with respect to international treaties*, largely equivalent to the guarantees offered by the constitutional revolution of 1971.

It was only in 1990, and again in 1993, that attempts were made to introduce constitutional review *a posteriori*. Although the proposals were framed in a very restrictive way, the Senate opposed the initiatives adopted by the National Assembly. In 2007, the new President of the Republic initiated a large-scale constitutional reform, mainly intended to bring the legal framework closer to the American model of presidential government. The idea consisted in subjecting the Prime Minister to the President, the introduction of hearings of nominees for certain important positions and of the possibility for the President to address the Assemblies.[10] To prepare the reform, he formed a committee to report on the 'modernisation of the institutions'.[11] In its report,[12] the committee voiced the need of introducing review *a posteriori* to repair the consequences of the 1975 decision and to bring 'hierarchical superiority back to the Constitution'. This was not part of the original presidential plan, but finally it was accepted by all political actors and inserted into the formal Constitution.[13] The new Article 61-1 reads:

[8] Decision 15 Jan. 1975. For the majority reading, cf. Louis Favoreu, Loïc Philip, *Les grandes decisions du Conseil constitutionnel* (Dalloz 2009) p. 180-199.

[9] Council of State, Nicolo, 20 Oct. 1989.

[10] Cf. Otto Pfersmann, 'Verfassungsrevision in Frankreich', in Michael Thaler, Harald Stozlechner (eds.), *Verfassungsrevision. Überlegungen zu aktuellen Reformbestrebungen* (Vienna, Jan Sramek Verlag 2008) p. 27-51, with further references.

[11] *See*, concerning the alleged reasons for its creation: <www.comite-constitutionnel.fr/pour quoi_sa_creation/>.

[12] This report can be found at <www.comite-constitutionnel.fr/accueil/index.php>.

[13] The whole reform was adopted by Parliament on 21 July 2008, promulgated on 23 and published on 24 July in the *Official Gazette*. The constitutional reform act enters into force on 1 of March 2009 or at a later date, according to the relevant provisions. This is case for the new rules concerning

> If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period.
> An organic Act shall determine the conditions for the application of the present Article.

This provision is completed by a new version of Article 62(2), which now states:

> A provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

These provisions, however, were not to take effect before the entry into force of an 'organic act'.[14] This act, adopted by Parliament in November 2009, was subject, as all organic legislation, to compulsory review by the Constitutional Council, which delivered its decision on 3 December 2009.[15] According to the provisions of the organic act, the reform entered into force on 1 March 2010.

Understanding the new procedure requires a presentation first of the varieties of concrete review and then of the specificities of the French procedure. In a third part, I shall revert to one element of the new structure, which until now has attracted little attention and which formalises a 'French system of constitutional

constitutional justice, which take effect with the entry into force of the organic law, which concretises the constitutional setting. Concerning the reform as a whole, *see*, e.g., *Revue Française de Droit Constitutionnel*, 'Après le Comité Balladur – Réviser la Consitution en 2008?', Numéro hors-série 2008; *Petites Affiches*, 'Une nouvelle Constitution? Commentaire article par article du texte de la loi du 23 juillet 2008 de modernisation des institutions de la Ve République', 19 Dec. 2008 ; *Revue Française de Droit Constitutionnel 82 (2010)*, 'Une nouvelle Vème République', in particular: Xavier Philippe, 'La question prioritaire de constitutionnalité…Réflexions après l'adoption de la loi organique', p. 273-287.

[14] In the French legal system organic laws are statutes adopted according to a special procedure framed by Art. 46 of the Constitution. At least fifteen days have to pass between the introduction of the bill and its debating and voting; moreover, if, after the usual vote by the two chambers, the National Assembly is given the final say; it can only accept the bill with an absolute majority of its members. They cannot be promulgated until the Constitutional Council has declared they are in conformity with the Constitution.

[15] Constitutional Council, decision n° 2009 – 595 DC. The whole documentary file is accessible under: <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-595-dc/decision-n-2009-595-dc-du-03-decembre-2009.46691.html>. The organic law ('Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution') and the decision are published in the Official Gazette on 11 Dec. 2009, accessible under: <joe_20091211_0287_p000898125049837927713>.

common law', or so I shall contend. I shall conclude with some general remarks on the possible consequences of the reform.

Comparative settings: Parties in concrete review

Concrete review is the examination of the constitutionality of primary legislative provisions in a concrete case by an organ with judicial status. The distinctive features of this kind of procedure are therefore: 1) litigation in a court concerning a given legal question, 2) primary legislation relevant to the case, in respect to which the court has doubts concerning its conformity with the formal constitution, 3) a judicial decision stating, possibly among other things, whether the possibly unconstitutional provision ought to be applied or not. This general structure leaves room for many varieties. The issue is always decided by a court, but this may be the same court as the one which has to settle the case at hand, or another one specially entrusted with the constitutional question. The unconstitutional provision may be declared inapplicable in the concrete case or annulled and thus eliminated from the legal system.

The constitutional question itself may be raised by the court settling the original litigation (*judex a quo*), by the parties or by both of them. In most European systems however, the *judex a quo* itself raises the question *and* decides whether or not the issue should be referred to another, specialised – constitutional – court. The first court, and not the parties in the original litigation, then becomes a party in a separate procedure. In the new French procedure, however, the original parties are also the parties in the separate constitutional procedure. Nevertheless, it is the *judex a quo* who decides whether or not the so-called 'priority constitutional question' (*question prioritaire de constitutionnalité* or QPC)[16] has to be transmitted to the Constitutional Council. One can thus distinguish two traditional settings of concrete review, which may be termed *immediate concrete review* and *preliminary ruling: courts as parties*. To these may be added a new type of concrete review, which is in fact an *indirect constitutional complaint*, of which the new French procedure is a species.

Immediate concrete review

I call *immediate concrete review* the procedure in which (one of) the parties in the concrete case can, as such, request the review of relevant statutory and allegedly unconstitutional provisions. Mostly, but not necessarily, a check will be requested against fundamental rights. In this kind of review, the constitutional question is

[16] This terminology has been introduced in the Organic Act in order to show that constitutionality has to be decided prior to conventionality.

not separated from the litigation at stake, but has to be resolved in the course of the solution of the case and the settling of the question of constitutionality is a premise for other elements of the ruling. The constitutional question is not procedurally but legally prior to the questions on which the constitutional norm has an impact. Once the possibility of raising constitutional questions is open to the litigating parties and once the court has the power to exert constitutional review, there is no need for special procedures (although of course this is not theoretically excluded). In short, immediate concrete review is settling litigation while directly minding constitutional requirements. The problem with general immediate concrete review is not procedural and hence does not raise questions as to the status of the parties. As is well-known, the issues are different and they do not only concern concrete review, but more generally the legal status of a declaration of unconstitutionality and hence the legal destiny of the norm identified as unconstitutional. Although the judge finally sets the issue of the case at stake, he does not finally determine the legal destiny of the unconstitutional norm.[17]

As there is only one procedure, immediate concrete review raises no questions as to the status of the parties in the constitutional litigation. This is different in the other varieties of concrete review.

