Edited by Monika Florczak-Wątor

Judicial Law-Making in European Constitutional Courts

Comparative Constitutional Change

ROUTLEDGE

Judicial Law-Making in European Constitutional Courts

This book analyses the specificity of the law-making activity of European constitutional courts. The main hypothesis is that currently constitutional courts are positive legislators whose position in the system of State organs needs to be redefined.

The book covers the analysis of the law-making activity of four constitutional courts in Western countries: Germany, Italy, Spain, and France; and six constitutional courts in Central–East European countries: Poland, Hungary, the Czech Republic, Slovak Republic, Latvia, and Bulgaria; as well as two international courts: the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The work thus identifies the mutual interactions between national constitutional courts and international tribunals in terms of their law-making activity. The chosen countries include constitutional courts which have been recently captured by populist governments and subordinated to political powers. Therefore, one of the purposes of the book is to identify the change in the law-making activity of those courts and to compare it with the activity of constitutional courts from countries in which democracy is not viewed as being under threat. Written by national experts, each chapter addresses a series of set questions allowing accessible and meaningful comparison.

The book will be a valuable resource for students, academics, and policy-makers working in the areas of constitutional law and politics.

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Comparative Constitutional Change

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Contents

Figure

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Introduction

Monika Florczak-Wątor

Do constitutional courts (CCs) create the law or do they just apply it? Does the interpretation of the Constitution in the process of analysing the constitutionality of the law have a creative or purely reconstructive nature? Can the CC develop, correct, and supplement the law or should it limit itself only to the assessment of compliance with the patterns of control specified in the application? These are questions that have been raised in the literature for years and have not been answered exhaustively. Although CCs currently exist in most European States, the question regarding the extent of their judicial activities and their optimal position in the structure of States organized on the basis of the separation of powers still remains open.[1] A significant number of active CCs raises an additional important question: Is it possible to analyse previously mentioned problems in terms of comparative law in order to discuss specific (and if so, which) typical assumptions (phenomena or tendencies), or are there such significant divergences that CCs should be analysed separately?

The aim of this book is to analyse and describe the specificity of law-making for selected European CCs. Our understanding of the notion of law-making, which is the key to our research, is very broad. It includes the repeal, modification, and supplementation of the law by CCs within the scope – and as a consequence – of the examination of the compliance of the law with the Constitution. The above-mentioned concept of law-making is applied through the creative interpretation of law, including the interpretation of law in accordance with the Constitution and in a manner that is friendly to European Union (EU) law and international law, as well as through adjudication on constitutionality of law combined with the determination of the extent of the declared unconstitutionality and the legal consequences of the CC judgements. Moreover, CCs have normative competence

1 See e.g. Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008); Andrew Harding & Peter Leyland (eds.), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill Publishing 2009); Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press 2009); Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 816, 817–825.

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sensu stricto as they are entitled to issue internal rules concerning the organization of CCs, in particular with regard to procedural issues. The initial research hypothesis is the assumption that the CCs determine the shape of the law, not only by repealing unconstitutional norms from it, but also by modifying and supplementing those norms that remain in the legal order after the announcement of the ruling on their conformity with the Constitution or their partial unconstitutionality. Therefore, the judicial review would seem to position itself between law-making and law-application, while the CC is not only a negative but also a positive law-maker,[2] which requires a redefinition of its position within the system.[3] This is because, in our opinion, Hans Kelsen's description of CCs being linked to the term 'negative law-maker'[4] does not reflect the essence of the changes which a ruling on the unconstitutionality of the law involves. This is due to the finding that, at present, the effect of such a judgement increasingly relates not to the repeal of a law, but to an amendment of normative content of the reviewed provision. The constitutionality of a law is examined at the level of legal norms and these are not always *expressis verbis* articulated in the wording of the legal provision. Often the provisions are not contested in their entirety, but only to a certain extent or in terms of a specific meaning, and therefore, if they are found to be unconstitutional, they lose their binding force only to a certain extent. Such a derogation is usually not expressed in the wording of a statute which, as such, does not change. Reconstruction of the normative content of a statute after issuing CC ruling declaring the partial unconstitutionality of the statute often leads to the conclusion that this content has not been reduced, but, on the contrary, extended to cover issues that have been previously excluded from the scope of the relevant regulation.

In our research, the results of which we present in this book, we analyse twelve CCs, ten of which are national CCs operating in European States that have adopted the model of the centralized control of the constitutionality of law, and the other two are international courts protecting the legal orders created at the

2 See Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (Cambridge University Press 2011); Anna Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4 *Cambridge Journal of International and Comparative Law* 423, 424–434; Stone Sweet (n 1) 827–828.

3 As Alec Stone Sweet indicated: 'constitutional courts ought to be conceptualised as specialised legislative organs, and constitutional review ought to be understood as one stage in the elaboration of statutes'. Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000) 61. Referring to this opinion, Wojciech Sadurski added: 'This seems quite obvious – although not to many legal scholars who often prefer to perceive constitutional courts as judicial organs; following the legal fiction propounded by the courts themselves, they tend to situate them within the judicial branch within the general tri-partite scheme of separation of powers'. Sadurski (n 1) 87.

