The New Constitutional Adjudication in France.

The reform of the referral to the French Constitutional Council in light of the Italian model ♦

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1. On July 21st 2008, the French Parliament passed a constitutional reform modifying a number of articles[1] of the text approved by a popular referendum fifty years earlier, in 1958, when the French 5th Republic was established under the leadership of General de Gaulle. One provision is of special significance for those who are interested in the development of constitutional justice in democratic regimes – the norm which goes under the number 61-1. The text runs:

> *If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council*

♦ I'm very grateful to Justices Guy Canivet and Olivier Dutheillet of the French Constitutional Council and to Gustavo Zagrebelsky emeritus chief Justice of the Italian Constitutional Court for many conversations that greatly helped me to understand the topic I discuss in this article. Lauren Jones helped me to edit the English text.

[1] Mostly minor changes have been enacted concerning 47 articles among the 89 of the 1958 Constitution.

which shall rule within a determined period. An Institutional Act shall determine the conditions for the application of the present article.[2]

This short and slightly cryptic article represents a *conceptual* revolution in the secular history of the French public and constitutional law. In the following pages I want to show why; in the last part of this article, I'll also do so by comparing the mechanism of constitutional adjudication[3] in France under the 5th Republic with the one introduced in Italy in 1948, which was implicitly the model of the French reform of referral to the Constitutional Council.

2. A very limited form of constitutional adjudication was introduced in France, after a first unsuccessful attempt in 1946, by the Gaullist constitution. As is well known,[4] it evolved significantly as a work in progress over the years, most notably because of two important events: first, because of a decision of the Constitutional Council itself in 1971; secondly, and more importantly, because of a constitutional reform of the mechanism of referral passed in 1974 under the presidency of Valéry Giscard d'Estaing.

[2] This is the official translation available on the website of the French Constitutional Council; here we read moreover: "The versions in italics [the constitutional amendments] of articles 11, 13, 25 [...], 34-1, 39, 44, 56, **61-1**, 65, 69, 71-1 and 73 of the Constitution will come into effect in the manner determined by statutes and Institutional Acts necessary for their application". As we will see the Institutional act (*loi organique*) concerning the article 61-1 has been approved by the Council of ministers during the spring 2009; it has to be discussed and approved by the Parliament probably in the fall. The French text of 61-1 says: « Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé. Une loi organique détermine les conditions d'application du présent article».

[3] In Europe we use this expression to designate the centralized system of judicial review existing nowadays in almost all the continental countries.

[4] See notably John Bell, *French Constitutional Law*, Oxford: Clarendon Press, 1992

In most countries of the European continent – with the important exception of Austria[5] – Constitutional Courts were established after the Second World War as a reaction to the authoritarian regimes that dominated a large part of the continent until recently. First Italy and Germany (1948 and 1949), then the South European post fascist regimes at the end of the 1970s, and eventually, after the collapse of the Soviet Empire in 1989, the countries of Central and Eastern Europe all introduced in their new constitutions jurisdictional organs with the task of constitutional overview over the acts of Parliament. The French constitutional history, which parted with authoritarian regime in 1871, followed instead a different path. The only large state on the continent free from a recent totalitarian past, France entertained and cultivated until 2008 – as did the UK – the old ideology of parliamentary sovereignty, which is not only part of its constitutional matrix since the Revolution but goes back to the Bodinian doctrine of the sovereignty of the legislative power. [6]

3. Starting from 1958 this ideology was *de facto* even if not explicitly seriously weakened by the constitutional decision of shifting to the government (the executive power) a significant amount of normative power traditionally attributed to the Parliament. Article 34 of the Constitution clearly limited the powers of the "legislative body," leaving a full range of discretion to executive measures and regulations[7]. The original task of the Constitutional Council – conceived of as a political body subservient to the President more than as a court – was to enforce the strict limits imposed by the constitution upon parliamentary normative

[5] There the first European Constitutional Court was introduced by the republican constitution in 1920.
[6] *Les six livres de la République* : Book 1, chapter 10 (1576).
[7] A recent astonishing example is the new reform of the University passed by the government of the President Sarkozy by simple executive orders and without any parliamentary debate.