Objective concrete review: courts as parties

The distinctive feature of constitutional review in the European model of constitutional justice[18] is, or at least was initially, the fact that the legal destiny of an

[17] The structural problem of the indeterminacy of the legal destiny of the unconstitutional norm is particularly apparent in the US, although this does not seem to trouble American scholarship in any particular way. The link between the fate of unconstitutional provisions and immediate concrete review is not, however, an intrinsic element of the 'American' model: it also can be found in Belgium, which has centralised review, and a system with a general judicial review-competence could theoretically allow courts to definitely eliminate unconstitutional provisions. Cf. Otto Pfersmann, 'Modèles organocentriques et modèles normocentriques de la justice constitutionnelle en droit comparé', in *Mélanges Francis Delpérée* (Brussels, Bruylant 2007), p. 1131-1145.

[18] The concept of the 'European' or 'Austrian model of constitutional justice (or: review)' is usually defined by the following elements: a special court, placed outside the ordinary judiciary, with exclusive competence in matters related to the application of the formal Constitution and especially the power to annul unconstitutional statutory provisions *erga omnes*, whereas the American model would be characterised by the fact that all judicial organs have constitutional competence and that their decisions are valid only *inter partes* (a classic reference may be Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, Bobbs-Merrill Company 1971)). This classification is problematic as it mixes heterogeneous elements, which are, besides this, much too large and undetermined (cf. Pfersmann, *supra* n. 17). In the French debate, particular attention has been paid to showing that the Constitutional Council truly belonged to the European model. The discussion concerned not only the question of comparative classification, but of the desirable evolution of constitutional review in France. Louis Favoreu has certainly been the most influential writer in this

unconstitutional provision is definitively settled in a separate procedure.[19] In this case, the constitutional question cannot be integrated into one and the same ruling because the issue of the termination of validity requires a separate decision. Theoretically this competence could have been entrusted to ordinary courts, but the second element of distinctiveness of the European model consists in a distribution of competences between on the one hand ordinary courts and on the other hand one constitutional court with a special and exclusive constitutional jurisdiction. This raises the question of who will be a party in the separate constitutional procedure.

Concrete constitutional review is *subjective*, when the constitutional procedure is driven by a complainant who considers that his constitutional position, generally his fundamental rights, is violated; it is *objective* if the referral is not linked to the individual interest of a particular person.

In most systems, concrete review is objective. An ordinary court (*a quo*) identifies a possibly unconstitutional provision, which has an impact on the outcome of the concrete case. The whole constitution is a possible reference for review. The court then has the authorisation or possibly the duty to transmit, as a party, the question or the request to the constitutional court in a new and separate procedure. The ordinary court has to check the conditions of admissibility and to sustain the argument. The constitutional court will again check the admissibility and rule on the request filed by the first court as a party. In such cases, the original litigants are possibly granted rights as *secondary parties*. They may present briefs and may be present in the audience, if the constitutional court has public hearings.

debate (cf. 'Symposium In honour of the late Louis Favoreu: France's exceptionalism in constitutional review', *International Journal of Constitutional Law* 2007 5(1)), cf. e.g., his 'Rapport général introductif', *Revue internationale de droit comparé*. Vol. 33 (1981), p. 255-281 (for alternative accounts: Olivier Jouanjan, 'Modèles et représentations de la justice constitutionnelle en France : un bilan critique', *Jus Politicum*, n°2, 2009, p. 1-25; Dominique Rousseau, 'The Conseil Constitutionnel confronted with comparative law and the theory of constitutional justice (or Louis Favoreu's untenable paradoxes', *ICON*, 5 (2007), p. 28-43). Favoreu claimed that because French review was suited to the European model it should not be changed, i.e., it should not be opened to *concrete review* (*see* his contribution in 'L'exception d'inconstitutionnalité (Le projet de réforme de la saisine du Conseil constitutionnel', *Revue française de droit constitutionnel,* 1990, no. 4, p. 581-617 as well as his 'Sur l'introduction hypothétique du recours individuel devant le Conseil constitutionnel, *Cahiers du Conseil constitutionnel* no. 10 (2001), p. 163-169.

[19] The point is not only, contrary to a widespread opinion concerning the nature of the 'European model', that the 'declaration of unconstitutionality' be centralised, but that the unconstitutional provision be definitely removed from the legal system, both as a norm and as the text which expresses the norm. This constitutive element of the Austrian model has progressively been weakened through the techniques of 'interpretation in conformity with the constitution' (cf. *supra* n. 7) and through the modification of the nature of the judicial opinion becoming a normative statement (without constitutional empowerment; cf. the third part of this article).

In certain systems, objective concrete review leads to paradoxical features. For instance in Austria[20] the Constitutional Court may, as a *first court*, file '*ex officio*' a request to itself as Constitutional Court, if it considers that a statutory provision it has to apply in a case pending before it may possibly be unconstitutional (Article 140(1) Austrian Constitution). *Ex officio* here means that the Court first has to suspend the case at hand and to specify the doubts concerning the constitutionality of the statutory provision concerned. It then acts as a party to a new procedure in which the same Court, but now in another capacity, checks whether the 'decision to interrupt the original procedure' meets the requirements of admissibility. If so, the arguments of the Court as judge *a quo* will be examined and the constitutional question decided in substance by the Court as judge *ad quem*, as the Constitutional Court proper.

In certain cases, the litigating parties may ask the court to lodge a request with the constitutional court. This is the case in Italy and Spain,[21] where provisions can be checked against the whole Constitution. Nevertheless, although the capacity to raise the issue of constitutionality pertains both to the litigating parties and the court which has to settle the original case, only the latter can refer the constitutional question to the constitutional court. These countries therefore also have *objective constitutional review procedures*, although, as in Germany and Austria,[22] the litigating parties are provided with derivative rights as secondary parties.

Subjective concrete review: indirect constitutional complaints

The French procedure certainly is a variety of concrete constitutional review according to the European model. The original litigation is separated from the litigation before the Constitutional Council, which rules exclusively on the constitutionality of a contested provision. The procedure starts before an ordinary court (administrative, civil or penal), which under certain circumstances may *transmit* the question to the highest tribunals to which it pertains. The Council of State, i.e., the highest administrative court, or the Court of Cassation, i.e., the

[20] On the Austrian case, cf. Otto Pfersmann, 'Le contrôle concret des normes législatives en Autriche', in Xavier Philippe (ed.), *Le contrôle de constitutionnalité par voie préjudicielle* (Paris, PUAM 2009), p. 91-107.

[21] Italy: Art. 1 Constitutional Law no. 1 from 9 Feb. 1948; Spain: Art. 35 Organic law 2/1979 from 3 Oct.