4 See Hans Kelsen, *Allgemeine Staatslehre* (J Springer 1925) 229–231; Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' in Vereinigung der Deutschen Staatsrechtslehrer (ed.), *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol 5 (De Gruyter 1929) 30–32; Friedrich Koja, *Hans Kelsen order Die Reinheit der Rechtslehre* (Böhlau Verlag Wien 1988) 131–133.

European level. Within the first group, the analysis takes into account both the CCs established in Western European countries just after the Second World War (Germany, Italy, Spain, and France), as well as CCs established in Central and Eastern European countries after the fall of communism, including the Visegrad countries (Poland, Hungary, the Czech Republic, and the Slovak Republic), the Baltic States (Latvia), and the Balkan States (Bulgaria). Therefore, we have considered those countries that have a tradition of CCs having functioned in a stable democracy dating back several decades, as well as those in which CCs are relatively young institutions that are still building their authority and real constitutional position. We have also included in our research those countries in which the CC system is currently in a constitutional crisis and in which the law-making of the CCs is beginning to threaten democracy and the rule of law.[5]

In addition to the national CCs, as already mentioned, we have analysed two international courts operating within the structures of European integration; namely, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The inclusion of these courts in the category of CCs may seem controversial, since until now the concept of the CC has referred to the national courts that protect the supremacy of the Constitution and that have the competence to review the constitutionality of the law. Although neither the Council of Europe nor the EU are federal States, the constituent documents (the European Convention on Human Rights (ECHR) and the EU Treaties) perform a similar function in these organizations to those of national constitutions within State organizations.[6] These two international courts protect the standards arising from these documents and, likewise, perform functions similar to those performed by national CCs. Furthermore, in countries where traditional CCs have found themselves in crisis (Poland and Hungary), the role of the guardian of constitutional standards has been taken over precisely by the above-mentioned international courts. This is perfectly illustrated by the situation in Poland, where the number of legal questions and constitutional complaints filed with the CC has declined dramatically during the last three years,[7] while the number of complaints

5 On the constitutional crisis in Poland see: Piotr Radziewicz & Piotr Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016* (Wolters Kluwer Polska 2017); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). On the constitutional crisis in Hungary see Peter Wilkin, *Hungary's Crisis of Democracy: The Road to Serfdom* (Lexington Books 2016).

6 See Francis Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in Deirdre Curtin, Daniel O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (Butterworth Dublin 1992) 25, 25; Anthony Arnull, 'A Constitutional Court for Europe?' (2003–2004) CYELS (*Cambridge Yearbook of European Legal Studies*) 2; Bo Vesterdorf, 'A Constitutional Court for the EU?', IJCL (*International Journal of Constitutional Law*) (2006) 4, 607, 607; Lukas Bauer, *Der Europäische Gerichtshof als Verfassungsgericht?* (Nomos 2008) 160–161.

7 See the Report of the Stefan Batory Foundation Legal Experts Group 'Functioning of the Constitutional Court 2014–2017' available in Polish at http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Funkcjonowanie%20Try

on constitutional matters submitted by citizens to the ECtHR and the corresponding preliminary questions referred by the courts to the CJEU have increased. Since the allegation of a breach of constitutional standards cannot be formally raised before such international bodies, it is transformed into an allegation of a violation of the ECHR or EU standards. However, the same standards are still at stake as regards, for instance, non-discrimination, the protection of fundamental rights and freedoms, the independence of the judiciary and the separation of powers. Therefore, there is no doubt that in those States where the CC is being marginalized or is even actually disappearing, the CCs' role is being taken over by international courts, which are the guardians of European standards developed on the basis of constitutional standards common to the Member States associated with the given organization.

Each chapter of this collection of studies is devoted to one specific CC. These chapters have a similar structure and take into account similar research problems. The concluding comments concerning the law-making activities of all CCs covered by the research are included in the last chapter. The authors of particular chapters are all researchers from the countries of the CCs whose law-making activity they have analysed. First, they present the legal basis for the functioning of a respective CC, the evolution of its constitutional position, its competencies, as well as the social trust it enjoys and the social acceptability of its rulings. Subsequently, the individual chapters present the issue of law-making of the particular CC, referring to specific examples from rulings in which both constitutional law-making and statutory law-making were considered for the national CCs functioning in the individual countries. In both cases, the aim was to demonstrate how CCs modify or supplement constitutional and statutory provisions by applying various methods of interpretation, and how, when a ruling declares unconstitutionality, it can result in large and quality-diversified changes in the content of the examined provision. The authors of the individual chapters also mention specific examples of CC decisions containing a law-making component, as well as the consequences of these decisions for the applicable legal order. The specific chapters also present the reactions of various State authorities, particularly the courts, to the law-making activity of the CCs, as well as the position of the legal science in this respect. It is worth noting that the judicial activism of the CCs in many countries has been, and continues to be, the main cause of conflicts with other courts, especially the Supreme Courts.[8] The studies contained in this collection

bunalu%20Konstytucyjnego.pdf (30 November 2019). The synthesis of this report is available in English at http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Functioning%20of%20the%20Constitutional%20Tribunal%202014.pdf (30 November 2019).

