French Constitutional Law

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CONSTITUTIONAL REVIEW WITHIN THE FIFTH REPUBLIC

THE idea of constitutional law is not novel in France. More novel is the role of law in the Fifth Republic's Constitution. From 1789 the very act of making constitutions defining the competence of governmental institutions introduced law as a regulator of public power. But the concern was predominantly with the division of institutional competence—who does what, and how each institution should operate. The Fifth Republic introduces two new dimensions: limits on the omnicompetence of the legislature, and a supervisory body akin to a court that can make binding rulings on the validity of Parliament's legislation. As a result, almost all decisions of organs of government are now subject to some form of judicial review. The growth of judicial review of the executive power is documented elsewhere.[1] Since, as will be seen, the executive has always had some autonomous legislative power, judicial review of legislation is not totally novel. The form and scope of judicial review of legislation in the Fifth Republic is far more extensive than before. Such a development was both planned and unplanned: planned to the extent that a new supervisory organ, the Conseil constitutionnel, was created to review the exercise of legislative power by Parliament and the executive; unplanned to the extent that the kind of judicial review exercised by this organ has exceeded the desires of those who drafted the Constitution. This book seeks to map out the extent of these developments primarily through decisions of the Conseil constitutionnel.

The nature of judicial review of legislation in France can only be understood by relating the role of the Conseil constitutionnel to that of other organs of government. It had a specific place in the new institutions created in 1958, but has evolved in symbiosis with changes in other institutions of government. In this chapter I shall try to highlight the place of the Conseil constitutionnel in the arrangements of the Fifth Republic's Constitution and in the State tradition of France.

[1] See L. N. Brown and J. Bell, *French Administrative Law* (4th edn., Oxford, 1993).

I.I. What Is Special about the Fifth Republic?

Origins

The Fourth Republic was established in 1946, and attempted to restore the liberal democratic tradition of constitutional government after the events following the fall of France in 1940. Congenital weaknesses compounded by problems caused by the ending of France's colonial role explain its early demise. Three major problems can be identified: the existence of major political divisions that weakened support for the system, governmental instability, and military unrest in the wake of decolonization.[2]

Political Division Political division was nothing new. The Third Republic (1870–1940) had to contend with strong anti-republican and anti-democratic forces for much of its existence. Many of these rallied around the Pétain Government of 1940–44, and were never reconciled to the Fourth Republic. The rebirth of the extreme right in the 1950s (the Poujadist movement) continued to provide a strong focus for this tendency. In addition, the Communist party grew in importance after the First World War, especially as the result of the Resistance movement, in which it was a leading member. It was at the peak of its power in the late 1940s, and captured over 25 per cent of votes in the 1946 and 1956 elections. Although it took part in the Governments from 1944 to 1947, it was by no means reconciled to the liberal democratic regime of the Fourth Republic. The Cold War was the final straw, and, under pressure from the United States, the Communists were expelled from the Government in May 1947. Once in opposition, the Communists provided a strong and active force of obstruction to the liberal democratic regime both inside and outside Parliament, and were treated with suspicion by it.[3]

Although not part of the anti-democratic movements, the followers of General de Gaulle also remained unreconciled to the Fourth Republic's regime. The General had made no secret of his disdain for politicians and their power plays when he resigned in January 1946. The parliamentarian system of the Fourth Republic provided scope for these, without the strong authority of the executive that he believed necessary. The man of destiny presented himself as swept aside by the squabbles of politicians. His Bayeux declaration of June 1946 set out an alternative, more presidential form of government, but it had little

[2] See generally V. Wright, *The Government and Politics of France* (3rd edn., London, 1989), 1-7.

[3] P. M. Williams, *Crisis and Compromise: Politics in the Fourth Republic* (3rd edn., London, 1964), 218-19.

influence on the Second Constituent Assembly. He founded a popular party (the Rassemblement du peuple français) in 1947 with significant success, but the electoral reforms introduced in time for the 1951 elections prevented his party (and the Communists) from benefiting from their popular support. For most of the 1950s the General withdrew from active politics, and his parliamentary followers were loath to give support to the various Governments that came to power. These anti-regime forces could count on the votes of over one-third of the electorate, and in 1946 and 1956 they took some 40 per cent of the seats in the National Assembly.