[22] Germany, Art 82(3) of the Law on the Federal Constitutional Court: 'The Federal Constitutional Court grants the participants in the litigation before the tribunal, which has filed the referral, the opportunity to present their views, it invites them to the oral hearing and gives the council, present at the proceedings, the floor.' Austria, Art. 63(1) of the Federal law on the Constitutional Court: 'The President calls for the hearing. The Federal government as defendant of the challenged legislation and the applicant are invited. (…) If the referral is introduced by a tribunal (…), the parties to the litigation have also to be invited.'

highest civil and penal court, as the case may be, transmits the file to the Constitutional Council if admissibility conditions are fulfilled. Yet, although courts refer the question to the constitutional judge, this is not a case of objective review.

The French procedure differs in an essential way from comparable procedures in Spain and even Italy, where the Constitution explicitly gives the parties the right to raise the constitutional issue before the ordinary courts.[23] Whereas in Spain and Italy the competence to raise the question is *shared* by the ordinary courts and the parties to the original litigation, this right in France is the exclusive competence of the parties; yet only the courts are allowed (*and* even obliged) to *transmit* the question under specific circumstances. In short, the original parties are also the primary parties in the constitutional litigation, even though they are not themselves empowered to transmit the referral ('question'). *Raising* and *transmitting* here are entirely split competences.

Specific ideological reasons have led to this construction, which I propose to term 'indirect constitutional complaint'. In the French constitutional debate, objective concrete constitutional review has never been a real issue. Neither politics nor constitutional scholarship was interested in giving ordinary courts the initiative of raising constitutional questions before the Council. The ordinary courts are not considered as institutions striving at promoting constitutional justice. This is probably due to a contradictory perception of the 'judge', which in turn reflects a contradictory idea of the *Constitutional rule of law.*[24]

[23] Cf. *supra* n. 21.

[24] 'Rule of law' is used as a theoretical concept. It means a legal order characterised by the following elements: 1) a high degree of normative determinacy; 2) a clearly articulated 'calculus of defaults' (norms stating the legal consequences of deficiencies in other norms: annulment, modification or non-application); 3) review of normative concretisation, i.e., of valid norms lacking conformity (presenting some deficiency with respect to higher norms); 4) the exigency to justify applicative (or, more technically, concretising) norm-production (cf. Otto Pfersmann, 'Prolégomènes pour une théorie normativiste de «l'Etat de droit»', in: Olivier Jouanjan (ed.), *Figures de l'Etat de droit. Le* Rechtsstaat *dans l'histoire intellectuelle et constitutionnelle de l'Allemagne* (Presses Universitaires de Strasbourg 2001) p. 53-78). The *Constitutional rule of law* integrates the application of the formal constitution into the rule of law. The rule of law is an ideal which is impossible to realise, because a comprehensive review of normative concretisation must always end somewhere with a decision concerning conformity, whereas this decision itself may lack conformity. Besides this difficulty, few legal orders effectively adhere to the ideal and try to implement it. In the British and American as well as in the German tradition, the expression 'rule of law' or '*Rechtsstaat*' is rather linked with a legally empty conception of 'justice' and the importance of 'judges' in law-making (cf. Otto Pfersmann, 'Die normative Demokratie: Der Vorbehalt des Gesetzes und der Rechtsstaat', in Constance Grewe, Christoph Gusy (eds.), *Französisches Staatsdenken* (Baden-Baden, Nomos 2002) p. 129-145; Otto Pfersmann and Ginevra Cerrina Feroni, 'La "costituzione contingente": a proposito del dibattito sulla judicial review', in Alessandro Torre, Luigi Volpe (eds.), *La Costituzione britannica / The British Constitution* (Torino, Giappichelli 2005) p. 1271-1283)). In France, the relatively recent notion of 'Etat de droit' seems also mainly related to the weight of 'judges' in legal concretisation. The point is that neither the concept of 'judge', nor its function in the legal system is clearly identified in legal scholarship and, of course, political discourse.

On the one hand, courts are considered, along the lines of Montesquieu's all too famous dictum of the 'mouth of the law', to be transparent 'applicators' of the law, i.e., as weak and passive actors who can only abide by the law. On the other hand, they are seen as rebels who always try to overstep their ambit of competence and to intrude into the realm of politics.[25] So the public perception of the 'judge' is not one of confidence. Even the Constitution seems to have consecrated this mistrust in dubbing the judicial branch 'judicial authority' and not, as the argument goes, 'judicial power'.[26] This, of course, is only a terminological issue, as the French judiciary has legal powers, i.e., *competences*. It might nonetheless give a hint as to why certain competences given to courts in other systems of constitutional review are not attributed to the French ordinary courts.

The second ideological element in the French debate is the ambiguous attraction of a model in which citizens directly apply to a 'Supreme Court' on rights issues.[27] The proposed reforms in 1989 and in 1993, which were not fundamentally different from the present reform, were discussed in terms of the introduction of an 'exception of unconstitutionality' and 'direct access' to the Council.[28]

[25] This fear is best expressed by the concept of 'judicial government' popularised in France by Edouard Lambert in his book *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, Marcel Giard 1921; reprint Paris, Dalloz 2004). On this topic, cf. Otto Pfersmann, 'Le concept de "gouvernement des juges"', in Séverine Brondel, Nobert Foulquier, Luc Heuchling (eds.), *Gouvernement des juges et démocratie. (*Paris, Publications de la Sorbonne Paris 2001) p. 37-52 ; *idem*, 'Remarques sur le concept de "pouvoir judiciaire"', in Olivier Cayla, Marie-France Renoux-Zagamé (eds.), *L'office du juge: part de souveraineté ou puissance nulle?* (Paris, LGDJ 2002) p. 181-193.

[26] 'Title VIII The judiciary authority' (Arts. 64 to 66-1).

[27] Cf. on this point Louis Favoreu, 'Rapport général introductif', *Revue internationale de droit comparé,* Vol. 33 (1981) p. 255-281.

[28] Cf. special issue on the 'exception d'inconstitutionnalité', *Revue française de droit constitutionnel,* 1990, no. 4. The term 'exception of unconstitutionality' refers to a *procedural* structure, in which litigating parties require that a legislative provision not be applied by the court settling the litigation because of unconstitutionality. Neither of the French reform projects, nor the present reform are introducing such a setting, which characterises *immediate concrete review*. None of the European systems (varieties of the Austrian system), with the exception of Portugal, integrates an exception of unconstitutionality. The use of this terminology in French scholarship shows the confusion between the varieties of concrete review in the European model (where judges ask the constitutional court for a – preliminary – ruling on the constitutionality of the applicable legislation) and a certain conception of the American model, in which the jurisdiction of litigation (there is no other one) decides on constitutionality among all other legal questions raised by the case. This confusion may have been the reason why the French system of concrete review attributes the initiative and quality of primary party in the constitutional procedure to the parties who raise the question of constitutionality. I have once called this structure 'preliminary ruling on exception of unconstitutionality' in order to underscore this combination of two different conceptions (Otto Pfersmann, 'Le renvoi préjudiciel sur exception d'inconstitutionnalité – la nouvelle procédure de contrôle concret a posteriori selon les articles 61-1 et 62 de la Constitution', in *Les petites affiches* 2008, No. 254, p. 103-110). I have to admit that outside this particular context, the expression remains confusing. The French construction is *not* an exception of unconstitutionality, but, as I try to show, an indirect complaint.

