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APPLICATIONS FOR PRIORITY PRELIMINARY RULINGS ON THE ISSUE OF THE CONSTITUTIONALITY OF PROMULGATED LAWS: IS FRENCH CONSTITUTIONAL LAW APPROACHING A COMMON-LAW CONCEPTION?

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Alors la matière sur laquelle on statue est générale comme la volonté qui statute. C'est cet acte que j'appelle une loi.[2]

Introduction

The preceding quote of Jean-Jacques Rousseau, implicitly, incorporates a considerable portion of the debate in France over the origins of law and the roles of the legislature and judiciary in a democratic State.[3] In the *Rousseauist* model of a democratic state, the law is supreme, an expression of the general will, of the people, which is the strongest authority, after God and natural laws, in a democratic State.[4] Perhaps due to historical coincidence, the revolutionary and post-revolutionary French Republic combined this *Rousseauist* model—and its concomitant idolization of the written, general law—with a historical disdain for judges and the judiciary following the Revolution in 1789, and thereby created a unique legal and political organization that has over time come to be seen as a possible alternative or competitor to the Anglo-American legal model and conception of democracy.[5]

Despite the various revolutions that occurred in France during the 19th century, two

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2 [Thus, the matter on which one legislates is general as is the will that legislates. It is this act that I call a Law.] Jean-Jacques Rousseau, Du contrat social ou Principes du droit politique 24, (Jean-Marie Tremblay ed. 2002) 1762, http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf.

3 *See id.* (noting that the general will is reflected in the laws, and for this reason, the law is supreme in a democratic State, a form of political organization that puts the people at the center of the notion of sovereignty and the State).

4 *See id.*

5 *See, e.g.,* Stefan Riesenfeld, *The French System of Administrative Justice: A Model for American Law?*, 18 B.U. L. Rev. 48, 56 (1938) (noting that when the Revolution occurred in 1789, revolutionaries relatively quickly passed new laws forbidding the judiciary from encroaching on executive power—the result of the old courts, or

unique features were present, and are still present to differing degrees, in the French organization of the State and its legal institutions: (1) the separation of administrative (or executive) law from private law and criminal law, and the consequential creation of courts of civil and criminal jurisdiction and courts of administrative jurisdiction; and (2) the attempted codification of the guiding principles of law into codes that the judiciary should apply, more or less bureaucratically, to the litigation at hand.[6] By 1790, a law had been passed by the revolutionary legislature forbidding judges from interfering with administrative functions.[7] This principle of separation of administrative law from private and criminal law persisted over the years as the highest administrative court, the *Conseil d'État*, evolved, and as a formal court, the *Tribunal des conflits*, was created to determine, in case of a dispute over a court's subject-matter jurisdiction, whether it should be heard before a civil or criminal court, or before an administrative one.[8]

By the 1870s, France had a highly delineated and technical body of civil and criminal law, and administrative law (well in advance of the Administrative Procedure Act's promulgation in 1946 in the United States).[9] Additionally, in 1804 the first *rationalized* code entered into legal force in France; it laid out the general principles of private, civil law, and did not merely restate years of case law and statutes, as previous historical attempts at codification usually involved—generally making such previous historical codes long and cumbersome.[10] The first code, and subsequent ones, were rational, organized by subject-matter and contained numbered *articles*, or sections.[11] By 1810, codes for criminal procedure,

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Parlements, under the pre-Revolution régime, or the *ancien régime*, undermining the King's efforts at reform).

[6] *See id.* ; *see also* JEAN-MARIE CARBASSE, MANUEL D'INTRODUCTION HISTORIQUE AU DROIT 276–277 (PUF 2e ed. corrigée 2003) (discussing the creation of the Civil Code in 1804 and how the idea of codification runs through the 'legalist' school of thought (a school advocating for rationalized law, rejecting the remains of feudal European law)).

[7] *See* Riensenfeld, *supra* note 5, at 58.

[8] *See generally id*. at 62–75.

[9] *Id.*

[10] *See* CARABASSE, *supra* note 6, at 293.

[11] *See generally id.* at 293–298.

for criminal law, for civil procedure, and for commercial law had all entered into legal force.[12] Interestingly, however, the French legislature has not adopted a code for administrative law, which in turn gives the State a certain flexibility in *judicially* developing and applying administrative law, an area of law which could consequently constrain the State's power.[13]

Thus, given the separation of subject-matter areas of law and the rationalization of the sources of law, in France a so-called *civil law* model has developed, in opposition to a common law, or Anglo-American, model.[14] In this French or civil law model, courts of general jurisdiction do not exist, as they do in most common law jurisdictions—such as in the State of New York, with the Supreme Courts (the trial courts in New York) constitutionally guaranteed general jurisdiction—and the sources of law and legal principles are generally laid out in concise, written, organized codes, as opposed to the common law model where legal rules and principles are most often developed over time through case law, through so-called judge-made law.[15] Moreover, in the French legal system, despite some of the actual and probably growing similarities between civil and common law systems, there is a strong disdain, or at least distrust, for 'judge-made law' and the general common law legal method where one relies primarily on case law, comparing and distinguishing cases as a first resort for legal authority in most instances.[16]

Nevertheless, France is a Western European democracy and despite the differences between the French legal system and the Anglo-American legal system, there are many similarities, including a present emphasis on fundamental rights and the rule of law.[17] However, how France and the United Kingdom and its legal progeny, the United States, arrived at the rule of law is quite divergent; whereas in the early 17th century, the United

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[12] *See id.* at 293–298.
[13] *See id.* at 299.
[14] *See id.* at 303–309.
[15] *See id.*; *see also* N.Y. CONST. art. VI, § 7.
[16] *See* CARABASSE, *supra* note 6, at 303–309.
[17] JOHN BELL, SOPHIE BOYRON, SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 9 (Oxford University Press

Kingdom had the strong beginnings of a legal tradition emphasizing the rule of law, and by the late 18th century the United States had enacted its last and current constitution, France throughout the 19th century suffered a series of revolutions and changes from democratic republics to monarchies and back, and further suffered a total of three catastrophic invasions, one in the late 19th century, and then two in the first half of the 20th century.[18] France, arguably, did not have stable legal institutions guaranteeing the consistent rule of law until after World War II when the Fifth Republic came into existence in 1958, and a novel legal institution appeared in France, the *Conseil constitutionnel*, perhaps contesting the prior theoretical underpinnings of law and the State, and disturbing the distinct, balanced powers and subject-matter domains of the *Cour de cassation* and the *Conseil d'État*.[19]

French constitutional law and the *Conseil constitutionnel* will be the focus of this article. More precisely, this article will delve into the new constitutional reforms in France that took place from 2008–2010, with the intent of allowing the reader to answer the question: is France abandoning, albeit somewhat slowly, its so-called Republican model where the law and the legislature are supreme, and are without substantial interference from judges and the courts?[20] Of note, following the constitutional reforms of 2008–2010, for the first time since the Revolution of 1789 a citizen involved in litigation can now attack a *promulgated* law on the grounds that the law is contrary to the Constitution of the Fifth Republic, and have the law annulled by the *Conseil constitutionnel*.[21] Before the constitutional reforms of 2008–2010, such collateral attacks on the constitutionality of a law were never possible; a law could only

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1998).

[18] *See* Riensenfeld, *supra* note 5, at 48, citing Hampden's case in 1636, the Court of the King's Bench announcing : "Many things which might not be done by the rule of law might be done by the rule of government."

[19] *See* BELL, *supra* note 17, at 147–148.

[20] Please note that any future apparitions of the word 'Republican' are not used in the American sense, i.e. the conservative political party; rather, in France, one speaks of the *modèle républicain* (the Republican model), in the sense of veneration for the French Republic and its historical particularities.