8 See e.g. Leszek Garlicki, 'Constitutional Courts Versus Supreme Courts' (2007) 5 *International Journal of Constitutional* 44, 44–68; Law Rafał Mańko, '"War of Courts" as a Clash of Legal Cultures: Rethinking the Conflict between the Polish Constitutional Tribunal and the Supreme Court Over "Interpretive Judgments"' in Michael Hein, Antonia Geisler, Siri Hummel (eds.) *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang, 2014) 79, 79–94.

also demonstrate the mutual inspirations of the CCs regarding the development and supplementation of the law. This is also an important element of their law-making activity. The sources of inspiration for CCs are not only the rulings of the CCs operating in other countries, but also the judgements of the above-mentioned international European courts, which undoubtedly contributed to the harmonization of European standards with regard to the protection of human rights and systemic matters. Yet, both the ECtHR and the CJEU benefit from European constitutional traditions, which the conventional CCs largely create and develop in their rulings. The problem of these interactions between the constitutional and national courts, which is frequently described in the literature before referring to the concept of judicial dialogue, is discussed in greater detail in some of the chapters.

In order to address the issue of the CCs' law-making in relation to more European countries, it was necessary to significantly limit the size of particular chapters. Therefore, many specific problems have only been signalled or briefly elaborated (without going into detail). Moreover, we do not consider further some theoretical problems that are directly connected with the topic of our research, such as the issue of legitimacy of CCs,[9] since our aim was mainly the analysis, description and systematic categorization of different law-making techniques applied in the case-law of European CCs. We hope the results of our research will enrich the discussion on these theoretical issues with new relevant findings.

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9 On the issue of legitimacy of CCs see e.g. Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2003); Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in Wojciech Sadurski, Martin Krygier & Adam Czarnota (eds.), *Rethinking the Rule of Law in Post Communist Europe: Part Legacies, Institutional, and Constitutional Discourses* (Central European University Press 2005) 25, 25–60; Sadurski (n 1) 27–63; Gamper (n 2) 436–440; Rosenfeld & Sajó (n 1) 828–829.

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Part I

Western European Constitutional Courts

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1 The French Constitutional Council as a law-maker: from dialogue with the legislator to the rewriting of the law

Julien Mouchette

The concept of the Constitutional Court as a 'negative legislator,' formulated by Hans Kelsen,[1] is well known to jurists. In the Kelsenian model, the Constitutional Court exercises a power of censorship of the law by annulling unconstitutional law. In this way, it exercises a legislative function, but only a 'negative' function: it undoes the law without being able to make it. Georges Vedel, President of the French Constitutional Council (CC), once declared that 'the CC has the right to use erasers, not to use pencils.'[2] In other words, the CC does not participate in the drafting of a bill and simply acts as a 'negative legislator,' a role described by the dyad 'annulment/rejection.'

Today, however, in countries governed by the rule of law, constitutional courts influence the legislative process as to the content, and also the procedure. The difference in nature between legislative and judicial functions seems to be overshadowed by the activity of the Constitutional Court. Undoubtedly, the Kelsenian proposition of the negative legislator is simply no longer appropriate as a description of the current function of constitutional courts.[3] Indeed, it rules on the effects over time of an invalidation of the law, as well as on its material scope. It sets out in directives the manner in which a law is to be interpreted and applied. Sometimes it provides a legal framework for future action by the legislator. Therefore, the Council intervenes in the optimization of the legislative process. By its very nature, the constitutionality review generates an intervention, sometimes a far-reaching one, in the exercise of the legislative function.

The French Constitutional Council (CC) is consistent with this observation. The existence of an *ex ante* constitutionality review necessarily has an impact, upstream, on the law-making process. This phenomenon can only be reinforced by the implementation of an *ex post* constitutionality review (*QPC*) in 2008. On its own initiative, the CC has developed methods to escape the constraints of this dyad, 'annulment/rejection.' It is concerned to 'save' the law from annulment.

1 Hans Kelsen, 'La garantie juridictionnelle de la Constitution' (1928) *RDP* (*Revue du droit public*) 252.
2 Georges Vedel quoted by Robert Badinter, 'Du côté du Conseil constitutionnel' (2002) *RFDA* (*Revue française de droit administratif*) 208.
3 Christian Behrendt, *Le juge constitutionnel, un législateur-cadre positif* (Bruxelles Paris Bruylant LGDJ, 2006) 537.

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However, very often these methods lead it to the verge of rewriting the law. But the question here is about the intensity of this influence.

The purpose of our study is to present these methods and to show how the Council's normative function is expressed and how it relates to the normative function of the legislator and government authority from a practical point of view. Indeed, the introduction of a constitutionality review in France in 1958 strengthened the authority of the Constitution and gave rise to case law with important consequences on the way in which the legislator makes law. However, not all laws are subject to such control; some have been excluded by the CC itself.

1 Exclusion of certain laws from constitutional review

In accordance with Article 61 of the Constitution, Institutional Acts before their promulgation and Rules of the assemblies (National Assembly, Senate, Congress, High Court) before their enforcement are automatically forwarded to the CC, which decides on their conformity with the Constitution within one month (a period that may be reduced to eight days in cases of emergency, at the request of the Government). Apart from this systematic control, which is mandatory, only ordinary laws passed by Parliament can be referred to the Council a priori and a posteriori in order for it to verify their conformity with the Constitution.[4] Indeed, the CC has declared itself incompetent with regard to constitutional laws and laws adopted by referendum.