This discourse was in plain contradiction to the very facts of the matter, as there has never ever been any concrete initiative to establish a Supreme Court along American lines or to introduce anything resembling a German *Verfassungsbeschwerde*, a Spanish *amparo* or an Austrian *Individualantrag*, let alone a Hungarian *actio popularis*.[29] This way of presenting the proposed reforms is probably due to the wish to give individuals something of an access to the Council, while leaving it to the ordinary courts to decide whether access should actually be granted. Even now, one can read that individuals have access to the Council.[30]

Direct constitutional complaints are requests lodged by individuals with the Constitutional court, which examines them as to the admissibility and possibly as to the substance. These complaints can have different objects and follow different procedures. The fact that they are lodged by individuals should not be confused with their legal target.[31] Whereas complaints like the Austrian *Beschwerde* or the Spanish *amparo* challenge individual administrative acts (in Austria) or also (in Spain) judicial decisions with respect to constitutionally granted rights, the German *Verfassungsbeschwerde*,[32] the Belgian *recours direct* and the Austrian *Individualantrag* may target primary legislation. When primary legislation is targeted, the admissibility conditions are usually more restrictive. Moreover, decisions quashing statutory provisions are rare.

[29] In Hungary, every person can challenge a statutory provision without any link to concrete litigation or personal concern (*actio popularis*) (Art. 32a(1) Hungarian Constitution). It bears thus an aspect of abstract review, but it gives the individual an access to the Constitutional Court, who will obviously indulge into a severe check of the requirements for admitting such a request for a deliberation on the merit. Cf. e.g., Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Berlin, Springer 2005); *idem*, 'Twenty Years After the Transition: Constitutional Review in Central and Eastern Europe', Legal Studies Research Paper No. 09/69 July 2009, Sidney School of Law, accessible under: <http://ssrn.com/abstract=1437843>; Laszlo Solyom, 'The Role of Constitutional Courts in the Transition to Democracy', *International Sociology* 18 (2003), p. 133-161.

[30] To give only one recent example: Gérard Longuet and Huges Portelli say in *Le Monde* from 9 Feb. 2010: 'Cette procédure, qui permettra à tout justiciable de contester la constitutionnalité d'une loi dont il estime qu'elle porte atteinte à ses droits fondamentaux…'. While not formally false, it induces the idea, that it is indeed every litigant who could bring his or her case to the constitutional judge.

[31] Cf. on this issue the studies edited by Otto Pfersmann on 'L'accès des personnes à la justice constitutionnelle: droit, pratique, politique', *Cahiers du Conseil Constitutionnel* 10 (2001), with an introductory essay 'Le recours direct entre protection juridique et constitutionnalité objective: expériences et perspectives', p. 110-120.

[32] The German *Verfassungsbeschwerde* (Art. 93, par. 4b, German Basic Law) may concern any violation of a fundamental right by 'public authority' (*Öffentliche Gewalt)*. This relief is generally used against judicial decisions, but it may also concern legislative acts if no other way is conceivable in order to challenge a normative act impacting directly on the legal situation of a person. The case and procedure concerning the direct challenge of a legislative provision is determined in Art. 93(3) of the Law on the Federal Constitutional Court.

Direct constitutional complaints directly targeting legislative provisions are abstract in the sense that admissibility conditions require that statutory provisions *as such,* i.e., without their application in a specific case, have an impact on the legal situation of the complainant and violate her or his constitutional rights. Whereas the Austrian *Beschwerde* presupposes the setting of an individual legal act, the Austrian *Individualantrag* presupposes the *absence* of any prior concrete case. The French procedure introduces by no means a *direct* complaint, neither against individual acts, nor against general and abstract norms: it requires that a possibly unconstitutional law is applicable substantively or procedurally to the case (*see infra*). But neither does it leave the task of raising a constitutional issue to the ordinary courts. This remains the exclusive competence of the parties in the case. Moreover, only provisions which violate fundamental rights and liberties may be challenged.

The set of categories of concrete review has thus to be enlarged with the category of *indirect constitutional complaints*. A procedure falls in this new category if, first, parties can challenge statutory provisions violating their fundamental rights in the context of a concrete case and, second, the request (in the French terminology the 'question') is not lodged by one of the parties, but *transmitted* by the ordinary court to the constitutional judge after a check of the fulfilment of the relevant conditions. It combines elements of (traditional) concrete review – the courts lodge the question (even though it is not their own) – with elements of constitutional complaint procedures – the person to which a statutory norm applies purportedly violating a constitutional right, challenges it, although not directly, before the constitutional judge. Procedures are separated, but the review is *subjective* and thus limited. And the question as to *who* is considered a party in the original litigation will also shape the profile of subjective concrete review in the new French setting.

Advocative subjective concrete review

One can consider still another hypothesis. The right to raise an issue of unconstitutionality can be granted to an organ, which is neither an ordinary judge, nor one of the parties in the original litigation directly affected by a violation of fundamental rights. The task of this organ is to act *on behalf* of the directly affected person. This competence can be exclusive or shared. In Spain, the *Defensor del pueblo* and the *Ministerio fiscal* (Article 124 Spanish Constitution) may play this role in the *amparo* referral (Article 162(2)).

In France, the advocative function exists already in abstract review, insofar as the authorities entitled to refer acts may – and often do – raise fundamental rights issues. The new concrete review procedure also holds an advocative element, as the Public Ministry is entitled to raise a constitutional question if it is a party to the original litigation. Since it, as an organ pursuing the abstract interests of the state,

has obviously no subjective rights, its function as complainant in matters of fundamental rights is advocative. This may cause a problem as it may simultaneously act in order to restrict fundamental rights in the course of a criminal procedure. We will come back to this.

The French reform: Preliminary ruling on individual request after judicial examination

The French version of indirect constitutional complaint articulates three steps: a) the *question* raised by a litigating party; b) the single or, as the case may be, double *transmission* decision by an ordinary court; c) the *ruling* by the Constitutional Council on the constitutionality issue. In doing so, the French Constitution introduces a new second-order fundamental right and a distinctive two-step check by the competent ordinary courts. It moreover grants large competences to the Constitutional Council once it is in charge of the constitutional question.

A weak second-order fundamental right: limited domain and extended participation

First-order fundamental rights are structures which encompass the following four elements: a constitutionally granted permission to act, the qualification as defective of norms of lower rank in contradiction with such an exigency, a judicially organised organ competent to quash such defective structures, and at least one organ competent to raise the issue before this court.[33] This concept of fundamental rights is minimalist and concentrates on the fact that certain rights are fundamental not in the sense that they are subjectively important, but because they are granted by the most fundamental legal structure within a given system, i.e., the formal constitution. This concept also implies that rights have no legal relevance if they cannot be legal reasons for quashing legislation that violates them.