powers[8]. This body was actually created to act as a guardian of the separation of powers between the Parliament and the government in their capacity as normative actors. De Gaulle was very keen on preventing the Parliament, and within it political parties, from abusing its power vis-à-vis the government acting under the leadership of the President of the Republic, meaning De Gaulle himself. There was indeed at the outset no preoccupation of having a protector of citizens' rights. This helps to understand the unusual and quite unique character of the mechanism of referral to the Constitutional Council. According to the original text of the article 61, only very few political actors, actually the apex of the political system, were allowed to activate the Constitutional Council:

> "Acts of Parliament may be referred to the Constitutional Council, *before their promulgation*, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate" [italics mine].

Notice that referral and decision of the Constitutional Council have to take place before the promulgation of the statute approved by the Parliament[9]. This rule allowed the rescue and survival of the traditional French ideology of *souveraineté de la loi* [the sovereignty of the statute laws], a point worth a short comment.

4. Since its inception at the time of Revolution, the French constitutional doctrine, defying any possible logic and cognitive dissonance, maintained, *at the same time*, that the constitution is a *rigid* text – meaning that the Parliament cannot modify it according the

[8] The Constitutional Council has moreover mandatory scrutiny over any change of the standing orders of the Parliament!

[9] "The Constitutional Council – we read at the art. 61 – must deliver its ruling within one month". It is not possible to discuss here the consequences upon the Council's work of this temporal constraint, but they are extremely important. The reasons of it are instead evident: without this strict obligation for the delay of the decision the parliamentary opposition would be able to excessively slow down the legislative power of the majority.

procedure used to enact statutes, i.e. majority rule – and that the *loi* (statutes) is the expression of the *general will*. This obscure expression means, on one side, that the statutes have obliging force for all the citizens, both those who agree with the content of the legal decision and those who do not. But, on the other hand, it also means that the statute is "right,"[10] which seems to imply that it is never in contradiction with the constitution. Like in the Popular Republic of China nowadays, there was *de facto* according to the French classical doctrine no real hierarchy of norms between the constitution and the statute laws,[11] since both the constituent power and the legislative power are *sovereign*. The consequence is that the alleged constitutional rigidity is a fiction or a wish, a hope, in sum a sort of invocation, but in any case it doesn't imply that a statute may contradict the constitution. So this rigidity, implying no superiority, has the peculiar property of being flexible! In this traditional context, which was accepted by part in doctrine but entirely in practice of the Third and Fourth Republic, the constitution of 1958 introduced a real limit to the power of the Parliament, which is not allowed to step over the roles and functions that the fundamental law attributes to the executive branch. Hence, at least in a sense, the superiority of the constitutional provisions was taken seriously and a watchdog was instituted in order to protect the governmental power. The mechanism was activated by the highest political authorities and works to stop *in ovo* any overflowing of Parliament's legislation beyond its limited competences. The idea was, in sum, that abuses of parliamentary power had to be prevented *ex ante* before a

[10] Echoing J.J. Rousseau, *Social Contract*, Book II, chapter VI « La volonté générale est toujours droite ».
[11] That shows it radical opposition to Kelsen's legal theory; see R. Carré de Malberg, *Confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions consacrées par le droit positif français relativement à sa formation*, Paris : Sirey, 1933.

mistake i.e. an abuse enters in the books, since at that point the statute will be written in stone and cannot be removed by the executive power. That was the reason of the *ex ante* control.

Taking into account the political circumstances that originated the global reform of the constitution of the 4th Republic which took the name of the 5th one, it is pretty clear, as already stated, that de Gaulle wanted to guarantee himself an instrument of control upon the political parties and the Parliament. But after his death, the institution he helped to create started to walk on its own legs slowly becoming a constitutional court able to protect both the political minority in the parliament and citizen rights.