First, with regard to constitutional amendment, the question of their control was raised in the late 1980s. In a political context marked by the constitutional revisions involved in strengthening European integration, the doctrine has occasioned a lengthy debate on the question of a possible review of the constitutionality of constitutional laws, following a Council decision of 2 September 1992 on the Treaty on European Union known as the Maastricht Treaty.[5] By this decision, the Council established the principle of its jurisdiction over constitutional laws and then specified the points on which its control could, if necessary, focus. While the limits on the periods for revision do not permit a substantive examination, the limit on the republican form of government implies that the Council must control the very content of the constitutional laws adopted. The extent of its control here depends on its conception of the 'republican form': is it 'only' to block the return of the monarchy or, in a broader and riskier approach, to sanction

4 In addition to the statutory laws, it is worth adding the special case of so-called 'country laws' (*lois de pays*), which are legislative norms adopted by the deliberative assembly of New Caledonia on the basis of Article 77 of the Constitution.

5 Decision 92–312, of 2 September 1992, § 19. Everything started from the phrase 'under the condition'. In this decision, the Council ruled that 'the constituent power is sovereign under the condition, on the one hand, that there are limitations on the periods during which a revision of the Constitution cannot be initiated or continued, which result from Articles 7, 16, and 89 paragraph 4 of the constitutional text, and, on the other hand, that the requirements of the fifth paragraph of Article 89, which stipulate that the republican form of government cannot be revised, are respected'.

any constitutional law that aims to call into question respect for certain values or principles deemed consubstantial with the republican form (secularism, solidarity, separation of powers, etc.)? However, whatever the approach adopted, the question of the Council's legitimacy to censor the revision of the constitutional text by the authors of the Constitution comes into sharp focus here. In order to avoid the awkward position in which this alternative would place it, the Council resolved to renounce such control by declaring itself incompetent in a decision of 26 March 2003.[6] At the source of this decision were some senators who contested the amendment of Article 1 of the Constitution by the addition of a reference indicating that the organization of the Republic is 'decentralized.' In their view, this reference directly challenged a principle enshrined in the same article according to which the Republic is 'one and indivisible.' This was a highly political issue that could only embarrass the members of the Council. Indeed, it should have determined whether the 'republican form' implied a unitary organization of the Republic or whether decentralization was compatible with the republican form. The difficulty that this posed to the members of the Council can be seen in the speed of its response. Only eight days after being referred to it, the Council declared that it 'does not have the power to rule on a constitutional review under Article 61, Article 89 or any other provision of the Constitution.'[7] However, the debate in France on the control of constitutional laws is not definitively over. Indeed, the contentious immunity of these laws is still being discussed by academic authors in the light of developments in European law,[8] and in particular of the model of what exists abroad.

Second, with regard to referendum laws – that is, laws adopted by the people through referendums – the CC decided not to control them, regardless of their purpose. This solution results from its decision of 6 November 1962 concerning the law of 28 October 1962 amending the method of electing the President of the Republic.[9] This solution has since been confirmed by the Council in its decision of 23 September 1992.[10] The lack of constitutionality review of the referendum law is due to the fact that it is the 'direct expression' of the sovereign, the people. These two decisions of 1962 and 1992 introduced a hierarchy giving referendum law a pre-eminent place over parliamentary law. It was in its 1992 decision that the Council clarified its reasoning. In 1962 the law submitted to the referendum was a constitutional law. However, the referendum law of 1992 was not a

6 Decision 2003–469 DC, of 26 March 2003 on the constitutional amendment of the decentralized organization of the Republic.

7 Decision 2003–469 DC, *a.m.*, § 2.

8 See Philippe Blachèr, 'Le contrôle par le Conseil constitutionnel des lois constitutionnelles' (2016) *RDP* 545; Joel Andriantsimbazovina & Helene Gaudin 'Contrôle de constitutionnalité des lois constitutionnelles et droit européen: débat sur une nouvelle piste' (2009) 27 *Cahiers du Conseil constitutionnel* 52.

9 This was one of the decisions that raised the most virulent criticism of the CC, with the then President of the Senate, Gaston Monnerville, going so far as to state that 'the CC had just committed suicide' (*Le Monde*, 8 November 1962).

10 Decision 92–313 DC of 23 September 1992, *a.m.*

constitutional law, but an ordinary law adopted by referendum. The Council therefore distinguished between national sovereignty according to the modes of expression. Parliamentary laws are subject to control because they may not respect the will of the sovereign people: a question that, by definition, does not arise for referendum laws, since the people express their will without intermediaries. The distinction between the people as legislator and the people as sovereign did not convince the Council. This position is motivated by a lack of legitimacy to examine the legislative work of the sovereign people. Already heavily criticized for its examination of the work of the people's representatives, the Council declined to provoke strong popular protests.[11] This decision was extended to the field of post-clearance control by a *QPC* decision of 25 April 2014.[12]

In summary, the Council only reviews laws – statutory or institutional acts – adopted by Parliament, and not those adopted by the French people following a referendum, which constitute a direct expression of national sovereignty. If we can observe a 'dialogue' between the Council and Parliament, then it must be said that the sovereign people, as legislators, escape this dialogue, possibly for the better.