However, the concept leaves open the issue of who is concretely entitled to raise such a violation before a (constitutional) court. It might be the person whose right is violated, but it also might be someone else. Indeed, the competence to raise the issue of a fundamental right's violation has to be distinguished from the right itself. This is a conceptual and not terminological issue: if one wants, one can use other terms. There is, however, a need to distinguish these issues, even though the German and the Austrian system, for instance, terminologically and functionally equate constitutional rights with the rights that may be invoked in the various forms of constitutional complaints. But even the German system with its

[33] For a further elaboration of this comparative concept of 'fundamental right', cf. Otto Pfersmann in Louis Favoreu (ed.), *Droit des libertés fundamentales* (Paris, Dalloz 2009, 5th edn.), chap. 'Esquisse d'une théorie générale des droits fondamentaux'.

strong conception of rights has not always had this particular property, as the constitutional complaint was introduced into the *Grundgesetz* only in 1969, twenty years after the same *Grundgesetz* entered into force with a list of 'fundamental rights', which then lacked this specific kind of protection. Italy and France, for different reasons, both have a set of constitutionally granted rights, but their beneficiaries were not entitled to address the constitutional court and in Italy this probably will not change in the near future.

A fundamental right allowing for a challenge to the violation of a first-order fundamental right is a *second-order fundamental right*. For quite different reasons, France and Italy had fundamental rights without second-order fundamental rights: the organs entitled to refer a constitutional question to the constitutional judge were 'political authorities' in France and the ordinary courts in Italy. In Italy, however, as said before, the litigants already had a weak second-order right: they could and can raise constitutional issues, even those not related to their constitutional rights, before an ordinary court, but not bring the case to the constitutional court themselves.[34]

The French reform establishes a slightly stronger, but still weak second-order fundamental right. On the one hand, the parties and only the parties to concrete litigation can raise a constitutional issue. On the other hand, the domain of review is by necessity *limited*: the parties can only challenge provisions in contradiction with first-order fundamental rights. This concerns therefore not a variety of objective concrete reviews, but a subjective fundamental rights claim premised on its relevance in concrete litigation. The initiative of a litigant is the necessary condition of constitutional review *a posteriori* in the French system, although it is not the sufficient condition. In this sense, it remains a – relatively – weak right. But this weakness is also found in other fundamental rights systems, which are apparently stronger. The right to lodge a *Verfassungsbeschwerde* in Germany is by no means a right to have the question examined on the merits: the relevance of the case is checked by a commission of three judges who may refuse to take the case by unanimous vote *without justification*.[35] And 98-99% of the complaints are actually rejected every year. Under these premises, the new French procedure only gives the exclusive right to have one's case examined for an eventual transmission.

There is, however, an element, which exceeds this strict conception of a second-order fundamental right. As said before, in its capacity as a party, the 'Public Ministry' may also raise constitutional questions in cases in which it represents the state either as public prosecutor in criminal cases or the interests of the state in civil procedure (if it is not a party, it has to be informed in order to be able to

[34] Constitutional law of 1 Feb. 1948, Art. 1; Art. 23, law no. 87 of 11 March 1957.
[35] Art. 93d of the Law on the Federal constitutional court.

present its observations).[36] If the Public Ministry as a party, probably mainly in criminal procedures, raises constitutional questions regarding rights and liberties, these are not its own, as it as representative of the state has no fundamental rights and liberties. In criminal procedures, the Public Ministry therefore not only has the duty to assure the interests of the public order to have purported criminals convicted, but also the delicate and discretionary task to raise constitutional questions when *the rights of the prosecuted persons* are violated by applicable legislation. Viewed thus, there is convergence with the more traditional structures of concrete review, in which the courts exercise the mission of raising issues of constitutionality in the interest of the rule of law. This shows two ways of organising competing interests: the ordinary courts always have to remain impartial in the original case, but in classical, i.e., objective concrete review, they may be partial and become a *party* in constitutional litigation. In subjective concrete review, i.e., indirect complaints, courts are not parties to constitutional litigation; rather, they solely *judge* the conditions of transmissibility. The extension of the right to raise a constitutional question to the Public Ministry combines this latter structure with advocative subjective review.

This may be considered problematic: the same organ which is in charge of having someone deprived of the use of a fundamental right, acts in favour of the defence of fundamental rights, as it will be the party who has to make the case for the unconstitutionality of a legislative provision infringing the rights of the person it accuses. These opposite functions raise a question not of impartiality, but of coherently organised partiality.

Double selective transmission

Within all European varieties of concrete review, the French case is certainly the most restrictive. It seems to be the consequence of the construction of the procedure as an indirect constitutional complaint.

Depending on whether the question is raised for the first time on appeal, in cassation or otherwise directly before the highest court in its order, there will be one or two examinations as to whether the claim meets the following three conditions (Article 23-2 and 23-4 of the organic law): 1) the contested provision is applicable substantively or procedurally to the case or constitutes the foundation of a criminal inquiry; 2) the relevant provision has not yet been declared in conformity with the Constitution in the motives and in the operative part of a decision of the Constitutional Council; 3) the question is not deprived of seriousness.

If the constitutional complaint is raised before a lower ordinary court, it has to decide in the 'shortest period of time', that is, in fact, without any precise time

[36] Cf. Art. 421 of the Code of civil procedure.

limit, to transmit it to the Council of State or the Court of cassation, depending on the nature of the case. The supreme tribunal concerned then has three months to transmit the question to the Constitutional Council. It has to do so if the first two above-mentioned conditions are met and if 3) the question is new or is not deprived of seriousness. As indicated, an indirect constitutional complaint can also be raised for the first time before the supreme tribunals. In this case, they have three months to decide under the same conditions.

When compared with other systems of concrete review, the first condition is more generous. A norm may be applicable to the case or to the procedure without being, strictly speaking, conditional for the ruling on the case. This provision stems from a parliamentary amendment – the governmental project was more in line with the traditional conception of concrete review as 'prejudicial' for the ruling on the merit and this is often considered to exclude questions concerning the applicable procedure.

The second condition is, in my view at least, the most distinctive of the French conception. It aims at excluding *bis in idem*, i.e., a challenge to an already settled case (*res judicata*). For reasons to which we revert later, the determination of the ambit of settled cases is problematic. According to the organic law, a case is ruled when a provision has been considered in conformity with the Constitution in the operative part ('dispositif') *and* in the justification ('motifs') of a previous decision of the Council. The Constitutional Council, which had to examine the constitutionality of this provision, ruled without any argument that this prevented a challenge to a *res judicata* and was therefore in conformity with the Constitution. The organic law attributes hence a normative character to the *justification* of a constitutional decision.