5. Two major events are at the origin of this significant metamorphosis. It is in fact at the beginning of the 1970s that the Constitutional Council started to change its main function and entered slowly into the family of the European Constitutional Courts. The first step is the famous decision of 16 July 1971 on freedom of association, which consecrated the unexpected but important role played by Jean-Paul Sartre and Simonne de Beauvoir in the history of French constitutionalism.[12] It is not important to enter here in the factual details of the case, but I need to draw the attention of the reader to a peculiarity of the last French constitution. Unlike most of the constitutional texts written after the *Weimar Verfassung* (1919), the Constitution of 1958 doesn't include a list of fundamental rights. Conceived of as a rationalization of the dysfunctional and highly fragmented Parliamentary system of the 4th Republic, the Gaullist constitution simply describes the structure of the separation of powers. Nonetheless, the text starts with a short *Preamble* where we read:

> "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the

[12] See for details, Alec Stone, *The Birth of Judicial Politics in France*, Oxford: Oxford University Press, 1992, p. 67 [??]

Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 [...]".

The legal status of this Preamble was unclear, as well as the meaning of the term "attachment". But we know that when during the debates of the *Comité Consultatif Constitutionnel* [13] one of its members, Dejean, asked if it had legal binding value, the representative of de Gaulle's government, Raymond Janot, answered formally that it did not![14] In 1971, the Council held the opposite position making the Preamble a yardstick for its decision on freedom of association, so that since then the Declarations of Rights of 1789 and 1946 are used as standards for constitutional interpretation (this set of standards goes under the name of *bloc de constitutionnalité*). This paramount decision would have been without any significant impact if the Parliament would not have passed a crucial constitutional reform in 1974, opening up the referral from 4 political actors as it was originally limited to 60 members of the two houses of the Parliament [*saisine parlementaire*]. The reform that Giscard and his government were able push through the Parliament radically changed the role of the Council. Since 1975, the parliamentary opposition has been able to send any major piece of legislation approved by the majority to the Constitutional Council in order to have it reviewed and actually often modified.

Thanks to these two events the organ that was at its origin the guardian of the Parliament became the watchdog of the elected majority, and the late embodiment of the Montesquieuian anti-absolutist doctrine of the "intermediary bodies," the function of which is of moderating and containing the power of the government!

[13] The Constitution of 1958 was not prepared by a Convention, but by de Gaulle's government that presented it to a simple Consultative Committee composed by 39 members before submitting the text to popular ratification.
[14] See: *Avis et débats du Conseil Consultatif Constitutionnel,* p. 101.

6. Since 1974 until now France developed its own specific model of constitutional adjudication which is normally qualified as *centralized*, *abstract* and *a priori*. I'll come back at the end to the abstract character of the constitutional adjudication, but it is beyond doubt that the Constitutional Council has been so far the only agency called to pronounce on the constitutionality of a statute and *before* the application of it, more exactly before the promulgation of the statute law so that in the French legal system all the statutes in the books are by definition constitutional. Evidently this system faces a problem: not only have the statute laws passed before 1974 not been scrutinized by the Council, but this is also the case after '74 of the (few) statutes that the opposition did not send to the guardian of the constitution. The official ideological answer until recently has been that the *certainty of the law* is more important that keeping some corpses in the closet – or, out of metaphor, some statutes that contradict the constitution! The answer apparently wasn't entirely persuasive, since in that case there would be no reason for the reform of the referral introduced in 2008. Be that as it may, for 35 years France lived with this quasi-unique system, which is now put in question and modified by the constitutional reform.

7. The text of 61-1 I quoted at the beginning this article refers to an *institutional act* specifying the new referral mechanism; this *loi organique*, as I said, has now been approved by the Cabinet and published. The Parliament may change some details but we have now a clearer idea of how the new system will work. Before considering it and spelling out the consequences and possible difficulties that will emerge from its enforcement, a few introductory considerations may be useful. The idea of