2 The Council's methods of influence on the law-making process

2.1 The Council's recommendations to correct or complete the law

Unlike the Council of State, which has an advisory function, the CC, contrary to its name, does not exercise any advisory functions. However, within its litigation function, the Council may recommend to the legislature that it adopt a new provision in accordance with the Constitution or that it take into account its indications or interpretations in the future. The particularity of these counsels here is that if the legislator does not comply with them, it accepts the risk of being censored. Is this really still advice?

This is what doctrine has sometimes called *le contrôle à double détente* – two-pronged control.[13] The method is simple. First, the Council declares certain provisions of a law

11 Dominique Rousseau, Pierre-Yves Gahdoun & Julien Bonnet, *Droit du contentieux constitutionnel* (Paris LGDJ 206) 157.

12 Decision 2014–392 *QPC* of 25 April 2014. Despite its coherent logic, this position is hampered by the constitutional revision of 4 August 1995, which broadened the scope of the legislative referendum under Article 11 of the Constitution to include 'any draft law on reforms relating to the nation's economic or social policy and the public services that contribute to it'. During the debates, the constituents deliberately rejected an amendment organizing a prior check on the constitutionality of the referendum bill on the grounds that its adoption would make the revision lose all relevance. Therefore, the interest of the revision – extending the scope of referendum laws – is clearly to build a legislative space free from any control and, in particular, from the control of the constitutional judge. Since this revision, a government, uncertain of the constitutionality of its plans, can therefore avoid both Parliament and the CC by legislating directly by referendum.

13 Guillaume Drago, *Contentieux constitutionnel français* (France University Press PUF 2009) 412.

to be unconstitutional, which makes it impossible for it to be promulgated. In doing so, it explains why these articles of law are unconstitutional but also explains how parliamentarians must ensure that these provisions of the law are in conformity with the Constitution. Second, Parliament decides to legislate again on the issue that has been censored by the CC. Moreover, the reviewed statute may, at the request of the President of the Republic, be discussed again by Parliament, for example, in order to draw conclusions from a decision of the Constitutional Court.[14] The parliamentarians' freedom of discrimination is then severely restricted, because if the CC is again so minded, it will be able to verify whether the Parliament has followed its 'recommendations.' If this is not the case, the Council will again annul the provisions, which will be deemed unconstitutional. This control is permitted by Article 61 of the Constitution, which in fact does not prohibit the possibility of referring the matter twice to the Council before the Act is promulgated.[15] Only the presidential decree promulgating the Act concludes the legislative procedure and in principle prohibits any preventive control of its conformity with the Constitution.

Here, in addition to the legal and symbolic weight of the power to repeal the law at the judge's disposal, there is also the corrective scope of his office. Thus, for example, in a decision of 29 December 1983,[16] the Council ruled against the provisions of a law concerning the procedures for carrying out a search for tax reasons, considering that the law grants exorbitant powers to the tax authorities and thus undermines personal security, the inviolability of the home, and respect for private life. But at the same time, the CC indicates to parliamentarians in which direction the text of the law should be corrected. In particular, the judicial judge must be able to review the merits of the tax administration's investigations, specifically that the judge be present during searches. A year later, a new law was again submitted to the CC, which organized tax searches. It noted that the legislator had rewritten the law in accordance with the 'explicit requirements' of the previous decision.[17] Therefore, not surprisingly, it ruled that the new wording of the law was in line with the Constitution. While the position here is not open to question in terms of the law and respect for the guarantees attached to freedoms, it must be admitted that the CC here 'held the pen of Parliament.'[18]

14 Article 10, paragraph 2 of the 1958 Constitution.

15 The CC, which had to review a law resulting from a new deliberation by Parliament, at the request of the President of the Republic, on a text that had been partially censored, considered that, 'in this case, it was not a question of voting for a new law, but of the intervention, in the current legislative procedure, of a complementary phase resulting from the constitutionality review'. Consequently, the constitutionality review is presented by the CC itself as a phase of the legislative procedure, insofar as this procedure is only perfect from the moment the law is promulgated (Decision 85–197 DC, of 23 August 1985).

16 Decision 83–164 DC, of 29 December 1983.

17 Decision 84–184 DC, of 29 December 1984.

18 Xavier Vandendriessche, 'Loi immigration et asile, une Nouvelle Occasion Manquée?' (2018) *AJDA* (*Actualité Juridique Droit Administratif*) 2234.

This dialogue with the legislator can now result from the combination of *ex ante* and *ex post* controls. A provision that is censored in the framework of a *QPC* is rectified by a law, which will then be referred to the Council, either immediately after its adoption or possibly once it has entered into force. More than ever, the Council is therefore called upon to provide the legislator with instructions for use.