[21] For a decent English-language summary of the reforms in France, one can consult the relevant webpage of the *Conseil constitutionnel* at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-

be declared unconstitutional *before* its promulgation *and* upon an appropriate petition by lawmakers and/or the executive, within a defined time period.[22] Are the constitutional and institutional reforms of 2008–2010 a substantial abandonment of the *Rousseauist* democratic model of the State, the law, and the citizen?; or is the new power granted to the *Conseil constitutionnel* merely a highly circumscribed power of judicial review—with the historical high courts (the *Cour de cassation* and the *Conseil d'État*) filtering constitutional questions on the grounds of their relevancy to the litigation at hand—where the *Conseil constitutionnel* is only able to act on very narrow constitutional grounds that put little of the historical foundations of the so-called French legal model, with its emphasis on written or statutory law, the legislature, and strictly delineated subject-matter courts, into question? As an example of this topic, a recent decision of the *Conseil constitutionnel* will be discussed, the *Daniel W., et autres* case.

French Constitutional Law Pre-Reform

Before discussing the constitutional reforms of 2008–2010, it is necessary to give an introduction to French constitutional law. American students of law, legal professionals and academics may take for granted the general power of the U.S. Supreme Court, the highest court in the United States, to strike down laws that the justices deem contrary to the text of the constitution or constitutional case law.[23] In many civil law nations, this power to attack a law

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constitutionality.48002.html.

[22] *See generally id.*

[23] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the U.S. Supreme Court may, at least, strike down federal statutory law that runs against the text of the U.S. Constitution); *see also* McCulloch v. Maryland, 17 U.S. 316 (1819) (holding that the U.S. Supreme Court can invalidate state laws that impede the realization of a constitutionally granted federal power; in this case, the state of Maryland could not levy a tax on a federal bank, when such tax was probably meant to burden the federal bank); *cf.* Ex Parte McCardle 74 U.S. (7 Wall.) 506 (1868). Even though the U.S. Supreme Court has exercised large powers in controlling the constitutionality of federal and state laws, the situation is not so clear. *See* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 260–268 (6th ed. 2008). Barring the U.S. Supreme Court's stated areas of original jurisdiction in Article III of the U.S. Constitution, Congress *may* have plenary powers to limit the U.S. Supreme Court's appellate jurisdiction, including stripping the U.S. Supreme Court's jurisdiction to hear specific constitutional claims. *Id.* However, the extent of Congress's jurisdiction stripping powers is "hotly disputed" and has not been fully, or at least clearly and unequivocally adjudicated by the U.S. Supreme Court. *Id.* Justice Scalia, in a dissent to *Webster v. Doe*, 486 U.S. 592 (1988), stated that there

on constitutional grounds *a posteriori*—that is, after the law has been promulgated—is often very circumscribed, or more often, non-existent.[24] In France, until the creation of the Fifth Republic in 1958, and until the development of important case law in 1971 by the *Conseil constitutionnel*, and the constitutional reforms of 2008–2010, attacks on the constitutionality of a law were severely limited.[25]

Again, one should underline the philosophical underpinnings of the French legal system and the place given to the constitutional control of laws: laws represent the general will, and nothing (beyond God and natural laws in the original 18th century sense of the French or civil law model) is higher in the democratic state; the basis of a democratic state is the general will expressed through the popular election of representatives to a legislative body who vote on laws to realize whatever general will may exist, or be found.[26] The idea of an unelected body, such as a Supreme (constitutional) Court, checking or controlling the expression of the general will as expressed through voted laws would be ideologically impermissible, particularly to the French Revolutionaries at the end of the 18th century.[27] Thus, until the Constitution of the Fourth Republic in 1946, there was no constitutionally created body to ensure that the legislature respected the French constitution when passing laws; and this *Conseil constitutionnel* created in the Fifth Republic really did not invalidate laws on the basis of constitutional rights until a major self-initiated evolution in 1971.[28]

Nevertheless, it eventually became apparent, especially through the various revolutions of the 19th century and the wars of the late 19th and early 20th centuries, that a

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is no right to have a constitutional claim adjudicated, and it may not even be necessary in all cases; under this theory state courts would be the guarantors of upholding the Constitution, but then, the issue of Congress's ability to strip state courts' jurisdiction then comes into play. *See* LOW, *supra* at 273.

[24] *See, e.g.,* PIERRE PACTET & FERDINAND MÉLIN-SOUCRAMANIEN, DROIT CONSTITUTIONNEL 176 (27e ed 2008) (noting that the German Federal Constitutional Court in Karlsruhe can be asked to determine the constitutionality of a federal law or a law of the German States (*Länder*) upon petition by the federal government, the government of a State (*Land*), one-third of the members of the Parliament (*Bundestag*) or a court.

[25] *See generally id.*

[26] *See* MICHEL LASCOMBE, LE DROIT CONSTITUTIONNEL DE LA VE REPUBLIQUE 312 (8th ed. 2002).

[27] *Id.*

constitution, without a body to ensure that the principles laid out therein are respected, was probably a mere pious vow.[29] In 1946, for the first time, the Constitution of the Fourth Republic created the *Comité constitutionnel*—a council, or dare one say court, legally separate from the historical *Conseil d'État* and the *Cour de cassation*—however, this body's powers were strictly confined to adjudicating disputes between the executive and the Upper House of Parliament *before* a vote on a proposed law was called.[30] Essentially, the body ensured that the legislature did not overstep its constitutionally enumerated powers and enter into the constitutionally declared role of the executive.[31] Notably, this body did not hear petitions from private citizens about the constitutionality of a law, originally or on appeal; once a law was promulgated, it remained in effect and valid until the legislature voted a new law abrogating or replacing it.[32]

From 1946 to 1958, however, France experienced another politically and economically unstable period.[33] Thus, in 1958 a new constitution was written and entered into legal force under the General De Gaulle.[34] Title VII of the Constitution of the Fifth Republic created a new, legally independent body to ensure that laws respected the text of the Constitution: the *Conseil constitutionnel.*[35] This supreme council, also charged with controlling the regularity of elections, can be petitioned under Art. 61.2 of the Constitution of the Fifth Republic in

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[28] *Id.*
[29] *Id.*
[30] *Id.* at 313.
[31] *See id.*
[32] *Id.*
[33] *Id.*
[34] *See* PACTET, *supra* note 24, at 324.
[35] *Id.* at 489–493. This council is composed of generally nine members that are nominated by the President of the Republic (subject to approval of the National Assembly (the lower house of Parliament) and the Senate (the upper house of Parliament) who exercise a veto power through the standing commissions on judicial nominations); the President of the Senate and the President of the National Assembly, subject to a mere 'opinion' on the nomination(s) by the standing commissions on judicial nominations. Each of the three aforementioned—the President of the Republic, the President of the Senate, and the President of the National Assembly—nominate three judges, totaling nine judges, who serve for nine-year mandates. In addition to the nomination of judges to the *Conseil constitutionnel*, the former Presidents of the Republic automatically serve on the *Conseil constitutionnel*, but for life. *Id.* at 491–493. *See also* Constitution du 4 octobre 1958 [The Constitution of the Fifth Republic], Title VII.

order to examine the constitutionality of a law, *before* it is promulgated.[36] Originally, only the President of the Republic, the President of the Senate, and the President of the National Assembly (the lower house of Parliament) could petition the *Conseil constitutionnel* to adjudicate the constitutionality of a proposed, and/or voted, but not promulgated, law.[37] However, a constitutional revision of 29 October 1974 allowed 60 members of either chamber of the Parliament to petition the *Conseil constitutionnel* to examine the constitutionality of a proposed law before promulgation.[38] Again, what is missing here is *a posteriori* control of the constitutionality of a law, and the right of a private citizen in litigation to challenge relevant and dispositive laws on constitutional grounds.

It appears that the drafters of the Constitution of the Fifth Republic intended the *Conseil constitutionnel* to have a modest role when it reviewed the constitutionality of a law; particularly, under the originalist view, the *Conseil constitutionnel* was an arbiter of legislative and executive competence, merely ensuring that the legislature did not usurp the power of the executive, and vice-versa to a lesser extent.[39] Of note, the Constitution of the Fifth Republic enumerates specific legislative powers in Article 34; from its birth in 1959 and until 1971, the *Conseil constitutionnel* seemed to adjudicate only whether or not the legislature exceeded its constitutional grant of powers and entered into the realm of executive power.[40] That is, until 1971, the *Conseil constitutionnel* merely looked at whether or not the Parliament or Government had respected the text of the Constitution and did not look at whether or not substantive rights guaranteed in the Constitution had been violated by the passage of a specific law.[41]

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[36] *Id.* at 499; *see also* Constitution du 4 octobre 1958 [The Constitution of the Fifth Republic], art. 61.2.
[37] *Id.* at 490.
[38] *Id.* at 499.
[39] *See id.* at 490.
[40] *See id.; see also* Constitution du 4 octobre 1958 [The Constitution of the Fifth Republic], art. 34. This article notes, for example, that (statutory) law can delineate rules concerning civil rights, rights and duties of national service, immigration law, criminal law, taxes, electoral system, social rights, etc.
[41] *See* PACTET, *supra* note 24, at 490.