The Fourth Republic was ill-fated from the start. The First Constituent Assembly presented a draft Constitution to a referendum in May 1946, but it was defeated. The left-wing dominated Assembly had tried to draw up a new charter of rights and to establish a parliamentary regime similar to that under the latter part of the Third Republic, though with only one chamber. In October 1946 the second draft only secured approval by a margin of a mere one million votes among an electorate of twenty million, with 31.1 per cent of electors voting against, and 31.2 per cent abstaining. The lukewarm reception of the Constitution, and the strong contrary forces that existed within it, meant that it did not have the broad-based political support necessary to carry it through any crisis.

Governmental Instability Like the Third Republic, the Fourth was a parliamentary regime, with the real power lying in the Assemblies, which chose the President, and to whom the Government was responsible, and upon whose support it relied. Again like the Third Republic, the institutions chosen produced a significant degree of governmental instability, which brought the politicians into disrepute and failed to create the consensus necessary to maintain the system in a crisis.

Although the Fourth Republic formally increased the power of the National Assembly, the proportional representation electoral system undermined its effectiveness. Coalitions were inevitable; but with one-third of seats going to the parties that were antipathetic to the regime, Governments could only function if there was support from the large majority of the remaining parliamentary groups. Since these disagreed significantly, long-term agreement was unlikely. In consequence, the country lurched from one Government crisis to the next. The combination of anti-regime groups and the centre parties that were disaffected from time to time was able to bring down a Government without being able to offer a constructive alternative. As a result, France got through twenty-three Governments in twelve years, the most enduring being that of Guy Mollet, from 1 February 1956 to 12 June 1957.

One must not exaggerate the degree of instability. Of the twenty-three Premiers under the Fourth Republic, sixteen had served in the previous Cabinet, and twelve were to serve in the next one. Especially in areas less central to political disagreement, ministers could occupy a single post for many successive years, as did Bidault and Schumann in the Quai d'Orsay (Foreign Affairs).[4] While the country grew strong economically, this was mainly due to continuity in the administration provided by civil servants.

The lack of political leadership was most pronounced in more contentious areas, such as the levying of taxes to meet expenditure and, in the later years of the Republic, to deal with the colonial crises.

Military Failures Like Britain, France did not leave its colonies without putting up significant military resistance. The military activities of the period were marked by notable defeats, leading to recriminations between the military leadership and the politicians at home. Vietnam was vacated in 1954 after a series of military defeats. Tunisia and Morocco followed suit in 1955. In addition, there was the Suez débâcle of 1956. Uneasy relationships existed between the military and politicians. Military repression was inadequately controlled in advance, as in February 1958, when the Algerian military command ordered the bombing of a civilian village at Sakhiet in Tunisia, close to a supposed base for Algerian liberation movements. Although politicians often felt obliged to defend military actions after the event, they preferred other policies that were not appreciated by the military. For example, the Government put an end to martial law in Algeria in March 1958, against the advice of military commanders and just at the time when the latter claimed that this policy was beginning to reduce the number of terrorist incidents.

Domestically, there were also problems with the police, who in March 1958 staged an anti-parliamentary, anti-Semitic demonstration outside the National Assembly.

The Transition to the Fifth Republic These problems came to a head on 13 May 1958, when the army occupied Government House in Algiers and set up a Committee of Public Safety, warning the President not to sell out to the liberation movements on Algerian independence.[5] This occurred the day before Pflimlin was to be confirmed by Parliament in Paris as Prime Minister, an event that the settlers took to be a sign of imminent capitulation to the independence forces. Some Gaullist

[4] See generally M. Larkin, *France since the Popular Front: Government and People, 1936-1986* (Oxford, 1988), 145-6.