introducing in France the so called "exception of unconstitutionality"[15] is not new. It goes back to 1990 and to the man who had been the attorney general of the first socialist government, who promoted the abolition of the death penalty in France and was later on, between 1986 and 1995, president of the Constitutional Council. Robert Badinter tried unsuccessfully to introduce the Italian mechanism that allows an ordinary judge to send a question concerning the possible unconstitutional character of a statute that she has to apply in litigation before her to the Constitutional Court in Rome. A similar attempt was repeated three years later in 1993, when a committee chaired by the most prominent French public law professor, Georges Vedel, proposed a basically similar reform, once again unsuccessfully. The conservatives opposed it, and the socialists themselves were not enthusiastic. It is, therefore, somehow paradoxical *prima facie* that a reform that was in the political program of the socialist party for many years is likely to succeed under a conservative presidency. History has its own paradoxes, but there are at least three reasons that can help us to understand the political reversal at the origin of the reform. [1]. The introduction of the exception of unconstitutionality was one of the many aspects of a set of constitutional amendments prepared by a Commission created by the president Sarkozy. It is important to take into account that some of the members of the Balladur Committee (from the name of its chair) are constitutional law professors who certainly played an important role in persuading the Committee to accept the proposal of the 61-1. Moreover one of them, Olivier Duhamel, had been involved in the previous attempts made by Badinter and Vedel. [2]. Moreover, this reform seemed popular, more than many others, relative to technical aspects of the French constitutional system. [3]. Finally, the reform may represent an

[15] This is the expression used in Italy to speak of the type of referral on which I'll come back in the text.

attempt to bring under the control of the French (constitutional) jurisdiction decisions which have been escaping it. Here is what that means.

8. In countries like France, Italy the United Kingdom, and in all the member states of the European Union there now exists three partially overlapping legal orders: 1. the internal law under the supremacy of the constitution of each member state; 2. the legal regulations of the European Union that have preeminence over the possibly conflicting norms of each member-state (ordinary courts of the member state are now authorized to directly apply the European norm and to dismiss the national one in case of conflict)[16]; and 3. the jurisprudence produced by the European Court of Human Rights in Strasburg, which enforces the rights and principles established by European Convention. The states that ratified the Convention and are members of the *Council of Europe*[17] know a different modality to internally implement the principle of the Convention. In France starting from 1975 ordinary courts were allowed to ignore French statutes if they contradicted the Convention. Surprisingly enough, this practice was the consequence of a decision of the Constitutional Council that in the famous decision *Interruption Volontaire de Grossesse* (abortion) claimed that it had no authority in adjudicating legal conflicts that are not under the direct jurisdiction of the French internal law[18]. This

[16] See the decision *Flaminio Costa v. ENEL*, [1964] ECR 585, confirmed by the decision *Simmenthal*, 1978, 106/77.

[17] 47 states are members of the Council of Europe, included Russia, Ukraine and Turkey that are not members of the European Union.

[18] See Decision 74-54 DC of 15 January 1975 [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/case-law.25743.html], here the specific arguments:

"5. A statute that is inconsistent with a treaty is not ipso facto unconstitutional;
6. Review of the rule stated in Article 55 [concerning international treatises] cannot be effected as part of a review pursuant to Article 61 [concerning the Constitutional Council], because the two reviews are different in kind;

choice of the Constitutional Council was at the origin of what is called in France *contrôle de conventionalité*. By that it is meant that the ordinary judges have the possibility of refusing to apply a French statute when they believe that it contradicts the legal principles of the Convention of Human Rights that France subscribed in 1950.

Taking into it all into account, it is possible to claim that the *status quo* preceding the reform of 2008 was based on a double mechanism of protection of the rights of the French citizens: on one side, the control *ex ante*, exercised by the Constitutional Council on request of the political minority inside the Parliament, able to cancel statutes before their promulgation, or more often to modify them or to offer constitutional interpretation of them; and, on the other side, the so-called *contrôle de conventionalité* by which the ordinary judges, and at the end of the day the highest jurisdictions[19], were able to refuse enforcing the French law in case of conflict among the internal statute and rights and principles protected by the European Convention.

Sometimes, this *status quo* has been presented as a good one, notably when it was necessary to defend France vis-à-vis criticisms of limited constitutional adjudication. But the present government thought that it was necessary to change the *status quo* and introduce the possibility for the citizens as litigants in a trial to call upon the protection of their (internal) constitutional rights vis-à-vis statute laws; breaking the dogma of statutes' sovereignty.