In 1971, the *Conseil constitutionnel* took a sharp turn: in the case on the Liberty of Association, all of one page long, the *Conseil constitutionnel* declared a law, which was going to be promulgated, legally invalid as it violated substantive rights guaranteed by the French Constitution.[42] Factually concerning this case, in January of 1971, Simone de Beauvoir and others sought to register an association named *Association des Amis de la cause du people.*[43] An application for official recognition of the group was made with the local prefecture (of police), which refused to recognize the group by refusing to deliver to the group proof of filing of an application for official recognition, the first step in being recognized as an association by the State.[44] A great public debate ensued, with accusations of communist witch-hunting against Simone de Beauvoir; the Government consequently proposed a law to modify the Law of 1 July 1901, which guaranteed the liberty of association.[45] The Government maintained that the Law of 1 July 1901, which recognized a fundamental liberty of association, was silent on the State controlling *a priori* the official creation of an association, which might be contrary to the interests of the State (thereby recognizing that the State could refuse to recognize groups if against the interests of the State).[46] The President of the Senate petitioned the *Conseil constitutionnel* concerning the constitutionality of this law, after both the Senate and National Assembly had debated the law, but only the National Assembly had voted to approve it; the Senate had rejected it in three different votes.[47] The *Conseil constitutionnel* took up the petition and declared the proposed law contrary to the Constitution of the Fifth Republic as it violated a fundamental liberty guaranteed by the Constitution: the liberty or right of association.[48] For the first time, the *Conseil*

[42] 16 juillet 1971 Liberté d'Association (44 DC) in L. Favoreu & L. Philip, Les grandes décisions du Conseil constitutionnel 241 (13th ed. 2005).
[43] Observations, Grandes décision p. 245, considérant 2.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 244.
[48] *Id.* at 244, considérant 2 (original decision).

constitutionnel referred to the substantive rights mentioned, explicitly and implicitly, in the Preamble to the Constitution of the Fifth Republic, and declared a law unconstitutional on the grounds of a violation of these rights.[49]

After the decision on the Liberty of Association, it became apparent that the *Conseil constitutionnel* was to take on a new role, the guarantor of substantive rights *within the legislative process*, and consequentially a new legal theory appeared in France, that of the *bloc de constitionnalité* (or the Block of Constitutionality). In this "block," one finds the fundamental rights and liberties that the Constitution of the Fifth Republic protects; the Preamble to the Constitution of the Fifth Republic refers back to the Preamble of the Constitution of the Fourth Republic, 1946, which enumerates certain rights and liberties, and refers to reader to the Declaration on the Rights of Man and Citizen of 1789, which also enumerates rights and liberties.[50] Importantly, the text of the Preamble to the Constitution of the Fourth Republic also recognizes the fundamental principles recognized by the laws of the

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[49] *Id.* at 246–247. The Preamble to the Constitution of the Fifth Republic states:

> The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.
>
> By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.
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> Constitution du 4 octobre 1958 [The Constitution of the Fifth Republic], preamble.

The Preamble to the Constitution of the Fifth Republic makes reference to the Preamble of the Constitution of the Fourth Republic, which contains certain rights, and which refers to the Declaration of the Rights of Man and of the Citizen of August 26, 1789, and other liberties recognized by laws of the Republic. The text, in pertinent part, declares:

> In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic.
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> Constitution du 27 octobre 1946 [The Constitution of the Fourth Republic], preamble.

[50] *See* PACTET, *supra* note 24, at 500. *See generally* Constitution du 27 octobre 1946 [The Constitution of the

Republic.[51] This provision essentially allowed the *Conseil constitutionnel* in its decisions to determine not only if a proposed law is against a fundamental right or liberty explicitly mentioned in the Preamble to the Fourth Republic of 1946 or the Declaration on the Rights of Man and Citizen of 1789, but also whether or not there are any other fundamental rights or liberties that have been recognized by *legislation* (i.e. statutory law passed by Parliament) before the Preamble of the Constitution of the Fourth Republic came into existence in 1946.[52] Thus, the *Conseil constitutionnel*, since 1971, has assumed the role of not only determining whether proposed laws violate a fundamental right or liberty, but also what are the fundamental rights and liberties in the Fifth Republic.[53]

Again, until the reforms of 2008–2010, a private citizen could not attack a promulgated law in court; a law could only be "controlled" for constitutionality within the legislative process, and only legislators and/or the executive had standing to petition the *Conseil constitutionnel*.[54] However, this raises the issue of what is a law? Articles 58–61 of the Constitution of the Fifth Republic note that the *Conseil constitutionnel* can control the constitutional regularity of elections for President, the Senate, and the National Assembly, of referendums, of organic laws, of regulations from the Parliamentary bodies, and of laws.[55] This enumeration excluded administrative acts which belong to the competence of the administrative courts and the *Conseil d'Etat*, the highest administrative court in France.[56]

Fourth Republic], preamble; *see also* Declaration of the Rights of Man and of Citizen, 26 August, 1789.
[51] *See* PACTET, *supra* note 24, at 501.
[52] *Id.*
[53] *Id.* at 500. The *Conseil d'État* also has a power to strike down unconstitutional administrative acts and seems to not apply what it feels are unconstitutional laws (although doctrinally this is denied), or uses international and/or European norms to circumvent the application of supposed unconstitutional laws; but it seems that over time the *Conseil constitutionnel* is becoming more and more like a "Supreme Court," with the final word on what are the fundamental rights and liberties guaranteed by the Fifth Republic; *cf.* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the U.S. Congress could not 'enlarge' rights already delineated by the U.S. Supreme Court, and maybe cannot define new constitutional rights without the finding of such a right first by the U.S. Supreme Court).
[54] *See infra* discussion on reforms, "The Constitutional Reforms of 2008–2010: Priority Preliminary Rulings on the Issue of Constitutionality."
[55] Constitution du 4 octobre 1958 [Constitution of the Fifth Republic] arts. 58–61.
[56] *See generally* BELL, *supra* note 17, at 176–187 (discussing French administrative law).

Acts by private citizens and non-administrative judicial acts would be attackable in the civil and criminal courts and the *Cour de cassation*, the highest criminal and civil court in France.[57] Thus, the domain of constitutional control or review by the *Conseil constitutionnel* is limited to: proposed laws and amendments to laws, laws voted on but not yet promulgated, organic laws[58], *ordonnances* (translated as either 'decrees' or 'ordinances') passed by the government with legislative force[59] *and* later explicitly or implicitly ratified by Parliament, treaties and international engagements, regulations of the National Assembly and the Senate, and various laws from overseas territories.[60] However, the *Conseil constitutionnel* in its jurisprudence has refused to examine the constitutionality of laws passed by referendum as these laws are the direct expression of the People, of the general will, and the spirit of Article 61 of the Constitution of the Fifth Republic is to allow the *Conseil constitutionnel* to control laws that come from indirect representation, that is, Parliament.[61] Any other act, such as an administrative one, belongs to the *Conseil d'Etat*, and any other private act and non-administrative judicial act belongs to the *Cour de cassation*. Importantly, the *Conseil d'Etat* and the *Cour de cassation* often freely intervene in their specific domains and control *acts* on the grounds that they are not constitutional, but not *laws*; thus, these two other supreme courts do have an indirect role in determining what exactly are the fundamental rights and liberties

