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THE NEWSLETTER OF CARLARA INTERNATIONAL

EDITORIAL

QUIS CUSTODIET IPSOS CUSTODES ?

Introduced into the French Constitution by the constitutional reform of July 23, 2008, the "Priority Preliminary Ruling on the Issue of Constitutionality" (usually referred to as "QPC" in French) is the name given by the law of Dec. 10, 2009 to the possibility for review of the constitutionality of existing legislation. The Constitutional Council, having received an application referred to it by the Conseil d'Etat or the Court of Cassation can now declare an existing statutory provision unconstitutional.

Coming into force on March 1st, 2010, in an atmosphere of general enthusiasm the implementation of the QPC has so far been an undeniable success. Rulings of considerable interest and affecting all branches of law on significant matters have been handed down in due time, leading to repeal or else confirmation of the law with or without reservations.

However one can only be concerned about the future balance between courts filtering QPC and the Constitutional Council. In dismissing claims of unconstitutionality that have been brought before them and in refusing to refer the matter to the Constitutional Council, judicial and administrative authorities indeed have the heavy responsibility of playing a role of "constitutional judge" They can do this in a negative fashion, by submitting to the Constitutional Council only referrals for review which are apparently appropriate. Similarly judges have almost total control concerning the individual rights and freedoms of individuals every time they interpret a law (or one of their own interpretations) when, for example they reject an internal national regulation by reference to a European Community rule. It is likely that the discrepancies and differences between the various levels of legal competence which are not ranked will be regulated, as Parliament had already been tempted to do so.

Despite the theory of Kelsen's normative pyramid, it is easily understood that there is still potential for conflict; a coherent system of law cannot have two masters: at the national level and at the level of the European Community. Because the question of priority is basic, the Priority Preliminary Ruling on the Issue of Constitutionality implies a constitutional "amputation, even if temporary, of national courts' powers compared to the law of the Union European". This problem was quickly brought up by the Court of Cassation before the Court of Justice of the European Union. The latter has diplomatically preferred not to arouse passions by treating with discretion any reservations in its contact with the Constitutional Council. Undoubtedly, the question of the primacy of Community law will inevitably resurface when, for example, QPC focus on mirror legislation which restates the provisions originally laid down in a European directive and transposed into French law. In such a case, only the Court of Justice has jurisdiction to rule over its possible invalidity: the question therefore before the European Court of Justice will have priority over any issue of constitutionality. It is likely that a solution will be found, such as the simultaneous dual priority for questions of constitutionality and of European Community law without trying to give primacy to one or the other.

The Constitution has now become a decisive factor in court proceedings and the ruling ot the Constitutional Council becomes a defining moment because the result of the litigation may depend upon it. Eventually, the judicial landscape will be modified because it is not the Constitution but the Constitutional judge who is at the centre of Priority Preliminary Rulings on the Issue of Constitutionality. However, not enjoying a position at the summit of the French legal system and not being able to censor the decisions of the Conseil d'Etat or the Court of Cassation, the interpretations pronounced by the wise men of the Rue de Montpensier are only considered as having a mere "authority". This situation will not be sustainable.

The issue of the legitimacy of the Constitutional Council and of its members will inevitably arise again. It is only when the Council becomes a "Court" that one might think that the "French exception" in the organisation of a system of law no longer exists. But in becoming a Court, the Constitutional Council will have to comply with the objective impartiality of section 6 of the Convention for the Protection of human rights and fundamental freedoms.

Who shall then guard the guards?

Jean-Hugues CARBONNIER
Partner

SUMMARY

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QPC, A REFORM? NO,YOUR MAJESTY, A REVOLUTION!

Much has been said about the reform concerning referral to the Constitutional Council of QPC for a Priority Preliminary Ruling on the Issue of Constitutionality, but there has been little comment on how it was a true revolution in our French ideology. More than two centuries after the Revolution our great country has finally discovered the true Rule of Law.