There is a second interesting element in this condition. A question may be raised even though covered by *res judicata* when there is a 'change in circumstances'. This concerns, on the face of it, a change in the legal, i.e., constitutional environment. But according to some, it can also concern *factual* changes.[37] What these might be, is by no means clear and leaves ample room for discretion.

The third condition leaves extensive discretion to the transmitting court. What is considered to be 'serious' is obviously open to the most opposite appreciations. That something might be considered 'new or serious', as the condition reads for the highest tribunals, is even more indeterminate, as it includes an alternative that extends the domain of discretion. Practice, mainly by the highest tribunals, will

[37] Marc Guillaume, Secretary General of the Constitutional Council, holds this view in: 'La question prioritaire de constitutionnalité', to appear in: *Justice et cassation, revue annuelle des avocats au Conseil d'État et à la Cour de cassation, 2010* (accessible at <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/QPC/qpc_mguillaume_19fev2010.pdf>) p. 14.

show whether or not this discretion will be used as an obstacle against the transmission of otherwise relevant challenges to the Council.

A further aspect ought to be briefly mentioned. All regulations concerning concrete review have to settle the issue as to whether the court in the original case may proceed with the case or has to suspend it. The French setting is differentiated and complex. Normally, the courts have to suspend the action, but the organic law introduces three exceptions. First, if there are precise time-limits for (urgent) decisions, they have to be met. Second, if the person concerned by the procedure is deprived of his liberty, the issue of liberty can/has to be decided without awaiting the decision on the issue of constitutionality. Third, ordinary courts may decide on issues which, if left undecided, could cause irreparable damage. Hence, it is not out of the question that the original case is definitely settled *before* the constitutional question is itself definitely settled. In its decision on the organic law, the Constitutional Council introduced a reservation holding that in such a situation, the person concerned has the right to start a new procedure before the ordinary court in order to have the constitutional ruling taken into account. The Council thus *added* an alternative provision to the law.

Determinative decision

According to the new provisions of the Constitution, a legislative provision declared unconstitutional is 'abrogated':

> A provision declared unconstitutional on the basis of Article 61-1 shall be abrogated as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

The organic law does not add any new and more concrete elements to this general provision. It gives the Council ample discretion as to the time-effects of an annulment. There is not even an upper limit to the postponement of the moment in which an unconstitutional provision will have to loose legal effect. And it is again the Council that rules on the concrete consequences of the elimination of an unconstitutional provision. The finely tuned mechanisms developed in other countries, especially Austria,[38] have not in the least been taken into account. The provision simply leaves it up to the Council to rule on the concrete consequences of a declaration of unconstitutionality, for instance in order to give the legislature enough time to replace the quashed provision. This further enhances its role as a 'positive legislator'.

[38] Cf. *supra* n. 18.

The French constitutional common law

'The force of *res judicata* is attached not only to the operative part ("dispositif"), but also to the reasons which constitute its necessary foundation' one can read in a major decision by the Constitutional Council.[39] Similar views, perhaps less explicitly stated, are found in the decisions of many other courts and the writings of scholars. The organic law concretising Article 61-1 of the Constitution now explicitly states in its Article 23-2:

> The tribunal states without delay with a reasoned decision on the transmission of the priority question of constitutionality to the Council of State or the Court of cassation. The transmission is operated if the following conditions are met: (…) 2nd The question has not yet been declared in conformity with the Constitution *in the motives and the operative part*, except a change of circumstances, by the Constitutional Council (…). (emphasis added).

As said before, the Constitutional Council in its decision of 3 December 2009, without any reasoning, considered that this provision meant to prevent a new exam of a question already decided by the Council, except in the case of a 'change of circumstances', and was thus 'not contrary to the Constitution' (15th consideration).

To this time, in France the setting on a par of motives and operative part was just a jurisprudential fact and a scholarly opinion.[40] The organic law gives it not only a general normative foundation, but also makes a declaration of conformity in the motives an obstacle for the transmission of a constitutional question. The Council could have considered that this was unconstitutional. It did not. The extension of the normative quality to legal arguments is now part of positive organic legislation.

This raises highly perplexing issues. It confuses two things, which are distinct by their very nature. It therefore promotes one thing (normativity) to the detriment of the other (explanation). This technically transforms (or boosts the transformation of) the French legal system into a specific form of *common* law, which weakens the rule of law while purporting to enhance it.

Norm and reason

The identity statement is often taken as doctrinal evidence: the decision and its main reasons are *one*. But are they? Most developed legal systems know some

[39] French Constitutional Council Decision n° 62-18 L, 16 Jan. 1962.

[40] Cf. Otto Pfersmann, 'Relativité de l'autonomie ontologique, confirmation de l'autonomie disciplinaire institutionnelle, paradoxe de l'hétéronomie épistémologique', in Bertrand Mathieu (ed.), *1958-2008. Cinquantième anniversaire de la Constitution française* (Paris, Dalloz 2008) p. 527-544.

form of constitutional review and require decisions to be reasoned. Constitutional review is a powerful tool for restructuring the legal system according to normative standards set forth at the highest level of lawmaking. The reasoning of decisions delivered in such matters has thus a particular importance as it provides, if not a cogent justification for a particular ruling, at least the reasons purportedly showing the path from constitutional requirements to specific outcomes. However, the relationship between decisions and reasons for decisions is far from evident. And the issue may even become important in the evolution of contemporary legal systems. Merging rulings and reasons may entail a major increase in the indeterminacy of legal orders and correspondingly reduce the normativity of the Constitution, as I shall try to show.

Rulings of constitutional jurisdictions are usually justified, although there may be cases where they settle a case without providing any reasons. This happens, for instance, when the German Federal Constitutional Court refuses to hear an individual complaint, either because the necessary admissibility conditions are not met or because the constitutional problem is not considered to be sufficiently relevant. In such cases, three judges of the Court may decide unanimously without giving any reason to the claimant. But unreasoned decisions are not allowed when primary legislation is annulled. All systems of constitutional justice require that such decisions be 'reasoned' or 'justified' or 'motivated'.

The obligation to justify a decision is not simply a 'practice' that courts may or may not follow; it is a legal and often differentiated obligation.[41] Of course, the relevant rules may present a certain degree of indeterminacy. When a statute simply says that decisions have to be 'justified', this does not say much about how a court ought to proceed when doing so. Leaving aside the difficult question as to whether there are normative standards concerning the level of elaboration of a 'proof', the form of a justification may be entirely left in the dark. Would it, for instance, be considered legally admissible for a French court to write in a continuous set of sentences, instead of a single sentence broken into highly complex subsentences, linked by a present participle ('considering that…', 'considering, on the other hand, that…', …), explicitly quoting legal scholarship or other judicial sources? To give another example: would it be admissible for the Austrian constitutional court to switch to a French or an American mode of 'justification'? The specific style may simply be a habit or practice. However, what remains is the common and basic requirement to say why one came from certain premises to certain consequences.