[57] *See generally* BELL, *supra* note 17, at 37–48 (discussing French private and criminal law).
[58] Organic laws in France are laws that are enacted to detail or carry out a constitutional provision. They are ranked higher than ordinary laws. *See* PACTET, *supra* note 24, at 599. An example in the United States of an organic law would be a Congressionally-passed statute on the organization of lower courts in the federal court system.
[59] In the Constitution of the Fifth Republic, under Article 38, it is possible for the legislature to authorize the government to pass laws, known as *ordonnances* ('decrees' or 'ordinances'), which have legislative force and which are normally within the subject-matter of the legislature's enumerated powers in Article 34 of the Constitution. These ordinances or decrees can then be either expressly ratified by Parliament or implicitly ratified by Parliament when it later proposes a law that references to earlier *ordonnances*. *See* PACTET, *supra* note 24, at 539, 599.
[60] *See* PACTET, *supra* note 24, at 527.
[61] Marc Guillaume, *La question prioritaire du constitutionnalité* in Justice et cassation, revue annuelle des avocats au Conseil d'Etat et à la Cour de cassation (2010), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/QPC/qpc_mguillaume_19fev2010.pdf ; *see also* Décision n°62-20 DC du 6 novembre 1962 (Loi relative à l'élection du Président de la République au suffrage universel direct, adoptée par le référendum du 28 octobre 1962), considérant n°2, available at : http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-

of the Fifth Republic.[62] It may appear that France has refuted, or perhaps never followed, the notion in American constitutional case law that there should be one unitary source of constitutional law, expressed through the United States Supreme Court.[63]

Thus, once a law has been promulgated in France, before the constitutional reforms to be discussed below ending in 2010, a litigant could not attack the constitutionality of a law; he or she could attack an administrative act or a non-administrative judicial act, but not a law passed by Parliament or a governmental decree with legislative force ratified by Parliament.[64] However, there is one indirect device that a litigant can use in proceedings against a law in a civil, criminal, or administrative court; this is done through Article 55 of the Constitution of the Fifth Republic.[65] This article provides that international treaties and accords trump national laws as long as three conditions are met: (1) the treaty or accord has been regularly (i.e. legislatively) approved; (2) the treaty or accord has been published in an official reporter; (3) the other party or parties to the treaty has or have approved and integrated the same treaty or accord into its or their law.[66] It should be noted, however, that the criminal, civil and administrative courts generally do not pronounce a law contrary to an international treaty or accord with the intent of invalidating the law, but treat it as a question of two competing norms being advocated by the parties, and apply to the litigation the one norm that is in conformity with the Constitution—that is, the court applies the international norm to the litigation if the national norm violates the international obligations of the French Republic,

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depuis-1959/1962/62-20-dc/decision-n-62-20-dc-du-06-novembre-1962.6398.html.

[62] *See* PACTET, *supra* note, at 513–515.

[63] *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); McCulloch v. Maryland, 17 U.S. 316 (1819); Seminole Tribe v. Florida, 517 U.S. 44 (1996); City of Boerne, 521 U.S. 507 (1997); *see also supra* text accompanying note 23.

[64] *See* BELL, *supra* note 17, at 149–150, 176–187.

[65] *See* PACTET, *supra* note 24, at 565; the text of Article 55 declares: "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." Constitution du 4 octobre 1958 [Constitution of the Fifth Republic] art. 55.

[66] *See* PACTET, *supra* note 24, at 565.

and then sort of ignores the essentially unconstitutional character of the law.[67]

Significant discussion and debate have occurred in France over the meaning of Article 55; some have questioned whether or not Article 55 *require*s that all properly voted, published, and reciprocal treaties trump French laws—that is, that the national courts and judges of France are under an obligation to apply international and/or European law regardless of other French constitutional norms, which may hypothetically be in conflict with international and/or European law.[68] The jurisprudence from the *Conseil d'Etat* and the *Cour de cassation* seem to indicate that properly voted, published and reciprocal treaties will trump French laws; however, a treaty cannot force the application of a provision in an international treaty that would be contrary to French constitutional norms.[69] This jurisprudence seems to maintain French sovereignty, yet reaffirm within reason the country's international obligations (which some may view as a fool's errand).[70]

Unlike the U.S. Supreme Court, even though the French created a *Conseil constitutionnel* in 1958 to control the constitutionality of laws, at least on strictly textual and institutional grounds found within the Constitution, or possibly on grounds of fundamental rights and liberties post-1971, the *Conseil constitutionnel* has highly circumscribed powers, far from the general power of constitutional review that the U.S. Supreme Court has asserted since *Marbury v. Madison*.[71] In particular, before 2010, private individuals could not attack a law that had cleared the national Parliament; the promulgation acted as a barrier to all attacks on the constitutionality (referred to as the *loi écran*), though a basis did exist under Article 55

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[67] *Id.* at 569.
[68] *See* BELL, *supra* note 17, at 19–20; *see also* CATHERINE ELLIOTT, ERIC JEANPIERRE, CATHERINE VERNON, FRENCH LEGAL SYSTEM 56–60 (2d ed. 2006).
[69] *See* ELLIOTT, *supra* note 68. *See* 20 October 1989, Arrêt Nicolo, Conseil d'Etat [CE] [highest administrative law court], Section du Contentieux [litigation section] N° 108.243 in Lebon, Les grands arrêts du Conseil d'Etat et du Tribunal des Conflits (holding that international law, in particular European law, is fully integrated into French law (and in case of conflict it appears that the international norm may govern)).
[70] *See supra* text accompanying note 69.
[71] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (*per* Marshall, C.J.) (holding that the U.S. Supreme Court has the power to invalidate federal statutes that violate the text of the U.S. Constitution).

of the Fifth Republic's Constitution to have an international law or norm applied if a French law or laws were in direct conflict with the international law. Attempts occurred in 1990 and 1993 to give, legislatively, rights to citizens to attack laws on constitutional grounds.[72] However, these attempts failed; in 2008, however, a constitutional revision passed Parliament which gave private citizen's the first right to attack a promulgated law on the grounds that it was unconstitutional.[73] Nevertheless, it appears that even though this might be a significant step in giving private citizens the right to attack a law, the right is hardly a right, but it is probably more accurately described as a mechanism, and this new mechanism is tightly controlled, and leaves open many questions about the balance that will occur between the three supreme courts of France (the *Cour de cassation*, the *Conseil d'État*, and the *Conseil constitutionnel*), and particularly whether or not the *Conseil constitutionnel* will become some sort of supreme court that is more supreme than the other two high courts, the *Cour de cassation* and the *Conseil d'État*.[74]

The Constitutional Reforms of 2008–2010: Priority Preliminary Rulings on the Issue of Constitutionality

The French exception on the constitutional review of laws by the judiciary—i.e., that this control may only occur *before* promulgation—seems to have at least somewhat disappeared following the approval by Parliament of the Law of 23 July 2008, which modified Arts. 61-1 and 62 of the Constitution of the Fifth Republic.[75] Parliament approved this law by a razor-thin majority of only one extra vote, after two previous attempts in 1990

[72] *See* ELLIOTT, *supra* note 68, at 56–60 ; *see also* Les divergences de jurisprudence 195 (Publication de l'Université de Saint-Étienne 2003).
[73] *See* Guillaume, *supra* note 61.
[74] *See* Frédéric Rolin, Professor of Public Law, *La question prioritaire de constitutionnalité ou meurtre dans un jardin à la française,* Posting to Combats pour les droits de l'homme (CPDH), http://combatsdroitshomme.blog.lemonde.fr/2010/02/24/la-question-prioritaire-de-constitutionnalite-ou-meurtre-dans-un-jardin-a-la-francaise-frederic-rolin-dalloz-etudiant-24-fevrier-2010/ (Feb. 24, 2010).
[75] *See* PACTET, *supra* note 24, at 505.

and 1993.[76] This reform could possibly be the final rejection, or the beginning of a rejection, of the absolutist 'legicentric' institutional view of the public powers; as one revolutionary, Cazales, proclaimed:

> In every society . . . There are only two powers, that which makes the law and that which executes it. The judicial power . . . is only a simple function, because its being is only the pure and simple application of the law. The application of the law is dependant on the executive.[77]