The amendment of Article L 512–1 relating to the conditions under which the Administrative Court rules on an appeal against a requirement to leave French territory notified to a detained foreigner (hereinafter *OQTF*) illustrates this dialogue. Before the amendment of the Article, the legislator had allowed the foreigner in detention a total period of five days to file his appeal against the requirement to leave French territory and the judge to rule on it. In a *QPC* decision of 1 June 2018,[19] the Council ruled that the legislator had not struck a balanced conciliation here between the right to an effective judicial remedy and the objective of avoiding the placement of the foreigner in administrative detention at the end of his sentence. The legislator drew the consequences from this decision by amending the Act two months later.[20] It now provides that, when it appears, during the proceedings, that the detained foreigner is likely to be released before the judge rules, the administrative authority shall inform the president of the administrative tribunal or the designated magistrate who decides on the appeal against the *OQTF*, within eight days of the court being informed by the administration. Having been alerted to this amendment to the Act, the Council, in the context of 'two-pronged control,' welcomed the amendment, in its decision of 6 September 2018.[21]

The legislator is also sometimes invited by the CC not to correct but to amend a legislative provision by adopting another provision, sometimes by setting a time limit for it.[22] The Council must still declare the norm in conformity with the Constitution, but enjoins the legislator to intervene to correct the law before it becomes unconstitutional, and attaches a 'decision of appeal to the legislator' to it.[23]

For example, the Council ruled that the provisions of the Orientation and Programming for Justice Act relating to local jurisdiction were in conformity with the Constitution. However, on that occasion, it also specified in paragraph 15 of its decision of 29 August 2002 that, 'on the date on which the CC decides on the law referred to it, the legislator has not adopted any provision relating to the status of members of local courts; that, consequently, in the silence of the law on the

19 Decision 2018–709 *QPC*, of 1 June 2018.

20 Act No. 2018–778 of 10 September 2018 for controlled immigration, effective asylum, and successful integration.

21 Decision 2018–770 DC, of 6 September 2018.

22 The examples given are taken from Jean-Luc Warsmann's article 'La place du Conseil constitutionnel dans les institutions de la Ve République' in *Cahiers du Conseil constitutionnel*, series 2009 (50th anniversary symposium, 3 November 2009), URL: conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/la-place-du-conseil-constitutionnel-dans-les-institutions-de-la-ve-republique#_ftn16.

23 Dominique Rousseau, *La justice constitutionnelle en Europe* (Paris Montchrestien 1998) 104.

entry into force of its Title II, local courts may be set up only once a law setting the conditions for appointment and the status of their members has been enacted.'[24] In this paragraph, the CC invited the legislator to adopt a law on the conditions for the appointment and status of local judges, which the legislator did six months later.[25]

This decision by the CC is not only an invitation to take over the legislative work, as in the previous decisions mentioned. It is also an indication of the forms that future legislative provisions will have to take in order to be in conformity with the Constitution. Indeed, the CC specified that 'this law must include appropriate guarantees to satisfy the principle of independence, which is inseparable from the exercise of judicial functions and the capacity requirements arising from Article 6 of the 1789 Declaration.' It was on the basis of these capacity requirements stemming from Article 6 of the Declaration of the Rights of Man and of the Citizen that the CC, its attention subsequently drawn to the Institutional Act on Local Judges, censored a provision allowing a person who had performed functions involving responsibilities in the administrative, economic or social field to become a local judge.[26]

There are several examples in constitutional case law of this second form of dialogue, which consists in formulating normative indications on the future provisions that the legislator would like to adopt in a matter. Some authors see it here as a manifestation of a 'close dialogue'[27] between the Council and Parliament.[28] But how can we see it as a dialogue, when the Council has the power of the final word? On the other hand, this is the case with the modulation of the effects over time of the decision, which allows the CC 'both to set the date of repeal and to postpone its effects in time and to provide for the questioning of the effects that the provision produced before the intervention of this declaration.'[29] In other words, it is divided into two variants: the postponement of the date of entry into force and the modulation of the temporal effects of the decision. They both relate to positive action by the Constitutional Court in that the former can change the general scheme of the law and the latter can increase the pressure on the legislator to change the state of existing law.

2.2 The formal rectification of a legislative provision 'by consequence'

The CC may rule that the entire text is not in conformity with the Constitution or that the law contains unconstitutional provisions that are inseparable from the rest

24 Decision 2002–461 DC, of 29 August 2002.
25 Institutional Act No. 2003–153 of 26 February 2003 on local judges.
26 Decision 2003–466 DC, of 20 February 2003.
27 Georges Bergougnous, 'Le Conseil constitutionnel et le législateur' (2013) 38 *Nouveaux cahiers du Conseil constitutionnel* (le Conseil constitutionnel et le Parlement). URL: conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-conseil-constitutionnel-et-le-legislateur.
28 Warsmann (n 22).
29 Decision 2010–108 *QPC*, of 25 March 2011, § 5; Decision 2010–110 *QPC*, of 25 March 2011, § 8.

of the law. In both cases, under Article 22 of the Organic Ordinance, the entire law cannot be promulgated. However, decisions of total nonconformity are uncommon, which is not surprising.[30] The Council is proceeding cautiously. Only about ten decisions of total nonconformity have been adopted. Some were for procedural reasons,[31] others for substantive reasons.[32] In these two situations, the legislator was compelled to resume examination of the law and adopt a text in accordance with the directives sought by the CC. However, as we have seen before, the new amended text is not immune to a second referral, although in practice the CC has never censored the amended text a second time.