As a matter of fact, this revolution is twofold: it has finally introduced a true hierarchy between constitutional principles and statutory provisions laid down by lawmakers and it places great emphasis on jurisprudence.

Compared to most other Western democracies, France has distinguished itself since the Second World War by an extreme hesitation in setting up a genuine possibility of constitutional review.

After the introduction of the system of Council of the Republic, which was hardly serious, the Fifth Republic, at least at the beginning, did not do much better. In the reorganisation of 1958, the Constitutional Council was designed to help the executive power contain the risk of parliamentary excess but there was nothing on the agenda about creating a Supreme Court. Ever since, we have been subjected to endless commentaries on the judicial nature of this institution.

This hesitation originates in the foundations of the French republican ideal.

In the eternal debate between legality and legitimacy, France has long been found on the side of the legitimists. The will of the people as expressed through direct universal suffrage must prevail. Following this logic, the Constitution is not seen as the fundamental basis of law but as a simple rule of political organization. This probably explains our particular historical record: eleven different political regimes in two centuries whereas most of our European neighbors were satisfied over the same period of time to move from monarchy to republic.

Yet the idea of the supremacy of the Constitution as a fundamental text which shall be imperative over the political has been slowly gaining acceptance. First by way of case law with the judicial recognition by the Constitutional Council itself of general principles of law having constitutional value, and then by the 1974 revision which opened up the possibility of referral to the Council by the parliamentary opposition. This revision which greatly increased the number of referrals enabled the Council to develop in more than thirty years a genuine constitutional "corpus". This has gradually limited the room for manoeuvre of lawmakers.

However, the system remained unsatisfactory because only new laws that had been the subject of a referral were subject to compliance with this "corpus". The hierarchy between the Constitution and existing law was very relative since many laws remained in force which had never been exposed to any kind of scrutiny.

The QPC has finally introduced a true principle of hierarchy. Now, no law which is contrary to our constitutional principles can continue to apply merely because it has escaped referral to the Constitutional Council by the members of parliament. It is the duty of the court system as a whole to participate in this task. In ideological terms this means that the mere fact that a law has been passed by a democratically elected Parliament is not sufficient to give full force of law, it is also necessary that the law (expression of the will of the people) does not undermine the principles that govern our society.

But this reform goes further in that it introduces definitively into French law the weight of jurisprudence and this, in two forms: first in a negative way by validating provisions already discussed previously, but also in a positive way, by allowing the Council to go back on its position if this change can be justified by a new element that has come up since the original review of the law that was challenged.

This reorganisation thus establishes, beyond the Priority Preliminary Ruling on the Issue of Constitutionality of Section 62, the importance of jurisprudence in our Constitutional law. It is been already obvious in practice for thirty years, but it is not unreasonable, here as elsewhere, that the law corresponds to reality.

To sum up, this reform challenges all the fundamentals of French republican tradition: the law, as the written expression of the general will, is no longer sacrosanct and inviolable. It is permanently subject to a higher standard where the weight of jurisprudence is essential.

Rousseau is dead, long live Montesquieu!

Jérôme GRAND d'ESNON
Partner

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Composition of the Constitutional Council	Track record of QPC as of March 2011
Jean-Louis DEBRÉ, appointed by the President of the Republic 02/2007 Valéry GISCARD D'ESTAING, ex Jacques CHIRAC, ex Pierre STEINMETZ, appointed by the President of the Republic 02/2004 Jacqueline de GUILLENCHMIDT, appointed by the President of the Senate 02/2004 Renaud DENOIX de SAINT MARC, appointed by the President of the Senate 02/2007 Guy CANIVET, appointed by the President of the National Assembly 02/2007 Michel CHARASSE, appointed by the President of the Republic 02/2010 Hubert HAENEL, appointed by the President of the Senate 02/2010 Jacques BARROT, appointed by the President of the National Assembly 02/2010 Claire BAZY MALAURIE, appointed by the President of the National Assembly 02/2010 Secretary: Marc GUILLAUME	Approximately 2000 QPC filed on first instance and appeal 527 decisions rendered (up to 02/28/2011) of the Conseil d'Etat et the Court of Cassation of which: - 124 decisions (25%) of referral (59 of the Conseil d'Etat and 65 of the Court of Cassation) - 403 decisions (75%) of non-referral 83 decisions rendered by the Constitutional Council: 56% of compliance, 34% of non-compliance (14 of total, 7 of partial and 9 of qualified non-compliance) 10% of dismissed referrals Average time for judgment: 2 months.