[5] See Williams, *Crisis and Compromise*, 51 ff.; Larkin, *France since the Popular Front*, 261 ff.

supporters were already seeking ways of securing the return of the General, by illegal means if necessary, and they tried to take charge of events. The leaders of the rebellion called for de Gaulle to take charge, and de Gaulle declared his willingness to form a Government (contrary to what he had told the President a mere ten days before). Algerian-based troops occupied Corsica on 24 May, declaring for de Gaulle, and the CRS (Compagnies républicaines de sécurité) forces sent to counter them merely capitulated without a fight. There was clearly the danger of a military coup that would spread to the mainland. The rebels threatened that 'Operation Resurrection' would be launched unless de Gaulle formed a Government. The centre–right coalition collapsed on 28 May, and the President warned that he would resign unless Parliament accepted de Gaulle, which many parliamentary leaders were prepared to do. On 1 June the President invited de Gaulle to head a Government. The General agreed, on condition that he could draw up a new Constitution. A *loi* of 3 June 1958 gave his Government powers to make decrees on whatever matters it thought necessary for six months, while it prepared a draft of a Constitution to be put to the people by referendum.

The crisis atmosphere, and the limited time for the exercise, ensured that the writing of the Constitution was not going to be a slow process of reflection and discussion. The Government began work on a draft in July. This was submitted to the Comité consultatif constitutionnel, which met for eighteen sessions between 29 July and 14 August. The draft was then presented to the Conseil d'État at the end of August, and was voted by referendum on 28 September 1958. The majority in favour was substantial (80.1 per cent of those voting, constituting 66.4 per cent of the electorate), even though some Socialists and the Communists were against it.

Clearly, given the time-scale, there was no room for enormous originality. In its delegation of full powers to de Gaulle, Parliament had isolated five principles that the new Constitution had to reflect: (i) universal suffrage as the sole source of political power; (ii) the separation of legislative and executive powers so that each was assured the full exercise of its proper functions; (iii) the answerability of Government to Parliament; (iv) the independence of the judiciary; and (v) a relationship between the Republic and associated peoples. There were, in addition, several abortive proposals for reform of the Constitution that had been made in recent years. Furthermore, many of those involved in the drafting had been leading figures in previous administrations, which was especially the case with the Comité consultatif constitutionnel. Continuity with established principles and practices was to be expected.

Duverger isolates novel inputs from three sources: de Gaulle, Debré,

and ministers.[6] De Gaulle proposed that the President of the Republic should be elected by a wider constituency than just the members of Parliament, that he should have powers to act in an emergency (such as that of 1940), and that ministerial and parliamentary functions should be mutually incompatible. Debré concurred in this last idea, and also wanted a 'rationalized Parliament'. Ministers wanted some way of dealing with issues of confidence that would avoid governmental instability, put an end to the annual debate approving Government policy, and do away with the honorific role of the Senate. Beyond these general outlines, work was supervised by Debré but carried out by legal specialists. The 1958 text is, in consequence, technical, and focuses on issues of the operation of institutions rather than on grand principles either of government or of fundamental rights.

1.2. Features of the Fifth Republic Constitution

The principal novel features of the Fifth Republic Constitution are institutional in nature: presidentialism, rationalized parliamentarianism, and the Conseil constitutionnel.

Presidentialism

The role of the President in the Third and Fourth Republics was essentially that of a figure-head, smoothing the way for the creation of coalitions, but having no part in active politics. Experiences with Louis Napoleon Bonaparte, who organized a coup to stay in office and became Emperor in 1852, with Marshal MacMahon, who tried to stage a royalist coup in 1877, and with Pétain during the Vichy period were sufficient to encourage such limitations on the President's role. Since he was elected by members of Parliament, his independence of action was thus limited. As Weiss commented in 1885: 'The fundamental principle of the Constitution is, or ought to be, that the President hunts rabbits and does not govern.'[7] All the same, the President did chair the Council of Ministers, though not the Cabinet, which included the junior ministers. Given governmental instability, his function was bound to be more than honorific, and both Auriol and Coty in the Fourth Republic played significant roles in the development of political events, but this owed much to their personal authority and to the tolerance shown by parliamentarians rather than to any constitutional mandate.

The original conception of the presidential role is contained in article

[6] M. Duverger, *La Cinquième République*. (Paris, 1959), 12 ff.