[41] Examples: Austria: para. 26 Law on the Constitutional Court; France: Art. 20 of the organic Ordinance on the Constitutional Council; Germany: para. 30, 57, 59 of the Law on the German Federal Constitutional Court; Italy, Art. 11 and 18 of the Law on the Constitutional Court.

Problems appear when one looks at the articulation of normative content and justificatory discourse. There are strong theoretical reasons for their strict distinction and many possibilities of arranging their unnoticed confusion. The reasons for distinguishing decisions from their justifications are conceptual, logical and legal.

– A judicial decision has by necessity a *normative element (operative part)*. This is a conceptual statement. Something which would be called 'decision' or 'הטלחה' or 'Urteil' without having any normative content would not be considered a 'decision', at least in this context and as a matter of convention, even though it may be pronounced in the most prestigious manner by something called 'Court of Justice'. A decision settles a normative issue where generally, different competing options are at stake. A decision may be broken down into several different steps, some of which may not have an immediately normative content, but which settle preliminary issues, on which the same or another court will be asked to build its decision. Only such judicial organs and only such legal acts are relevant here.

A normative element, however weak it may be, contains at least an authorisation, a prohibition or an obligation. This normative element exists in a certain legal order if it has been enacted according to conditions set forth in an already valid norm; otherwise it has no normative value in the system.[42] There are two main legal issues concerning a judicial decision: its relative *validity* (or relative normativity) and its *conformity*.[43] A legal act, which respects the necessary and sufficient conditions for its production is relatively *valid*, i.e., it is valid *in* the system under consideration. A valid norm then may or may not be in *conformity* with other legal standards, made substantially binding on the said norm. As the legal system organises the validity of prescriptive acts as *legal*, it organises the consequences of an eventual lack of conformity.

A norm stating that some action ought to be performed (or is authorised or prohibited) is neither true nor false. It does not say anything about how things are in the real world and cannot be tested against any reality. Of course, a statement that certain norms exist in a certain legal system may be true or false, but this is a different matter. It is indeed a fundamental question of the most basic legal scholarship whether a norm exists or not and how to establish the proof of its existence, i.e., its (in-)validity. But a (true or false) argument concerning validity has to be distinguished from its object, i.e., a norm, which is neither true nor false.

[42] Validity is a recursive property. For a more elaborated presentation cf. Otto Pfersmann, 'La production des normes: production normative et hiérarchie des normes', to appear in Michel Troper, Dominique Chagnollaud (eds.), *Traité international de droit constitutionnel* (Paris, Dalloz 2010).

[43] On this distinction, cf. Pfersmann, 'La production des normes', *supra* n. 42.

– A *justification* is the set of arguments, which tends to show that one certain outcome has a basis in existing law. As said before, most courts, especially in constitutional matters, have to reason or justify their decisions. This is a normative requirement and as such it may or may not be complied with in fact. The justification may be deficient or prove something else than what appears in the normative substance of the decision. It may correctly motivate a decision in a case where the normative part itself bears no relation with the argument developed in the reasoning. As a matter of fact, a justification may present different degrees of (in)accuracy: concerning the legal sources, the facts of the case, and the argument of choice.

– The meaning of the relevant legal sources may or may not be correctly identified. This is the main topic of a theory of legal interpretation.[44] Whether the law is written or unwritten, it has a meaning and the justification first has to identify this meaning. By 'meaning' is of course not meant that a prescriptive proposition means that one and only action ought to be taken.

The question as to what possible outcomes fall under one set of prescriptive signs expressing legal norms is an open question. Certain traditional doctrines as well as their recent restatements consider law to be result-determined and the task of the judge as consisting in 'constructing' the relevant text in order to establish the right answer.[45] This position confuses different issues and concerning the issue of meaning it is patently false.

It is false because the degree of indeterminacy and vagueness of norm formulations in natural language is an open question, i.e., it is a matter of scientific semantic investigation. In certain cases, the formulation may be so precise that the meaning allows for only one correct application. But in general, norm formulations are designed so as to allow for a more or less wide range of indeterminacy and vagueness. In such a situation, there is still one meaning of a norm formulation, but it consists of a whole range of elements. Interpretation as analysis of meaning cannot do more than provide for the entire range of meanings and it can neither exclude nor consecrate one specific element of the meaning-range under the title of 'interpretation'. Choosing another terminology does not change this. It is indifferent as to whether one says that interpretation establishes a set of meanings or that the meaning of a set of prescriptive sentences encompasses a whole range of elements due to vagueness and indeterminacy.

[44] Cf. Otto Pfersmann, 'Le sophisme onomastique. A propos de l'interprétation de la constitution', in Ferdinand Melun Soucramamien (ed.), *L'interprétation constitutionnelle* (Collection Thèmes et commentaires; Paris, Dalloz 2005) p. 33-60.

[45] This is of course the position held for some time by Ronald Dworkin in several writings: *Taking rights seriously* (Cambridge, Harvard University Press 1977); *A Matter of Principle* (Cambridge, Harvard University Press 1985); *Law's Empire* (Cambridge, Harvard University Press 1986).

Contrary to normal adjudication, constitutional adjudication is concerned with the question of the conformity of statutory norms, i.e., provisions of primary legislation, with constitutional norms. This leaves in principle much less space for the establishment of relevant facts, as the relevant facts in such matters are precisely the norms at stake and the normative relation between them.

– Interpretation is true or false. True if the range of meaning is correctly established, false otherwise. This raises the most difficult and disputed epistemological issues, as the question of what makes an account of meaning correct is one of the most disputed philosophical problems. I can however leave that question aside here, as long as I do not have to run against the contention that establishing the meaning is totally impossible. If it were so, there would be no point in enacting laws or judicial rulings, nor even in using language for anything for which a relative degree of precision is required. Even fundamentally antagonistic views on interpretation share the idea that at least some access to the meaning of the prescriptive sentences used to formulate constitutional or legislative (or other) norms is possible, even though the degree of accuracy may be much lower than in other domains of knowledge. With this proviso, interpretation is indeed true or false, i.e., it reaches or it fails to reach the correct range of meanings.

One can at this point distinguish the truth or falseness of the premises from the truth or falseness of the conclusions. Interpretation is, like any other form of investigation, a set of propositions linked through logical operations. If the assumptions are false, the consequences will be false, even though the logical operations have been correctly applied. And it may be that the premises are false and that yet the reasoning reaches a correct conclusion through an error in the logical calculus. We may arrive at true conclusions, though not at true justified knowledge.[46]

– Once meaning is established, a justification provides reasons for the *choice* of a certain outcome. This is again an element of the legal obligation of the court to provide the reasons for issuing one certain ruling with normative impact. This latter element of the decision clearly has a different status than interpretation. It presupposes interpretation and has to keep within the borders established by it. Once interpretation has defined the range of semantic indeterminacy and vagueness of legal prescriptions, or in other words, the array of discretion, the court has to state how it uses this discretion to settle the case, i.e., it has to make a choice

[46] Sometimes, even true justified knowledge may of course be only partly justified, as in the famous Gettier-paradoxes (cf. Edmund Gettier, 'Is Justified True Belief Knowledge?', *Analysis* 23 (1963), p. 121-123). The point is that only a more elaborated theory of justification may be able to resolve the problems arising from problems with prima-facie correct justifications.

among possible outcomes and it has to provide arguments justifying this choice. An argument aimed at justifying an outcome which falls outside the range established by interpretation is false, as it states that something is authorised by law, of which it was formerly shown that this outcome is excluded from the allowed outcomes.[47] All other outcomes are in this large sense technically 'true', even though they are exclusive of each other. Of course, the quality of the reasoning may be highly different from case to case and the result may be more or less convincing. But this is legally indifferent.