The Law of 23 July 2008, which allows a private citizen for the first time to raise in litigation the issue of the constitutionality of a relevant and/or dispositive law and possibly have it annulled by the *Conseil constitutionnel*, seems to implicitly reject the view that the judiciary is merely a bureaucratic corps applying the relevant law to each dispute; it deposits the seed of the conception that the *Conseil constitutionnel* may have full subject-matter jurisdiction over the laws and may be the final arbiter of whether or not a duly passed law is a valid law under the Constitution (yet whether or not it gets to adjudicate all such disputes is not clear as the other two high courts have the right to determine whether or not an attacked law is relevant, and if not, then block review by the *Conseil constitutionnel*).[78] The reforms embodied in the Law of 23 July 2008 lay out three important objectives: (1) giving a right, or at least a mechanism, to the private citizen to challenge the constitutionality of a law during litigation; (2) purging unconstitutional laws from the legal order; (3) ensuring that the Constitution, and not a legicentric fetishism, is the highest source of law in the nation.[79] Nevertheless, specifically, how does this new law reforming Articles 61-1 and 62 of the

[76] *See* PACTET, *supra* note, at 505.
[77] PHILIPPE BLACHÈR, CONTROLE DE CONSTITUTIONALITE ET VOLONTE GENERALE 198 (PUF 1st ed. 2001).
[78] *See* PACTET, *supra* note, at 506.

Constitution realize these objectives? To answer this question, it is necessary to look at the actual reforms in the Law of 23 July 2008.

The Law of 23 July 2008 modifies Articles 61-1 to read:

> When during legal proceedings before a court, it is maintained that a legislative disposition endangers the rights and liberties that the Constitution guarantees, the *Conseil constitutionnel* may be petitioned concerning this question through a certified question by the *Conseil d'Etat* or the *Cour de cassation* which will decide on such certification within a fixed time period.
>
> An organic law will determine the conditions under which the present article will be applied.[80]

The same law also modifies Article 62, so that the second clause of the Article reads:

> A disposition declared unconstitutional pursuant to Article 61-1 is rescinded starting from the date of publication of the decision of the *Conseil constitutionnel* or at a later date fixed by the decision. The *Conseil constitutionnel* will determine the conditions and limits under which the effects of the disposition will be able to be postponed.[81]

The Law of 23 July 2008 also modifies the organic law passed in 1958 concerning the

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[79] *See generally* Guillaume, *supra* note 61.
[80] *See id.* at 1.
[81] *Id.*

status and proceedings of the *Conseil constitutionnel* to define in detail how the new law allowing preliminary priority rulings on the constitutionality of a law should be applied.[82] Of note, the *Conseil constitutionnel* also reviewed the constitutionality of these changes in the new law before it was promulgated, and not surprisingly, approved them.[83]

Thus, currently in France, during litigation, a party can submit a written and reasoned paper containing an accessory plea that a law applicable to the case at hand is unconstitutional; this pleading may allow the petitioner to obtain a preliminary priority ruling on the constitutionality of the law.[84] The ruling is preliminary because the issue of the constitutionality of the law must be examined before any other legal issue, such as the contention that a law is contrary to France's international law obligations under Article 55 of the Constitution of the Fifth Republic.[85] However, the conditions of the validity of such an accessory plea and the delay within which the court must rule vary depending on whether the litigation is in a court of first instance, or whether it is in an intermediate appellate court, or before the highest appellate court of the nation, the *Conseil d'Etat*, for administrative litigation (between public bodies or between private citizens and public bodies), or the *Cour de cassation*, for matters of private litigation or criminal law.[86]

Priority preliminary rulings on constitutionality and litigation at the lowest level and intermediate appellate levels

At the court of first instance and at the intermediate appellate level, one can raise the

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[82] *Id.*
[83] *See id.* at 2. The law modifying the Ordinance of 7 November 1958 (the organic law on the functioning of the *Conseil constitutionnel*) is the Law N°2009-1523 of 10 December 2009. The decision of the *Conseil constitutionnel* on the Law N°2009-1523, authorized by the new Article 61-1, is Decision N°2009-595 DC of 2 December 2009.
[84] *See* Guillaume, *supra* note 61, at 2–3.
[85] *Id.* The drafters of the law seemed to possibly to have been aware that the two other high courts, the *Cour de cassation* and the *Conseil d'État*, could effectively block the use of the new law by simply relying on international and/or European law first. *See generally* Rolin, *supra* note 74.
[86] *See* Guillaume, *supra* note 61, at 4–22 (detailing the relevant legal provisions before the courts of first instance, the intermediate appellate courts and the highest courts).

issue of the constitutionality of a law that is relevant to, or better yet dispositive of, the litigation.[87] The issue must be raised in writing and be reasoned, without which the plea will be barred.[88] It appears that before administrative courts, there will be a hard line taken, with judges capable of barring the plea by noting the absence of a satisfactorily written and reasoned plea; in civil and criminal jurisdictions, the plea may be barred after the judge notifies the parties of the lack of the written and reasoned plea and gives them an opportunity to correct this.[89] However, the issue of the constitutionality can only be raised by the parties to the litigation, and not the judge him or herself, that is *ex officio*.[90] During a criminal trial, the issue may be raised at the court of first instance if the criminal proceedings are essentially in a procedural posture that is equivalent to a grand jury in Anglo-American criminal proceedings; after this period, the issue cannot be raised.[91] However, upon appeal of a trial court's ruling in a criminal matter, the issue of the constitutionality of a law may be raised.[92]

In any appropriate circumstance, the written pleading can attack a "legislative disposition."[93] What is a "legislative disposition?" As noted above, legislative dispositions include organic laws, ordinary laws, but not laws passed by referendum; it also includes ordinances passed by the government upon *a priori* approval by the Parliament, and then later expressly ratified by Parliament, or implicitly ratified by Parliament through a later reference to the ordinance in a subsequent proposed law.[94]

An issue raised with the new law is what are the rights and liberties that may be alleged to be endangered by a legislative provision?[95] This appears, but such is not clearly

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[87] *See id.* at 4; *see also* Arts. 23-1 to 23-3 of the Ordinance of 7 November 1958 (modified). Note that the term used for the issue raised and its form is a *moyen*.
[88] *See* Guillaume, *supra* note 61, at 4–22.
[89] *Id.* at 9.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* 4–6; *see also* PACTET, *supra* note 24, at 531.
[95] *See* Guillaume, *supra* note 61, at 6.

proclaimed, to come from the jurisprudence of the *Conseil constitutionnel* on what are the fundamental rights and liberties protected by the Constitution of the Fifth Republic, particularly through its reference to the Preamble to the Constitution of the Fourth Republic, and this document's reference to the Declaration of the Rights of Man and Citizen of 1789, and other principles recognized by laws of the Republic.[96] Future case law from the *Conseil constitutionnel* will further clarify this issue, particularly on how free the *Conseil constitutionnel* is to find new substantive rights without any legislative action beforehand defining or creating such right(s).[97]

Once the appropriate plea and associated papers have been presented to the judge at the court of first instance or the intermediate appellate court, the judge then determines whether or not the three criteria discussed below have been met; if they are the judge will transmit the papers and pleadings to the *Conseil d'Etat* or the *Cour de cassation*, depending on whether the litigation is administrative, or civil/criminal, respectively.[98] The judge upon receiving the pleadings on constitutionality must decide whether or not to refer them to the *Conseil d'Etat* or the *Cour de cassation* "without delay," which appears to mean as soon as possible.[99] The *Conseil d'Etat* or the *Cour de cassation* will then decide whether the legal issue(s) raised meet three criteria, in order to certify the question to the *Conseil constitutionnel*.[100] Importantly, the power by the *Conseil d'État* and the *Cour de cassation* to "filter" petitions attacking the constitutionality of a law seems to possibly circumvent the