Most often, declarations of unconstitutionality concern only a part of the law, a few provisions. Under Article 23 (1) of the Ordinance of 7 November 1958, the President of the Republic may either promulgate the law without the censored provision(s) (more frequently) or request a new discussion from the Chambers.[33] In addition, he may, in accordance with Article 23 of the Ordinance, have new provisions substituted for unconstitutional provisions.[34]

However, there is a particular case where the CC may have to reclassify the title of a law after partial censorship of the law. Since 2007, the CC has itself participated in the implementation of its decisions on partial unconstitutionality by coordinating and rectifying certain statutory provisions kept in the legal system, in order to ensure that the text is legible. This is called the 'rectification of the law by consequence.'[35] Already in 2007, the CC had rectified the title of the law referred to it as a result of the declaration of unconstitutionality of one of its provisions.[36] After it was established that one of the provisions of the referred bill was unconstitutional, changing the spirit of the bill, it decided 'accordingly' to change its title. Subsequently, it proceeded for the first time to rectify a statutory provision as a consequence in the context of the constitutionality review of organic laws.[37] It has since been transposed into the constitutionality review of statutes,[38] as well as the priority preliminary ruling on constitutionality (*QPC*).[39]

30 Jean-Marie Garrigou-Lagrange, 'Les partenaires du Conseil constitutionnel ou de la fonction interpellatrice des juges' (1986) *RDP* 664.
31 Decision 79–110 DC, of 24 December 1979.
32 Decision 81–132 DC, of 16 January 1982.
33 Ordinance No. 58–1067 of 7 November 1958, constituting the Institutional Act on the CC.
34 It is a choice of the President of the Republic, which is not free in the sense that it requires a countersignature. This provision of Article 23 (1) is to be read in conjunction with Article 10 (2) of the Constitution (possibility of requesting a new deliberation). In 1985, the CC considered that this new reading procedure of Article 23 (1) was only one of the modalities of the second deliberation of Article 10. Therefore, for the CC, these two procedures are equivalent.
35 See Maxime Charité, 'Quand le Conseil constitutionnel réécrit la loi. À propos de la rectification d'une disposition législative par voie de conséquence' (2018) *AJDA* 261.
36 Decision 2007–546 DC, of 25 January 2007.
37 Decision 2007–559 DC, of 6 December 2007.
38 Decision 2009–588 DC, of 6 August 2009.
39 Decision 2012–250 *QPC*, of 8 June 2012.

These corrections do not concern the substance, but only the form of the bill. To date, the Council has not used this litigation technique to remedy material mistakes made by the legislator. These corrections are therefore limited in scope. The rewriting of one or more statutory provisions is done solely in order to ensure coordination and readability of the provisions retained in the legal system.[40] Otherwise, they would be tantamount to a manifestation of an authentic power to make the law, or even to replace the legislator with the CC. However, as soon as it became necessary, the Council issued a reminder that it does not have the power to make changes to the law. Thus, for example, in a decision of 6 August 2009, before which the Accounts Settlement and Management Report Act for 2008 was submitted, it recalled that it was not its responsibility 'to make the corrections to the Settlement Act requested by the applicants.'[41]

When it rectifies 'by consequence,' the Council corrects only formal errors of the legislator – editorial clumsiness or the consequences on the drafting of the law of a decision of unconstitutionality. For example, in its decision of 6 August 2009, it declared a provision of the law unconstitutional as the legislator referred to the wrong paragraph of an article of the Labour Code. It went on to say 'accordingly' that the words in the law that referred to the wrong article must be replaced by the words referring to the right article. Another example is found in its *QPC* decision of 8 June 2012, in which a comma that the Council decided to delete was replaced with 'and.'[42]

2.3 Attempts to remake the law: 'reservations of interpretation'

Among the techniques developed by the Council to avoid the stark alternative between censorship and conformity, it is worth focusing on the so-called 'interpretation reservations' technique. This allows the Council to declare a provision to be in conformity with the Constitution provided that it is interpreted or applied in the manner it indicates. This technique makes it possible to validate a provision, which, without this reservation, could or should be censored.[43] Through this technique, the Council 'frames and supervises the conditions for implementing the law, thus completing the intervention of the legislator.'[44]

Throughout case law, three types of interpretative reservations have been observed: neutralising reservations, which eliminate possible interpretations that would be contrary to the Constitution; directive reservations, which include a prescription for the legislator or a State authority responsible for the application of the law; and constructive reservations, when the Council adds to the law to bring it into

40 Michel Verpeaux, *La QPC* (Paris Hachette 2013) 118.
41 Decision 2009–585 DC, of 6 August 2009, § 7.
42 Decision 2012–250 *QPC*, of 8 June 2012.
43 See Alexandre Viala, *Les réserves d'interprétation dans la jurisprudence du Conseil constitutionnel* (Paris LGDJ 1999) 336.
44 Bertrand Mathieu, 'Le Conseil constitutionnel "législateur positif". Ou la question des interventions du Juge Constitutionnel Français dans l'exercice de la fonction législative' (2010) *RID comp.* (*Revue internationale de droit comparé*) 520.

conformity with the Constitution. It should be noted that in its comments on its decisions, the CC only partially uses this classification. Moreover, as we can see, these constructive reservations are also neutralising in nature: classifications must be assessed flexibly, since the different categories of reservations can, in reality, overlap.