An interesting property of choice-reasoning is that it allows – and thus requires – the courts to introduce premises which are not related to legal obligations. Insofar as they by hypothesis are not bound to choose one particular outcome among the admissible outcomes, but are obliged indeed to choose one of them, the reasons for the choice cannot themselves be a legal standard (otherwise there would be no choice, at least in this respect, contrary to the hypothesis). Traditional doctrines find this difficult to accept. They deem that the courts have a legal duty to produce the 'just' result.

– There is no logical link between true interpretation and correct choice, i.e., the justification, and the decision. It may be, as a matter of legal requirement, that a decision is valid only if the justification is 'correct', that is, if the meaning is correctly established and the steps towards the choice of the outcome are argued without overstepping discretion or deficiencies in reasoning. But even so, there is no logical link between the justification and the normative part of the decision. The link is legal: the law simply conditions the validity of the norm 'decision' on the presence of certain justifying elements in the act.[48]

This does not depend on the way in which decisions are presented. A judgment may contain a part entitled 'sources', another entitled 'facts', and a third one entitled 'held', but the content of these parts may not have any relation to what the title announces. The relevant question is therefore whether and which part of a judgment contains a normative issue and which part, if any, the justification. If both these elements exist, however named, then no logical link exists between

[47] 'Purposive interpretation' tries to claim the contrary. This approach is not convincing. If it appears that the relevant norms allow for deciding in another way than is prima-facie established. The case is trivial (though it may it may obviously be highly complex in detail), as it just shows that *secunda facie* the meaning is broader than it first appeared. But if the premise is that a judge under no circumstances is allowed to make his ideas of what the law ought to be prevail on the legally determined set of possible outcomes, the claim that it is nonetheless legally possible or even desirable that he decides what the law in his eyes ought to be, is simply false.

[48] It would be highly difficult to manage this rule. The technique of law consists normally precisely in leaving difficult epistemological questions outside the ambit of validity, for which only blunt formal conditions are required, whereas the more thin questions are left over for the appreciation of conformity.

them. The normative part is valid because it complies with the normative conditions presiding its production; the explicative or justificatory part is legally correct because it respects the substantive requirements guiding its content. And this is the case because the interpretation of the relevant applicable norms is true and the choice left over to the deciding body is exercised within the determined boundaries.

– As a legally normative statement, a decision depends in terms of validity on other norms already valid within the system under consideration. It is an element of a dynamic system, i.e., a system, in which nothing is valid when it is not enacted according to an already existing norm of norm production. However, validity in terms of reasoning is another matter. A justification is valid in terms of reasoning, if it either truly expresses the meaning of a normative statement or develops the consequences of it according to rules of formal reasoning, or if it introduces propositions concerning choices within the ambit of legally admissible choices and their logical consequences. In other words, the validity in terms of reasoning does not depend on rules of production. Reasoning is epistemologically and/or logically valid, whether it is explicitly formulated or not.

– *A judicial decision hence bears by necessity a normative part, which is not explicative, and possibly an explicative part, which is not normative.* If this simple and elementary distinction is correct, it follows that a judicial decision, which would not present some sort of distinction between a normative and an explanatory part would not be justified.

Indeed, if in a decision everything were normative, this would imply by necessity that nothing is explained in the sense that from a set of testable true premises certain conclusions logically – hence again in a testable manner – follow, nor in the sense that the reasons for legally undetermined choice would be revealed and their consequences developed. The opposite obviously holds as well, but is not relevant here. If there were only justifications for a certain normative outcome without a certain normative outcome, it would not be a judicial decision at all, however interesting and convincing the reasoning may appear in other respects. It would just be a piece of legal scholarship in the form of a judicial reasoning.

The paradoxical weakening of the rule of law

The problem, then, amounts to the following. If reasons are transformed into norms because they cannot be both reasons and norms, then constitutional decisions (where the same applies to other judicial decisions as well) will not be justified, in other words they will be arbitrary.

Instead of enhancing the Rule of Law, which requires that norm production, especially by courts, ought to be justified, it weakens justification, as reasoning are transformed into normative statements.

Second, it weakens the Rule of Law insofar as it introduces norm statements, which are not conceived of as norm statements. 'Motivations' are conceived of as explanations and justifications; they present themselves in the garments of argument. Instead, Article 23-2 of the organic act transforms those statements expressed and written as arguments into the formulation of secondary constitutional provisions, without, of course, explicitly formalising justifications as 'secondary constitutional acts'. This raises several difficulties. First, these provisions are difficult to read in themselves and require a high amount of interpretive reconstruction. Second, they introduce a high amount of indeterminacy. Third, they are by no means systematically organised. Instead of structuring norm production and the check of norm application, the Constitution becomes difficult to identify and difficult to understand. And this new, barely intelligible Constitution develops in an unorganised manner adjacent to the old Constitution, which continues, nonetheless, to claim it is the only Constitution.

The future of French (and other) constitutional justice

French constitutional justice has proven to be very strong compared to other European legal systems, as the Constitutional Council can rule on entire pieces of legislation, instead of only on particular provisions in a particular case. It is exactly the latter narrow conception, characteristic of *a posteriori* review, that the reform requires the Council to learn and to adapt. The parties and their councils will have to choose between international rights standards applicable directly by an ordinary judge and constitutional questions with far-reaching consequences.[49] The impact of the reform will be determined by the courts, and especially by the Court of Cassation and the Council of State: it is at their discretion whether the Constitutional Council will have to rule on important issues. It also depends on the Constitutional Council itself, as it decides on the (temporal) effects of annulments. This makes for a lot of variables. Only time and empirical observation will tell how the new procedure will work in practice.

Finally there is the structural transformation of the French constitutional system into a kind of a common law. The consecration of case-law as secondary constitutional law cannot but introduce more indeterminacy. This in turn will not only increase indeterminacy in further decisions, but also the difficulties to a scholarly presentation of the system.

[49] The constitutional question has 'priority' over the problem of conformity with 'regularly ratified and applied' international treaties, but only to the extent to which both issues been raised by the parties. Priority remains thus relative to the choice made by the parties and of course the good will of the highest jurisdictions to transmit the question to the Constitutional Council.