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7. It is therefore not for the Constitutional Council, when a referral is made to it under Article 61
of the Constitution, to consider the consistency of a statute with the provisions of a treaty or an
international agreement"

[19] The *Cour de Cassation* and the *Conseil d'état*, respectively the supreme courts of civil/criminal and administrative litigations.

9. With the help of the *organic law* it is possible to understand the basic mechanism that will regulate the new type of referral. The parties in a trial may ask the judge to send the Constitutional Council a preliminary question (*question préjudicielle*) in order to check the constitutionality of a statute that the judge needs to put into effect to adjudicate the conflict among the litigants or to convict the defendant in a criminal process. Let me first consider the steps of the procedure before commenting on them:

a. the judge cannot take the initiative (like in Italy or in Germany) to send the question *motu proprio*, she has to be asked by one of the parties, and only concerning the *right and liberties* covered by the *bloc de constitutionnalité*;

b. the judge accepting the request from the party has to produce arguments in order to *justify* it on the bases of three explicit criteria (*loi organique*: art. 23-2): I) the statute challenged has to be necessarily used in the adjudication of the trial – we can call it the criterion of relevance; II) the statute has not to have been considered constitutional if checked by the Constitutional Council in the *ex ante* procedure, but that clause can be bypassed in presence of "of new circumstances" (I'll come back on this important specification) – criterion of novelty; III) the question asked by the party has to be serious – criterion of non-futility;

c. if the judge accept the request her motivated preliminary question cannot directly reach the Constitutional Council, the reform introduces – again a difference from the Italian system – a filter between the ordinary judge and the organ in charge of constitutional adjudication: the request will be scrutinized by the two highest courts of the French judicial system, the Cassation Court and the Council of State, which have the task of verifying the fulfillment by the ordinary judge of the three mentioned criteria.

10. I'll come back to some other important procedural details of the organic law. Now I will comment on the aforementioned provisions. The need for the judge to produce reasons to accept the preliminary question as well as the circumstance that the parties (meaning their counsels) have to be at the origin of the "preliminary question" of constitutionality will have paramount consequences inside the French legal system. Until now, constitutional adjudication has been the exclusive field of a very limited number of specialists – essentially the members of the Constitutional Council plus some political authorities, their legal advisors and few academics interested in constitutional litigation (*contentieux constitutionnel*). Not only the public at large but also judges, counsels and law students had no practical interest in that technical discipline since in their activity as legal practitioners neither the judges nor the advocates were ever involved in constitutional litigation. The monopolistic mechanism of *saisine parlementaire* (the referral from the political minority in the Parliament) excluded all of them from the constitutional court cases. Before the reform, the Constitutional Council had held no hearings and no advocate had been involved in an adversarial procedure and decision. The new system of referral will have the effect of percolating the teaching and the culture of constitutional justice inside the entire legal system from the School of Law to the special school for the judges (the *Ecole Nationale de la Magistrature*)[20]. The Justice ministry is preparing teaching programs for the judges and the different bars are preparing similar programs for their members. In the future, constitutional law in France will become more similar to the teaching of this discipline in the US and in countries that have judicial review, since even if the ordinary judges

[20] It has to be brought to the attention of the reader that in France, like in most of the continental legal systems judges are civil servants hired by judges after the end of the Law School and a competitive exam.

will never be authorized to cancel a statute law, they will more and more be involved in the procedure that opens the door of the Constitutional Council.

11. Evidently it is possible and even likely that in the next few years judges will be reluctant to accept questions of constitutionality from the parties, it is also possible that the second filter represented by the highest jurisdictions, double checking the questions sent by the ordinary judges, will reduce the impact of the new mechanism opening up to the citizens access to the organ in charge of constitutional control of the acts of the Parliament. But the legal culture in France, dominated until now by the supremacy of the statute law will in any event be deeply modified. This is a sort of cultural revolution that in the long run can change the relationship of the French citizens to their constitution.