5 of the Constitution, whereby the holder has the function of seeing that the Constitution is respected, and exercising arbitrament in securing the proper operation of government. In discussion before the Comité consultatif constitutionnel, de Gaulle stated that the President's function was that of an arbiter who had to secure the proper functioning of public powers, whatever happened, but whose influence did not extend to day-to-day policy.[8] He was to act when there was a gap in the institutions, such as in the crisis situation of 1940 or when there was no effective Government. All the same, the notion of 'arbitrament' (*arbitrage*) means that, even in normal times, he was to be no mere figure-head who appoints the Prime Minister and ministers, is head of the army, and signs treaties. Debré described his role as 'superior judge of the national interest', with the authority to require Parliament to reconsider bills, to refer them to the Conseil constitutionnel, and even to dissolve the National Assembly (a power that had only once been used in the previous eighty years, but has been used four times in the Fifth Republic). As such, he was to be a 'head of State worthy of the name'.

The original procedure for electing the President involved an electoral college composed of some 80,000 national and local representatives. Direct elections were thought impossible while there were so many French nationals in the African colonies, and, in any case, a popular election might be partisan in character, thus dividing the nation.[9] Following his success in ending the Algerian war, and the popular support he received after an assassination attempt against him at Petit-Clamart on 22 August 1962, de Gaulle managed to have a constitutional amendment passed by referendum instituting direct elections for the presidency. This created the kind of dialogue between President and people that de Gaulle had envisaged in his Bayeux declaration of 1946. It provided the presidency with an independent mandate that both increased its authority and later helped Mitterrand to remain in office between 1986 and 1988, when the parliamentary elections produced a majority for the opposition. This new situation was already evident from the statement of Pompidou on assuming office in 1969, that the President is 'both head of the executive and guardian and guarantor of the Constitution. In this double role, he is charged with giving the fundamental impetus, defining the essential directions, and assuring and controlling the proper functioning of public authorities: an arbiter with primary national responsibility at the same time'.[10] The President is the man in charge. Although

[7] Cited in Williams, *Crisis and Compromise*, 185.
[8] *Avis et débats*, 118-19.
[9] M. Debré, Speech to the Conseil d'État, 27 Aug. 1958, in *GT* 2-3.
[10] Press conference, 10 July 1969, ibid., doc. 5-101.

successive Presidents have denied that they are electoral agents for their party, they do in fact have an important role in parliamentary election campaigns, and build up a parliamentary majority for their policies.

According to article 8, the President appoints the Prime Minister and, on his recommendation, he appoints and dismisses other ministers. In practice, this has meant that the Prime Minister holds office at the President's good pleasure, and Presidents have changed Prime Ministers when they have wanted a new direction, as in 1972 with the dismissal of Jacques Chaban-Delmas by Pompidou, or in 1984 with the resignation of Pierre Mauroy after Mitterrand had simply announced the withdrawal of the controversial education reform bill from the parliamentary agenda, or in 1991 when Michel Rocard was forced to resign after a long period in which it was obvious that he no longer enjoyed the President's support. Presidents have equally appointed ministers of whom the Prime Minister does not approve.[11]

The capacity of the President to take emergency powers under article 16 was used at the height of the Algerian crisis, from 16 April to 30 September 1961, when a military rebellion in Algeria threatened the Republic. This power is limited, in that the Prime Minister and the Conseil constitutionnel must be consulted before a declaration is made, and Parliament meets automatically and cannot be dissolved while the emergency powers are in force. The Conseil constitutionnel offers advice on the measures to be taken. Deciding when to end the period of emergency powers is up to the President, and despite informal suggestions from the Conseil, de Gaulle continued them for longer in 1961 than was really necessary.

Overall, the President does meet Debré's idea of a 'republican monarch', though one with considerably more power than any unelected monarch in Europe.

Separation of Executive and Legislature

One of the principal criticisms made by the authors of the Constitution was that Parliament had, in the recent past, been too keen to intervene, making the task of governing difficult, if not impossible. The Fifth Republic set out to remedy this. Both de Gaulle and Debré considered that a clearer division of labour between Government and Parliament was necessary. This is carried out by a separation of both functions and of personnel.