[96] *Id.*; *see also* PACTET, *supra* note 24, at 534. The notion of *principes fondamentaux reconnus par les lois de la République* '(fundamental principles recognized by the law of the Republic) is taken from the language of the Preamble to the Constitution of the Fourth Republic, and seems to include the fundamental rights and liberties that were recognized by laws passed by the various legislative bodies before the Fourth Republic, particularly the Third Republic; to this point one can cite the liberty of association and the secular nature of the Republic (i.e. the separation of Church and State). *Id.* at 534.
[97] *See supra* text accompanying note 50, and text discussing the notion of the *Bloc de constitutionnalite* discussion; *cf.* City of Boerne, 521 U.S. (1997).
[98] *See* Guillaume, *supra* note 61, at 12.
[99] *Id.*; *see also* Art. 23-2 of the Ordinance of 7 November 1958.
[100] *See infra* text accompanying notes 100–110 (discussing the three criteria that the courts will use to determine whether or not to certify a question to the *Conseil constitutionnel* about the alleged unconstitutionality of a law or laws).

notion that with the new law the *Conseil constitutionnel* will come to resemble an Anglo-American Supreme Court, with the ability to adjudicate disputes over the constitutionality of a law, and presiding of sorts over the other two high courts; the provisions providing for a 3-prong review before certification, indeed, may create a sort of institutional struggle with all three courts constantly attempting to shape constitutional law, with the two traditional courts denying or transmitting the petitions for priority preliminary rulings on constitutionality that they deem convenient or that fall within their conception of constitutional law.[101]

The three criteria by which the trial judge will test the pleadings for referral are: (1) whether the contested legislative disposition is relevant to the litigation or the procedure of the litigation, or is at the basis of the proceedings; (2) whether the legislative provision has not already been declared constitutional by a decision of the *Conseil constitutionnel*; (3) whether or not the contestation is of a serious nature.[102] All three criteria must be met for the contestation of constitutionality to be referred to the *Conseil d'Etat* or the *Cour de cassation*.[103] Importantly, in regards to the second criteria, whether or not a legislative provision has been declared constitutional can depend on a change in circumstances: if the constitutional text itself has changed or if facts have changed to enlarge the application of the legislative provision to then unknown domains or subject-matters when the *Conseil constitutionnel* declared the provision constitutional, then the judge may still refer the challenge of constitutionality to the *Conseil d'Etat* or the *Cour de cassation*.[104] Moreover, if the judge determines that the challenge of constitutionality does not meet the three criteria, then the judge can reject it in a written ruling; *this ruling may not be the subject of an interlocutory appeal*.[105] Additionally, if the judge does decide to refer the challenge to the *Conseil d'Etat* or the *Cour de cassation*, the judge may not make a final adjudication on the

[101] *See* Rolin, *supra* note 74.
[102] *See* Guillaume, *supra* note 61, at 12; *see also* Art. 23-2 of the Ordinance of 7 November 1958.
[103] *See* Guillaume, *supra* note 61, at 14.

case, but the case still does continue and the judge can order provisional and conservational remedies; this again reinforces the notion that the ruling on constitutionality is one of priority and preliminary, in that it precedes the final judgment.[106] Yet again, one can see, however, that the two traditional high courts of France, the *Conseil d'Ét*at and the *Cour de cassation*, retain the power to "filter" petitions, and reject them under such motives as not being "serious" or "relevant."[107]

Once all of these issues have been resolved by the lower court judge and the criteria have been met, the challenge of constitutionality is transmitted to the *Conseil d'Etat* or the *Cour de cassation.*[108] These two courts must then decide within three months whether or not to submit the challenge of constitutionality to the final court, the *Conseil constitutionnel*, which will finally adjudicate the dispute of constitutionality and issue a preliminary priority ruling on the constitutionality of a contested law, and possibly rescind or annul a finally promulgated law.[109] These two courts will send the challenge to the *Conseil constitutionnel* if, again, three criteria are met: (1) the contested law is applicable to the litigation or procedure; (2) the law has not already been declared constitutional by the *Conseil constitutionnel*; (3) the question presented is new or presents a serious nature.[110] The third criterion here differs slightly from the third criterion that the lower court judge uses; it is reputed that the difference is to underscore that the high civil, criminal and administrative courts cannot rule on the constitutionality of a law under the pretext that the issue is not serious enough; if there is a constitutional issue, it seems that the challenge must be referred finally to the *Conseil constituionne*l; however, this vague wording could also conceivably allow the high courts to filter the challenges that they like and do not like, and implicitly

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[104] *Id.* at 15.
[105] *Id.* at 18.
[106] *Id.* at 19; *see also* Art. 23-3 of the Ordinance of 7 November 1958.
[107] *See* Rolin, *supra* note 74.
[108] *See* Guillaume, *supra* note 61, at 22.
[109] *Id.*; *see also* Art. 23-4 of the Ordinance of 7 November 1958 (modified).

preserve their institutional power (lest it leak out to the benefit of the *Conseil constitutionnel*) under such large, given notions as "new" and "serious."[111]

Thus, from the preceding paragraphs, one can see that although the constitutional reforms of 2008 to 2010 created a new right for private citizens to challenge the constitutionality of a law, there are so many 'filters' put in place along throughout the procedure of certifying a question that one might call it not a right of challenge, but rather the possibility of a challenge, dependant on the fulfilment of explicit criteria, and *in the discretion of the courts*.

Priority preliminary rulings on the constitutionality of a law raised directly before the Conseil d'Etat or the Cour de cassation

As previously noted, one can raise the issue of the constitutionality of a relevant law not only at the lower court, but also during appeal to an intermediate court, and finally when directly before the highest courts of the French Republic.[112] The challenge of constitutionality must be written and reasoned, otherwise it will be rejected.[113] The *Conseil d'Etat* or the *Cour de cassation* must decide on a constitutional challenge before adjudicating a challenge based on France's international engagements first, hence the "priority" notion of the ruling.[114] The two courts must decide on whether or not to refer the challenge to the *Conseil constitutionnel* within three months.[115] Moreover, the legislative provision attacked must be relevant to the litigation or the procedure; the legislative provision must not have been previously declared constitutional by the *Conseil constitutionnel*; and the question

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[110] *See* Guillaume, *supra* note 61, at 22.
[111] *Id.*; *see also* Rolin, *supra* note 74.
[112] *See supra* text accompanying notes 100–110.
[113] *See* Guillaume, *supra* note 61, at 24.
[114] *Id.*
[115] *Id.*

presented must be novel or be of a serious nature.[116] Generally, if the matter is transmitted, a final decision may not be made on the case, pending a decision from the *Conseil constitutionnel*.[117] If the *Conseil d'Etat* or the *Cour de cassation* decide to send the matter to the *Conseil constitutionnel*, it will do so with a reasoned decision to this effect, along with the pleadings of the parties involved.[118]

Procedure before the Conseil constitutionnel

Once the matter is before the *Conseil constitutionnel*, the parties must be able to engage in a 'contradictory' process, which for the French legislature appears to imply the presentation of written pleadings that contradict one's adversary and the ability to make oral observations during the actual public hearing on the matter.[119] The *Conseil constitutionnel* has three months to make a decision on the matter, and must inform the President of the Republic, the Prime Minister, and the Presidents of the Senate and the National Assembly.[120] Interestingly, the exchange of information between the parties and the court must take place by electronic e-mail; the legislature included this requirement given the relatively short delay that the *Conseil constitutionnel* has to decide the matter.[121]

The constitutional reforms give private citizens for the first time the possibility to challenge allegedly unconstitutional laws that have been promulgated, and for which the period of 'preventive' review by the *Conseil constitutionnel* has passed. Nevertheless, given the traditional *legicentric* French reverence for promulgated laws, the constitutional reforms of 2008–2010 may be a fairly significant advance by giving more powers to the judiciary, the

[116] *Id.*
[117] *Id.*
[118] *Id.* at 26; *see also* Art. 23-7 of the Ordinance of 7 November 1958 (modified).
[119] *See* Guillaume, *supra* note 61, at 26–28; *see also* Art. 23-10 of the Ordinance of 7 November 1958 (modified).
[120] *See* Guillaume, *supra* note 61, at 28–30; *see also* Art. 23-8 and 23-10 of the Ordinance of 7 November 1958 (modified).
[121] *See* Guillaume, *supra* note 61, at 29.

branch that, during the Revolution at the end of the 18th century, was merely conceived of as a bureaucratic corps, destined to mechanically apply the laws to the litigation at hand.[122]