It is important in this context to notice that the organic law includes a provision that will certainly play an important role. The point is the following: the Cassation Court and the Council of State may use their power of filtering to keep the door of the Constitutional Council closed[21]. They could argue that the question sent by the ordinary judge has to be rejected since the statute was already examined by the Council or they may invade the task of the latter producing constitutional interpretations of the statute in question. To avoid that, the organic law says at the article 23-7: "The Constitutional Council gets a copy of each decision by the Council of State or the Cassation Court denying the referral to a preliminary question of constitutionality". This provision can work first of all as a disincentive over the highest courts to abuse their filtering power. Moreover, the

[21] The reasons of this double filter absent in Italy, Germany or Spain are not entirely clear; more than the alleged will to avoid an overloading of the Constitutional Council (the French justice have no clerks and it would be not difficult to hire a couple of them for each justice) they may be found in the will of the powerful French highest jurisdictions to have a say in the mechanism of referral coming from the ordinary judges.

Constitutional Council can certainly find a way in its control *ex ante* to reverse and quash the decision of the two highest judicial bodies.

12. Another provision of the organic law deserves to be highlighted. I said that in the *status quo* preceding the reform, the ordinary judge had no possibility of asking for control upon the status law, but she had instead the freedom, if asked by the parties, to avoid using a French statute if she believed that it was in contrast with the European Convention of Human Right. The fact that international law could bypass the French legal and constitutional system entirely became in the last years a reason of worry and of unease for the French government.[22] Now art. 23-2 disposes that if the party of the trial claims that a statute is contrary to the Convention and to the Constitution the judge must start first with the preliminary question of constitutionality before engaging in the possibility of suspending the application of the French statute on the basis of the Convention. This last legal remedy is still open but only after the decision of the Constitutional Council. It is pretty clear that here there is an attempt to reverse the decision of 1975 that gave to ordinary judges the "control of

[22] Very clear in this sense the declaration by the President Sarkozy in his speech on the occasion of the fifty anniversary of the Constitutional Council on November 3rd 2008: "J'ai ensuite prêté attention à l'argument de ceux qui estiment que l'exception d'inconstitutionnalité est devenue inutile, dès lors que le contrôle de conventionnalité des lois permet aux justiciables de faire valoir leurs droits fondamentaux en invoquant des conventions internationales ou européennes. A la réflexion toutefois, j'ai acquis la conviction que ces deux voies de droit n'étaient pas équivalentes. D'abord, je ne crois pas qu'il y ait une homothétie absolue entre les droits fondamentaux protégés par nos normes constitutionnelles et les droits fondamentaux protégés par les textes internationaux. Si le Conseil constitutionnel a cru pouvoir dégager le concept d'identité constitutionnelle de la France, c'est qu'il a eu conscience de cette différence. Ensuite, il est singulier d'observer l'ardeur de nos hautes juridictions à rappeler la suprématie absolue de la Constitution dans la hiérarchie des normes, sans être pour autant réellement dotées de mécanismes permettant de la faire respecter. Très franchement, et le Constituant l'a compris, je préfère que nos lois soient censurées sur le fondement de notre Constitution plutôt que sur le fondement de conventions internationales et européennes.

conventionality" and the will to once again place the French constitutional system and its supreme organ at the center of the mechanism of control on the acts of the Parliament.

13. The new referral will play a role also in the transformation of the Council into a true jurisdiction, and indeed the constitutional litigation starting in the ordinary courts may end up in the Council where there will be hearings like in a US Supreme Court. The art. 23-9 runs: "The parties will be able to present in an *adversarial procedure* their arguments. The hearings will be held in public ..." (italics mine). I reiterate that up to now the Constitutional Council had no hearings.

14. Having taken into account so far the important transformations introduced by 61-1 and by the organic law specifying it: a) the transformation of legal education because of the significant role that constitutional jurisprudence will play from now on, b) the direct involvement of the counsels and judges in the access to constitutional adjudication, c) the restoration of the French constitutional law at the center of the control over the statute laws and d) the transformation of the Council into a real Court of justice based on adversarial procedure, we need to ask two largely connected questions concerning the concrete implementation of the new system.

A) On one hand, we may want to ask what is in reality going to change vis-à-vis the *status quo* characterized by the *ex ante* control; B) on the other hand, we have to try to figure out how the new system of *ex post* adjudication will coexist with the traditional *ex ante* one, which will evidently survive and not be replaced at all.