Establishing the Government's capacity to govern involved setting limits on the scope of parliamentary legislation (*lois*) in article 34, in

[11] See Wright, *The Government and Politics of France*, 28-30, 87; GT, docs. 8-102-5.

order to free the Government to take charge of the direction of the nation without being bound by unacceptably detailed instructions from Parliament. Equally important was the curtailment of the power of Parliament to dismiss a Government. The Government was to be appointed by the President, not by the National Assembly, to whom it is responsible only in limited ways. A Government must resign if it is defeated in a vote on its general programme, but it is under no obligation to present one to Parliament at all. Thus, in June 1988 the minority Government of Rocard did not present a programme to Parliament, and thus did not court defeat. In addition, censure motions are restricted. The proposers of a motion must secure an absolute majority of the members of the Assembly—in other words, they must be more or less in a position to offer an alternative Government. Counting only the votes in favour of the censure motion could have curious effects: for example, in the United Kingdom the Callaghan Government was defeated on a censure motion in March 1979 by 311 votes to 310; the absolute majority at the time would have been 315. On the Fifth Republic's rules, Callaghan would have won the vote of censure. As Debré put it: 'the responsibility of the Government is established according to procedures that avoid the risk of instability.'[12]

The separation of personnel was simply part of this idea of the independence of the executive. Article 23 creates an incompatibility between being a minister and being a member of Parliament, with the result that ministers need have no parliamentary experience. This rule has some origins in the experience of de Gaulle as head of the Liberation Government of 1944–6, when he considered that ministers owed too much allegiance to their parties and not enough to him. Ministers have the freedom from party responsibility, with only limited control by Parliament. Parliament authorizes policies and votes *lois*, but it does not have the power to challenge ministerial appointments, as it had done under the Third and Fourth Republics. The executive was to have, in effect, a more managerial role.

Rationalized Parliament

The new role of the executive necessarily diminished the functions of Parliament, at least in a formal sense. It was no longer a regime dominated by the elected Assemblies. While formally weaker, Parliament came in practice to enjoy real powers that restored its importance. The rationalized system streamlined what Parliament was effectively able to achieve within a system with a strong executive.

[12] Speech of 27 Aug. 1958, in GT 7.

Though apparently weaker than the United Kingdom Parliament, the real position of the two institutions is actually much closer.

Formally at least, Parliament no longer enjoys legislative sovereignty. As will be seen in Chapter 3, article 34 enumerates a long list of matters on which Parliament enacts *lois;* in some areas it enacts the rules, while in others it merely sets out the general principles. For the rest, article 37 confers legislative power on the executive to make *règlements* (decrees). In other words, formal residuary legislative power lies with the executive, not with Parliament. In addition, since implementation of *lois* depends on the Government passing decrees, the Government is effectively able to block parliamentary legislation without any obstacle from Parliament. For instance, the *loi* on contraception passed in December 1967 was not implemented for seven years, and other legislation has met a similar fate.[13]

The power of Parliament is further reduced by the fact that its time for sitting is restricted. Article 28 establishes the *maximum* for parliamentary sessions, not the *minimum* set in previous Constitutions. It meets in two sessions, from 2 October for eighty days (including weekends), and from 2 April for ninety days. Since the budget occupies much of the autumn session, the time left for ordinary activities is limited. Even the Government has to resort to extraordinary sessions to pass its own legislation. Parliament may be convened at other times either by a majority of members of the National Assembly or, more usually, by the Prime Minister. In either case, there must be a specific agenda for the extraordinary session. Although this is more limited than the United Kingdom Parliament, it is less restricted than many other similar bodies.

What inhibits Parliament more is the Government's control over the agenda. Article 48 gives priority to the discussion of Government bills or private members' bills that it endorses. Effectively, this can mean that serious matters do not get discussed by Parliament at all, as happened, for example, with the events of May 1968.

Questions by members of Parliament to the Government have had a chequered history. Limited initially to one session a week (and that on a Friday, when many deputies were away in their constituencies), oral questions received scanty responses from Government; before the National Assembly in the Pompidou era, for example, the reply rate fell to below 20 per cent. In the period from 1970 to 1974 only 14 per cent of questions were answered within the proper time-limit, and often junior ministers were sent to reply on behalf of the whole Government. Since 1974, the number of sessions has increased, and so has Government diligence in replies, but, even then, 15 per cent of

[13] See Wright, *The Government and Politics of France*, 146-7.

questions from 1981 to 1984 remained unanswered. There is certainly not the same atmosphere as Question Time in the United Kingdom Parliament.