An Example of the Current Application of the Constitutional Reforms: The *Daniel W., et autres* Case

The *Conseil constitutionnel* has not hesitated to use its new powers. As a possible third "birth" of the *Conseil constitutionnel*—the first being the creation of the *Conseil constitutionnel* in 1958 upon the enactment of the Constitution of the Fifth Republic, the second being the 1971 decision on the Liberty of Association where the *Conseil constitutionnel* authorized itself to control laws on the basis of substantive rights without any express mention to this effect in the Constitution of the Fifth Republic—on July 30, 2010, the *Conseil constitutionnel* published a decision which more or less struck down a large portion of the legislation, or required the legislature to revisit the laws, on provisional police custody known as *garde à vue*.[123] The *Conseil constitutionnel* received two series of *renvois* (certified questions) for a preliminary priority ruling on the constitutionality of the laws allowing for *garde à vu*e (provisional policy custody) and setting up the mechanism by which one can be detained under the *garde à vue* legislative dispositions.[124] The numerous defendants at the lower court challenged their detentions and some their convictions under these laws, on the basis that the laws were unconstitutional; the Penal Chamber of the *Cour de cassation* heard the petitions of the many petitioners together and agreed that the constitutionality of these laws on provisional police custody was in question; the laws on *garde à vue*, according to the *Cour de cassation*, Penal Chamber, implicated the right to defense, the right to an individual's liberty, the right to a just and equitable procedure, and the right to not be the subject of an arbitrary arrest, and such implication of constitutionally guaranteed rights—found in the

[122] *See generally* Riesenfeld, *supra* note 5, at 57–58; *see also generally* Blachèr, *supra* note 76.
[123] Décision n°2010-14/22 QPC du 30 juillet 2010 « M. Daniel W. et autres [Garde à vue] ».

Constitution itself, the Declaration of the Rights of Man, and fundamental rights recognized by laws of the Republic—was serious and such legal and constitutional questions were not fully adjudicated by the *Conseil constitutionnel*, thus justifying a *renvoi* (certified question) on such constitutional questions to the *Conseil constitutionnel*.[125]

Garde à vue essentially means being held by the police in a police station upon plausible suspicion of having committed an infraction, *of any gravity*, and without an arrest warrant in order to obtain information about the crime or infraction, and probably, inculpate the detained person.[126] In France, one can be detained upon plausible suspicion of having committed a crime, even a petty crime or misdemeanour, for up to 24 hours.[127] This period can be extended for crimes of a more important nature, such as suspected terrorism-related activities, and drug trafficking.[128] A suspect held in *garde à vue* is generally deprived of all of his or her possessions, almost always strip searched, held in secret, and questioned, in order to obtain self-incriminating oral statements to be used during trial.[129] Additionally, the suspect is not informed *at the beginning* of the detention that he or she has the right to remain silent.[130] Moreover, the law limits the amount of time a suspect may spend with his or her attorney to thirty minutes maximum, and the attorney generally is not allowed to be present during questioning of a suspect.[131]

In its decision, the *Conseil constitutionnel* noted that in 2009 there were 790,000

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[124] *Id.*
[125] *Id.* The visa of the decision notes the persons who challenged their provision police custody provision. Looking over the list, a large plurality of the defendants had Arab last names, and a few others had Spanish and/or Portugese last names; immigration, integration, lack of work, and racism have, of course, been very debated issues in France, particularly since the riots in the suburbs of Paris in 2005. *See* Paris et sa banlieue, blog, Le Monde 24 March 2006, http://parisbanlieue.blog.lemonde.fr/2006/03/24/2006_03_quand_les_banli_1/; *see also* Décision de renvoi n°2010-14/22 QPC du 10 juin 2010, Cour de cassation, chambre criminelle « M. Daniel W. et autres [Garde à vue] ».

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[126] *See* La Garde à vue, Document de travail du Sénat p. 6 (Dec. 2009), http://www.senat.fr/lc/lc204/lc204.pdf.
[127] Décision n°2010-14/22 QPC du 30 juillet 2010.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*

detentions for questioning, or *garde à vue*, in France, in a nation of slightly more than 60 million persons.[132] Moreover, the majority of persons convicted of misdemeanours and crimes are convicted solely on the basis of evidence obtained during the detention period, the *garde à vue*.[133] Finally, the court noted that the number of national police has doubled since 1993, when the *Conseil constiutionnel* first decided, before promulgation of revisions of the *garde à vue* laws, that such revisions were constitutional.[134] In a way, there has been, with the growth of the use of *garde à vue*, a betrayal of the normally three-part phase of France's traditional model of criminal prosecution: the police apprehending, the examining magistrate assembling relevant and admissible evidence for the *dossier* (with the parties, prosecutor and accused, capable of engaging in a contradictory process), and then the presiding judge (or jury) making a decision on guilt and punishment based on the *dossier* assembled.[135] According to the *Conseil constitutionnel*, unfortunately, the role of the examining judge seems to be in the process of being displaced by the excessive use of *garde à vue*, where the majority of evidence is now gathered, and where, generally, certain rights seem to not be respected or diminished in importance, such as the right to counsel.[136]

Given the change in the facts that lead to a larger application of the laws concerning *garde à vue* previously approved as constitutional by the *Conseil constitutionnel*, the *Conseil constitutionnel* concluded that the laws are now unconstitutional, or at least need to be redefined, particularly because the person detained is not immediately informed of the right to remain silent, the smallest infractions can lead to detention without an arrest warrant, and the detained person is denied the *effective assistance of counsel*, with a law that limits consultations to thirty minutes and allows the attorney to be barred from interrogations and

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *See* Les Cahiers du Conseil constitutionnel, Cahier n° 30, *Commentaire de la decision n° 2010-14/22 QPC – juillet 2010, M. Daniel W. et autres*, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201014_22QPCccc_14qpc.pdf.

also allows the right to remain silent to *not* be declared before interrogations.[137] It should be noted that the *Conseil constitutionnel* did not forcefully state that there is a right to effective assistance of counsel, or that one has to be informed of the right to remain silent; rather the *Conseil constitutionnel* looked to Article 9 of the Declaration of the Rights of Man which declares that: "As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law."[138] This Article essentially gives to the *Conseil constitutionnel* the task of weighing the proportionality of police measures taken to ensure the public order (a constitutional value in itself) versus the general rights of defense, of a just and equitable trial, and of an impartial and independent courts.[139] The *Conseil constitutionnel* in its decision looked at the general regime of provisional police custody, and noted that the use of *garde à vue* was excessive and out of hand (possible for the husband who has paid all child support but failed to communicate to his ex-wife, as required by law, his new address).[140] Moreover, the rights of defense are harmed by the current excessive use of *garde à vue*, where attorneys are not allowed during interrogations, generally, and the person in provisional police custody is generally not informed of his right to remain silent.[141] However, the court did not recognize an explicit right to counsel at a certain point, or the right of being informed of the right to remain silent; rather, the court noted the current structure and practice of provisional police custody harmed these rights.[142] The *Conseil constitutionnel* suspended the effect of its decision on *garde à vue* until July 1st, 2011, so that Parliament can debate and vote on a new law.[143] The *Conseil constitutionnel*, more hesitant to use its new

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[136] *See id.*
[137] *See id.*
[138] *Id.* at 19.
[139] *Id.* at 20.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

powers than the current U.S. Supreme Court is to use its long recognized powers, noted that it is not a legislator, and thus cannot make specific rules on provisional police custody; that is a task for the legislature, and thus the *Conseil constitutionnel* deferred the effect of its decision to allow the legislature time to contemplate its decision and modify the laws on provisional police custody as necessary.[144]

Interestingly, in this decision, the *Conseil constitutionnel* has justified a change in case law based on a *stare decisis*-like discussion of the changed factual circumstances.[145] It has annulled a law that it previously said was constitutional, given the perceived excessive recourse to detention without arrest warrant, without notification of rights, and without effective assistance of counsel, and it dictated to the Parliament that it must a change a law, and such revisions will be reviewed again by the *Conseil constitutionnel* before promulgation, assuming, very realistically, that the President of the Republic, or the Senate, or the National Assembly, or 60 members of either house of Parliament petition the *Conseil constitutionnel* to review the constitutionality of the law's future amendments.[146] What is interesting is that the *Conseil constitutionnel*, to review all the provisional police custody laws—which it had formerly declared constitutionally compatible before they were promulgated—had to find a way to overturn its previous decisions.[147] In France, the notion of *stare decisis* and a discussion on such to overturn case law is a foreign notion; however, interestingly, in this decision the *Conseil constitutionnel* largely followed the work a common law high court would do, and noted the changed factual circumstances, and how it was appropriate to review its previous case law.[148]

A Common-Law Court of Constitutionality?