The CC's first recourse to the interpretation reserve technique took place in 1959 in a decision on the rules of procedure of the National Assembly.[45] The 1980s saw a rapid rise in interpretation reservations due to political changeovers and the legal crisis. The technique has developed, especially since the decisions on the security and freedom law of 20 January 1981[46] and on the law on press companies of 11 October 1984.[47]

In practice, these reservations are of great importance. They appear in about a quarter of the decisions and often settle very important points of law. Moreover, they allow the CC not to be locked into a binary choice between censoring the law or rejecting the appeal. The interpretation reservation is the expression of the general power of interpretation that is included in the constitutionality review operation. It constitutes a 'rescue' procedure, which makes it possible not to censure a legal provision that hypothetically could or should be censored.

It is a technique with many advantages when the control exercised by the CC is an *ex ante* review – which means abstract (i.e. independent of any concrete dispute). The CC's attention is drawn to a law that has several possible applications. It must therefore identify, in order to prohibit them, those law enforcement scenarios that are subject to constitutional requirements. This is a work of anticipation; the reservation of interpretation contributes to better legal certainty insofar as it settles upstream questions of application of the law, which are of a constitutional nature; on the political level, the technique of reservations makes it possible to avoid too brutal a conflict with the Government and with the majority of Parliament, which voted for the law, while giving satisfaction to the members who oppose it. For example, with regard to the personalized autonomy allowance, a social assistance benefit distributed by local authorities, the law gave a Commission a decision-making role in an area that concerns the free administration of local authorities. The legislator had remained unclear about the composition of the Commission, indicating only that the Commission was 'notably' composed of general councillors. The Council issued a reservation that 'in particular' meant 'majority,' in accordance with the parliamentary debates.[48]

However, some observers may have found the power of interpretation given to the CC in this way exorbitant. The criticism mainly concerns the so-called 'constructive' reservations, i.e. those in which the Council adds to the law to bring it into line with the Constitution. These types of reservations are no longer an expression of the general power of interpretation that is included in the constitutionality review process. In this type of reservation, the Council '[adds] to the text what it lacks to be in conformity,

45 Decision 59–2 DC, of 24 June 1959.
46 Decision 80–127 DC, of 20 January 1981.
47 Decision 84–181 DC, of 11 October 1984.
48 Decision 2001–447 DC, of 18 July 2001.

under the guise of interpreting it.'[49] The positive nature of this technique is obvious, given that the reservations of interpretation are 'at the limit of rewriting'[50] the law.

However, and this is the problem, the Council sometimes rewrites the law by adopting one of these interpretative reservations in a way that is contrary to the legislator's intentions.

One of the most obvious examples of this is the Council's decision on the Civil Solidarity Pact Act.[51] In this Act, the legislator created the Civil Solidarity Civil Partnership (PACS), which is defined as an agreement between two natural persons of full age, of different sex or of the same sex wishing to organize their life together. Very close to the features of marriage, this contract was an initiative of the government towards people of the same sex so that they could organize their lives together. However, at no time in the Act is there any mention of a couple's life as a condition for such a convention. In this respect, PACS thus comes closer to a pact of common interest between two people, regardless of their sex. The signing of this pact therefore consisted, at least, of two people pooling goods for the purpose of a community of life, regardless of whether or not sexual relations existed. In this decision, the Council redefined the text as establishing a contract for a community of life, in particular and implicitly, in sexual terms, which was obviously not part of the voted text or the parliamentary debates.[52] In this way, the CC has rewritten many of provisions of the Act, which can hardly be applied without reference to the Council's decision.

However, according to Article 62, paragraph 3, of the Constitution, 'no appeal shall emanate from the decisions of the CC. They shall be binding on public authorities and on all administrative authorities and all courts.' This authority focuses on the operative part of the Council's decisions as well as on the 'grounds that provide the necessary support and constitute the very basis for them.' Reservations are the necessary support for a decision taken in the context of an abstract constitutionality review (i.e. *ex ante*) by the Council. When the Simplification of Law Act was reviewed in 2004, the Council stated that its decisions have the force of res judicata, but also the force of res interpretata. Reservations are meaningful only if they guide the resolution of disputes arising subsequently from the interpretation or application of the law. Therefore, the judge or law enforcement authority must be mindful that, if the Council had not made such a reservation on a legislative provision, that provision could not have been promulgated. The reservation is therefore incorporated into the law.

However, by making a reservation, the CC allows a provision to escape into the legal field, which, if interpreted differently from the way in which it has done, is not in conformity with the Constitution. It is then the recipient of the reservation

49 Louis Favoreu, *La décision de constitutionnalité*, quoted by G. Drago, *Contentieux constitutionnel français*, (Paris PUF 1998) 419.

50 Jean Gicquel, *Droit constitutionnel et institutions politiques* (Paris Montchrestien 2002) 599.

51 Decision 99–419 DC, of 9 November 1999.

52 See the Council's official commentary on the decision 99–419 DC, of 9 November 1999.