The Government possesses significant powers to push through its legislation. As will be seen in Chapter 4, under article 44 §3, the Government can require Parliament to vote on the whole or part of a bill as a block, with such amendments as the Government is prepared to accept. This procedure is often combined with making a vote an issue of confidence, thereby guaranteeing the bill's passage. The Government may also hasten the passage of a bill by making it a matter of urgency under article 45. And, furthermore, the Government always has up its sleeve the possibility of securing a delegation of power under article 38 to pass legislation by *ordonnance*, thus avoiding further parliamentary battles and saving time.

The financial powers of Parliament are closely controlled. As will be seen in Chapter 4, ordinary members of Parliament cannot propose increases in public expenditure or taxation. In addition, Parliament must deliberate on the annual budget within a very tight timetable.

From this it might appear that Parliament is an institution of limited value. While this could be said of the early years of the Fifth Republic, it is less true today. Governments of recent years have been more parliamentarian in outlook, and Parliament has been able to exert influence, even if it has not been able to stop the Government doing much of what it wished to do.[14] The extent of Parliament's influence depends in part on how far Government supporters are ready to vote in whatever is presented, and on the stability of the majority coalition. While the Constitution was drafted against the background of a number of small parties that existed in the Fourth Republic, the realities of the Fifth have seen a move to a semblance of two-party politics, particularly in the 1980s. Nowadays, there is a real situation of Government facing the opposition in a similar way to the United Kingdom, though with the major difference that the Prime Minister and other ministers are not members of the National Assembly. For much of the Fifth Republic the Government has had a working majority in the National Assembly, and has thus had a compliant Parliament, rather than needing to resort to its constitutional powers to push through its measures. In such a situation, the Government is much less likely to be aloof from Parliament, and the active co-operation of the two is more likely.

1.3. Constitutional Review

The creation of the Conseil constitutionnel was originally intended as an additional mechanism to ensure a strong executive by keeping

[14] See Wright, *The Government and Politics of France*, 149-55.

Parliament within its constitutional role. As will be seen later, this original intention has been departed from to a significant degree in subsequent years to create what is effectively a constitutional court.[15]

Constitutional Review in French History

In presenting the Conseil constitutionnel to the Conseil d'État in 1958, Debré stated that 'It is neither in the spirit of a parliamentary regime, nor in the French tradition, to give to the courts, that is to say, to each litigant, the right to examine the validity of a *loi*.' Until then, although the rule of law quite quickly involved the subordination of the executive to the law and to bodies that could be called courts, Parliament, as the lawmaker and representative of the nation, was in a different position. This is reflected both in the history of institutions and in currents of ideas.

Institutions In the *ancien régime* there was nothing quite like a modern national Parliament. The Estates General, composed of representatives of the three orders of society (nobility, clergy, and commoners), was the nearest equivalent to one, but it did not meet from 1614 until 1789. The regional *parlements* were lawcourts, membership of which was an office of profit to be bought and sold, and representatives were drawn from the nobility and the clergy. In order to be valid, a law made by the King had to be registered with the local *parlement*, from which grew up the view that it had the power to refuse to register laws made by the King. Although the King could impose his will by holding a *lit de justice*, remonstrances made by the *parlement* against a particular measure could ensure that it was altered. This power had been used in the years leading up to the Revolution of 1789 in order to block reforms introduced by Louis XVI. The clergy and nobility were thus able to resist change, and the *parlements* gained the reputation of being reactionary.

The separation of powers introduced by the revolutionary Constitutions sought to prevent the judiciary being able to obstruct Parliament. Hence the *loi* of 16–24 August 1790 insisted in article 10 that the judiciary was not 'to take part directly or indirectly in the exercise of legislative power', or to 'obstruct or suspend the execution of the decrees of the legislative body'. Article 127 of the Criminal Code backed this up by making it an offence for a judge to interfere with the legislative power. The Tribunal de cassation (as the highest ordinary

[15] See generally J. Beardsley, 'Constitutional Review in France' [1975] *Supreme Court Review* 189 at 191-212; F. Luchaire, *Le Conseil constitutionnel* (Paris 1980), ch. 1; L. Hamon, *Les Juges de la loi* (Paris, 1987), ch. 2.

court was known) decided as early as 1797 that 'the absolute terms in which the prohibition on the courts to stop or suspend the implementation of *lois* is drafted can admit of no exception or excuse'.[16] Apart from two possibly aberrant decisions of the Cour de cassation (as the Tribunal de cassation had then become) in 1851, the ordinary judiciary has consistently refused to challenge the validity of *lois*.