THE JOY OF PRESENTING A QPC!

The filtering system by the various administrative and judicial bodies designated by law is fully justified. Otherwise the Constitutional Council would inevitably be overwhelmed by referrals. However, it does turn the process into a real minefield. Knowing, for example, when to file a referral during a criminal proceedings requires a consummate knowledge of criminal procedure and its intricacies. The Court of First Instance is not enough. Then you have to face the Court of Cassation or the Conseil d'Etat, which is always a difficult test. The contrast is particularly striking for the fortunate few who manage to reach the Holy Grail which is the review before the Constitutional Council. All of a sudden, everything becomes simple, easy and transparent.

For the happy few who are already acquainted with this prestigious institution it is no surprise. Even though it has had to go through a radical change in its way of functioning, the influx of new cases and new lawyers has not affected either the friendly reception or the effectiveness of the administrative staff. The mere fact of being greeted amiably on the day of the hearing and led to a small lounge where you have at your disposal, computer, fax and some refreshments may seem minor. Yet it is an example of "savoir vivre" increasingly rare.

However, what is really striking is the decidedly modern approach "to managing the process".

The Council had long since switched to modern means of communication and its website is an example of clarity and user-friendliness that we would like to find replicated on other public sites. For QPC, its innovative approach is reflected in the choice of paperless procedures.

All communication is by email. The clerk of the Council asks at the beginning for your email address and says any doubling with paper documents is completely unnecessary. When you send in your submission (in pdf), a simple email message confirms acknowledgement of receipt and when the Council sends you the briefs of the opposing party, you are, in turn, politely asked to acknowledge reception. All is simple, traceable without unnecessary paranoid need for identification of the supposed sender. And everything works perfectly! Question: Why can't we extend this simple and intelligent system to other judicial procedures? Doubtlessly because it is too simple and too clever.

Another important innovation: hearings are filmed and you are asked if you agree that your speech be posted on the Council's website. I, myself, have accepted and I acknowledge any personal vanity without a complex. Only the colleague who has refused one day the presence of a camera has the right to throw the first stone. Beyond the immediate prestige it gives you in your close family circle, (usually children initially amazed stop listening after the third sentence) the exercise has a real utility. In terms of transparency, it is hard to do better as any citizen can access the totality of discussions on topics that affect the fundamental principles of our Republic.

In addition, it provides a wealth of valuable information that could be used in the training of young colleagues considering the difficulty of the exercise. Each lawyer is only entitled to fifteen minutes to present his arguments. One has to be succinct but incisive. Our young lawyers would be well advised to go on line and see how some of their seniors often carry off this unique challenge. Open, transparent, efficient, the Constitutional Council has shown in its handling of QPC litigation what can be modern justice. Let us hope this example will be emulated.

Jérôme GRAND d'ESNON
Partner

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FLASH NEWS AND SEMINARS

• As part of the Partnership Forum France - Algeria, held in Algiers on May 30 and 31, 2011, Jérôme GRAND d'ESNON spoke on the theme of "Public-Private Partnerships" (PPP) in Algeria. Four other partners in our law firm, Edouard de LAMAZE, Jérôme GRAND d'ESNON, Fiorella VECCHIOLI de FOURNAS and Charles DELAVENNE also participated in this seminar.