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[144] *Id.*
[145] *Id.* at 12–13.
[146] *Id.*
[147] *Id.* at 13.
[148] *Id.*; *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (discussing *stare decisis* and when previous case law should be overturned).

Legal scholars and political scientists may wonder whether or not the *Conseil constitutionnel* has not taken a large step towards a more common-law like high court that has the power to decide constitutional law issues, and to revisit, through reasoned justification, its former case law when necessary. There are facts that seem to lend credence to this idea, and then there are others that could cause one to hesitate before drawing such a conclusion.

First, in *Daniel W. et autres* the court's discussion on the change in factual circumstances since the first decision in 1993 on the constitutionality of the *garde à vue* laws seems to resemble a common-law high court's discussion on *stare decisis*, and when it is appropriate to change case law, or disapprove of a law previously approved.[149] Justices O'Connor, Kennedy, and Souter's discussion on *stare decisis* in *Planned Parenthood*, where a Pennsylvania anti-abortion, spousal notification law was struck down before the United States Supreme Court, comes to mind on this—particularly, how it was noted that the factual circumstances had not evolved to such a point as to reconsider the seminal case, *Roe v. Wade*, that was consider roughly twenty years earlier and gave woman more or less a right to a first semester abortion, found in an implicit constitutional right to privacy.[150] Furthermore, over the years, notably since the Liberty of Association case in 1971, the *Conseil constitutionnel* has not hesitated to define the fundamental liberties and rights guaranteed in the Constitution of the Fifth Republic, and to protect these in various advisory opinions, and now, in actual cases and controversies.[151] In this regard, it appears that the *Conseil constitutionnel* is becoming the final arbiter on what are the fundamental rights in the French Republic, much as the United States Supreme Court is the final arbiter on this same point in the United States, and that this power is extending from merely advisory opinions issued before a law is promulgated to a real institutional player that may come to have the final word on not only

[149] *See* Planned Parenthood, 505 U.S. at 844–869.
[150] *Id. ; see also* Roe v. Wade, 410 U.S. 113 (1973).
[151] *See* 16 juillet 1971 Liberté d'Association (44 DC) in L. Favoreu & L. Philip, Les grandes décisions du

what are the rights guaranteed by the French constitution, but also whether various laws promulgated are in line with the *Conseil constitutionnel's* reading of what the French Constitution protects.[152]

However, one should not draw conclusions too hastily. The *Conseil constitutionnel* has a vary particular role: advising the executive and legislative on the constitutionality of a law or laws being proposed, and to a more circumscribed extent, defining which laws violate the rights or liberties that the *Conseil constitutionnel* has identified.[153] Moreover, in France, both the *Conseil d'Etat* and the *Cour de cassation* also identify and define what they believe are the fundamental rights and liberties in France, within their respective subject matter domains: administrative law, and civil and criminal law.[154] Furthermore, as was discussed in this article, it was the legislature that granted the *Conseil constitutionnel* a right to strike down promulgated laws, and only upon petition by a litigant and after *filtration* by the appropriate highest administrative or civil/criminal law court; these traditional high courts could block any effective use of this new power, or law, by the *Conseil constitutionnel*, simply by concluding within the general language of the law that a challenged law does not present a serious constitutional question or a novel one.[155] Moreover, even in its own jurisprudence, the *Conseil constitutionnel* has referred to the language in the Preamble to the Constitution of the Fourth Republic, referenced by the Preamble to the Constitution of the Fifth Republic, that speaks of fundamental principles recognized *by laws* of the Republic.[156] This observation supposes that the *Conseil constitutionnel* could never have as large a role in defining constitutional rights, as the U.S. Supreme Court does, as the rights it finds must have first been enacted by the legislature.

Conseil constitutionnel 241 (13th ed. 2005) ; *see also* Les Cahiers du Conseil constitutionnel, *supra* note 134, at 10–22 .

[152] *See generally* City of Boerne, 521 U.S.

[153] *See supra* text accompanying notes 71–74.

[154] *See supra* text accompanying notes 54–60.

[155] *See* Rolin, *supra* note 74 (discussing how the three courts could react, institutionally, to the new reforms).

The *Conseil constitutionnel* has recognized that a large portion of fundamental rights and liberties are to be defined by the past legislation of the Republic.[157] This is in stark contrast to the United States where from nearly the beginning the United States Supreme Court, in *Marbury v. Madison*, recognized its role as final arbiter of constitutional law, and in later case law, particularly *City of Boerne v. Flores*, refused to recognize any role of the United States Congress in defining the fundamental rights and liberties guaranteed by the Constitution, or at least in expanding rights that the Supreme Court had already determined in previous case law.[158] Nevertheless, the decision in *Daniel W. et autres* in France was very interesting, and it remains to be seen how far the *Conseil constitutionnel* will go in asserting its role in French constitutional law, and how deferential it will remain to the legislature, and to what extent the *Cour de cassation* and the *Conseil d'État* may block the effective use of this new power, in the concern that the *Conseil constitutionnel* is eating away, institutionally, at their own power.[159]

The constitutional reforms in 2008 to 2010 in France give private litigants an important new tool, and it also gives the *Conseil constitutionnel* the right to get a second look on any laws it examined in the past, or over which the executive and legislative branches may have colluded not to get reviewed by the *Conseil constitutionnel.* It is maybe difficult not to get at least somewhat impassioned about the new reforms and the novel possibility in France for the *Conseil constitutionnel* to review laws after promulgation for the first time; that is, there has been an even further destruction of the *loi-écran*, the protective screen in French political and legal theory whereby enacted statutes confer to themselves a protective screen once the period of constitutional review has passed and the law has been promulgated, after

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[156] *See supra* text accompanying notes 50–53.
[157] 16 juillet 1971 Liberté d'Association (44 DC) in L. Favoreu & L. Philip, Les grandes décisions du Conseil constitutionnel 241 (13th ed. 2005).
[158] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).
[159] *See* Rolin, *supra* note 74 (discussing how the three high courts in France may react to the new laws on

which, before the present reforms, the *Conseil constitutionnel* could not exercise any power of control.[160]

Perhaps one should probably not be too hasty in comparing common law supreme courts to the *Conseil constitutionnel*. The reforms give more power to the latter body, yet these are new powers that are specifically defined in an organic law, passed by a legislature, which is far from a broad grant of power, or at least a strong tradition of exercising vast powers of constitutional review, as is the case with the U.S. Supreme Court.[161] Change has occurred, but the *Conseil constitutionnel*, unfortunately or fortunately, is still just a *conseil*—a council, and not a *cour*, or court. It depends on the traditional high courts, the *Cour de cassation* and the *Conseil d'État*, in feeding it cases, or not feeding it cases.[162] It is not a court of general jurisdiction on constitutional matters, nor properly an appellate court of constitutional matters within the context of a double degree of jurisdiction, as again, it depends on the other two high courts to send it cases.[163] It is hard to imagine the traditional high courts giving up too much of their institutional prerogatives, or of the *Conseil constitutionnel* breaking too hard from the French Republican model and fashioning laws itself as the U.S. Supreme Court in essence does from time to time.[164] Nevertheless, it does constitute at least a theoretical challenge for the French Republican or the *Rousseauist* model of the State and its political and judicial organs.

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constitutional review).
[160] *See* LES DIVERGENCES DE JURISPRUDENCE, *supra* note 71.
[161] Ordonnance du 7 novembre 1958.
[162] *See* Rolin, *supra* note 74.
[163] *Id.*
[164] *Id.*