As to the first point A), *prima facie* there will be a very limited room for preliminary questions if we consider that almost any significant statute has

been considered *ex ante* by the Constitutional Council since 1974. Undoubtedly, some few statutes avoided the constitutional scrutiny since the parliamentary opposition did not send them to the Council. Famously the statute banning religious symbols in public high school (incorrectly known as the statute forbidding the Islamic scarf) found approval in the Parliament both of conservatives and socialists. And it is pretty certain that in the next few years there will be a judge in France who sends that statute to the Constitutional Council. There are unquestionably also some rare statutes passed before 1974 that will be scrutinized *ex post* and declared contrary to the constitution. But all that will be a marginal increase of the caseload and a minimalist change in the real functioning of constitutional adjudication. The second question, B), is much more important. The French system of constitutional control seems to follow the Kelsenian model of a negative legislation. The task of the Council looks as that of a super judge in that rather than controlling the legality of the acts of the administration, it controls the compatibility of a statute, in its abstract phrasing, with the even more abstract text of the constitution. Evidently this conception of constitutional adjudication is a fiction. What the members of the Council have to do when they examine a statute *ex ante* is to anticipate the *possible* future concrete effects of it and intervene on the text of the statute to avoid that the anticipated consequences turn out to be an infringement upon the rights and liberties protected by the constitution.

With the provision of 61-1 the task of the Council will be inevitably modified and should become, over time, similar to the practice of the Italian Constitutional Court.

15. The Italian Constituent Assembly introduced in the Chart promulgated in 1948 an organ in charge of the guarantee of the constitution (see articles 134-137), but because of opposition by the social-

communist group and the upholders of the traditional doctrine of Parliamentary sovereignty, the Assembly was not able to come to an agreement concerning the specific mechanism of referral. In very general terms, the articles of the constitution refer vaguely to the Kelsenian model of constitutional syllogism. Only a few months after the enactment of the constitution, the Christian Democratic government was able to pass the equivalent of an organic law introducing the "exception of unconstitutionality"[23] implying the possibility for the judges (without any other filter) do send a statute, already existing in the legal system, to the Constitutional Court if it seemed to be in contradiction with the new republican democratic constitution. The question had to emerge from a case or controversy – from a trial for the adjudication of which the judge had to utilize the statute she considers of doubtful constitutionality. In this procedure of referral the judge *a quo* – at the origin of the request – has to suspend the trial and wait for the decision of the Constitutional Court concerning the constitutionality of the statute before again starting the trial – as it will be the case in France. The Court has the formal task of judging the statute as such and of giving a general answer that will be afterward applied to any similar situation. I need to remind that the Italian Constitutional Court is not an appellate court but a guardian of the constitution and has not to decide the case from which the question emerges. Nonetheless it is evident, reading the sentences of the Italian Court that the judgment about the constitutionality of the statute is made, very often, considering the problems that appear in the concrete application of the legislative norm, also considering the specific case the ordinary judge had in front of her when she sent the preliminary question. What I'm trying to say is that the crucial difference between the *ex ante*

[23] Constitutional law n. 1, February 9th, 1948.

control that has characterized the French Constitutional Council until now and the judgment *ex post* typical of most of the Italian constitutional decisions may consist essentially of the difference between the *anticipation* of the effects of the statute in question and the *consideration of the concrete effects* of the statute once enforced.

Undoubtedly, what is evident to someone used to the adjudication of the Italian Constitutional Court may be and will be for a while foreign to the French doctrine, more so by the way than to the members of the French Constitutional Council. It seems to me, in any event, that the door of the Council will be significantly more open than in the past only if the constitutional culture of the country will accept that the arguments to adjudicate a statute *ex ante* do not cover all the possible concrete consequences emerging from the application of the statute laws. It is only from this gap that a new form of constitutional adjudication can develop, supplementing the control *ex ante*, and that a statute, which was already scrutinized, can be sent again by the judges to the guardian of the constitution, since "new circumstances" (see the organic law, art. 23.1.2) may appear when the statute is applied and becomes part of the operating legal system.