• CARLARA INTERNATIONAL sponsored the **sixth "Spring of the ARFA"**(Association of Managers in Mergers and Acquisitions Sector), which was held on June 17, 2011 at the Pavillon d'Armenonville in Paris on the topic of "Mergers and Acquisitions in 2011: Motivation and Challenges for M & A during end of crisis period" This event brought together over 150 participants, officials of CAC 40 companies and specialists in mergers and acquisitions (advisors, auditors, investment funds, financial institutions). On this occasion, Me Philippe CROIZAT, partner, spoke on the topic "Accelerating Innovation" and, more specifically about innovation oriented investment funds. Edouard de LAMAZE, Isabelle DESJARDINS, Christophe LACHAUX and Charles DELAVENNE also attended this conference.

• Antoine FOURMENT taught the second half of the Master 2 class in **"Distribution Law" at Sciences Po** (Economic law - Law covering markets and regulation).

• Jérôme GRAND d'ESNON participated **on June 16, 2011 in the Symposium UGAP, public procurement,** in Rennes. He also acted as **head of the French delegation for the UNCITRAL work group concerning a model law on public procurement from June 27 to July 1 in Vienna, Austria.**

• On June 16 and 17, 2011, Bernard PREUILH and Corinne THIERACHE, respectively partners of Carbonnier Lamaze Rasle & Associés (Paris) and Preuilh Vidonne Croizat Huguenin (Lyon), both representing **CARLARA INTERNATIONAL**, attended the biannual meeting of the network **LEXICOM** organized in Bucharest. In addition to France, several countries were represented: Poland, Great Britain, Ireland, Switzerland, Germany, Austria, Italy, Greece, Cyprus, Netherlands, Sweden, Romania, Belgium.
On this occasion, all present were updated on the activities of the LEXICOM network. The opportunities of extending the network to other countries were discussed, particularly in Eastern Europe and on the American continent. Finally, participants agreed to welcome into the network a law firm based in Kiev (Ukraine) bringing the number of network members to 20. The next meeting will be held on November 3 and 4, 2011 in Nicosia (Cyprus).

• Fanny Desclozeaux led on April 4 and 5, 2011 a training session entitled **"The fundamentals of banking law"** within the agency EFE.

• On June 30, 2011, Alain BEL together with Jean-Louis BARROIS, notary, held a seminar on **"The reform of inheritance tax"** which took place in Lille in front of more than 120 participants.

• On June 23, 2011, our law firm welcomed the society **CYBERLEX (Law Society of New Technologies)**, which held its Annual General Meeting on our premises. After the meeting, Corinne THIERACHE was appointed Vice-President for a second two-year term.

• An article entitled **"TV connected: "Has the moment of convergence really come ?"** (co-written by Corinne THIERACHE, partner, and Carol Bui, associate of the New Technologies and Industrial Property Department of our law firm) was published in the May 2011 issue of Légipresse.

• On April 27, 2011, Edouard de LAMAZE attended a breakfast organized by MAZARS and L'HEMICYCLE, to discuss the theme **"PRIORITY QUESTION OF CONSTITUTIONALITY AND BUSINESS LAW: A YEAR AFTER? WHAT CONCLUSIONS?** Jean-Louis DEBRÉ, President of the Constitutional Council was guest of honor at this event.

• **On July 1, 2011**, the **annual meeting of CARLARA INTERNATIONAL** was held in Bois-Héroult. The meeting was led by Stephen BENSIMON, pedagogical manager at the Institute of Training of Mediation and Negotiation, Frédéric BONAVENTURA, founder of LEXposia agency, and Dominique JENSEN, consultant and author of "Organization and Strategy of a law firm", in the presence among others of CARLARA Lille and the Paris and Lyon teams of the law firm ALCIMUS which recently joined CARLARA INTERNATIONAL (see letter n°14).

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