This reaction to the *parlements* did not mean that the French were not aware of the need to keep Government and Parliament within the limits of the Constitution. The excesses of the Terror brought home the necessity for such control. In the debates on the *Directoire* Constitution of 1795 Sieyès suggested that there should be a *jurie constitutionnaire* that would ensure that the Constitution was obeyed by annulling acts of the legislature and the executive that were contrary to it. Rejected then, the idea was taken up at the adoption of the next Constitution in 1799. The Constitution of year VIII established a Sénat conservateur that had the function of considering the constitutionality of provisions, and even annulling decisions referred to it by the Tribune (Assembly) or by the Government (article 21); this included annulling *lois*, though only before their promulgation (article 37). In fact, this body was totally ineffective. Composed of persons appointed by the consuls, who were irremovable, it did nothing to prevent the excesses of the Napoleonic period. It only decided to quash legislative acts two days before the capitulation of Paris in 1814. The institution was revived under Louis Napoleon (soon to become Napoleon III) in the Constitution of 14 January 1852. Again composed of persons appointed with security of tenure, it was intended as the guardian of liberties and other basic values. It could pronounce on the constitutionality of *lois* before promulgation, but it could also pronounce on any decision referred to it by the Government or on a petition of citizens. This was thought to open the way to review of *lois* even after they had been promulgated. But the provision was never put to the test, and the Sénat of the Second Empire was as ineffective as that of the First.

The contrary, and typically republican, tradition exhibited in other Constitutions before 1946 was that Parliament itself was the guardian of constitutionality. In the very first Constitution of 1791 the National Assembly was enjoined to refuse all proposals that infringed the Constitution. Self-limitation was the preferred institutional device for ensuring that the Constitution was respected, with an ultimate control exercised by the electorate.

It was the collapse of the Third Republic, and the actions of the Vichy regime that encouraged further consideration of institutional safeguards. The First Constituent Assembly of 1945–6 adhered to the

[16] Decision of 18 fructidor, an V.

predominant republican tradition, and did not even have a second chamber as a check on the National Assembly. Following the Second Constituent Assembly, the Constitution of 1946 established a Comité constitutionnel composed of the Presidents of the Republic, the National Assembly, and the Council of the Republic (as the Senate was called), and then seven persons nominated by the National Assembly and three by the Council of the Republic. The nominees appointed by the two Assemblies were to come from outside their membership. This body was designed to make prompt decisions on a limited range of matters concerned exclusively with the institutional provisions of the Constitution, and deliberately excluding the declarations of rights. It could examine *lois* before they were promulgated to see if a constitutional amendment was necessary. Since the procedures for such an amendment were cumbersome, this was, in theory, a serious obstacle to unconstitutional legislation. It was concerned merely to resolve conflicts between the two chambers, and was designed to redress the power of the National Assembly to override the Council of the Republic. It was called upon to make only one decision: in 1948, on the question of the time-limit within which the Council of the Republic had to vote on a bill when the National Assembly had classified it a matter of urgency.[17] Other attempts to have matters referred were not successful. Notably, in 1957 the Gaullists tried to have the bill ratifying the Treaty of Rome referred to the Comité on the ground that it was incompatible with national sovereignty. Since there was no conflict between the two Assemblies on the issue, the Comité had no jurisdiction to consider the matter.

The self-limitation of Parliament was not very effective, in that blatantly abusive *lois* were passed both in terms of procedure—for example, the delegation of blanket legislative powers to the executive—and substance—the anticlerical legislation of the turn of the century. Even the Fourth Republic offered no check where both chambers were agreed on a measure.

Constitutional review before 1958, where it was permitted, involved three main features. First, examination of bills before promulgation was typically the only way envisaged for dealing with questions of constitutionality. There was no sense in which there could be a challenge in the ordinary courts by way of defence (the so-called *exception d'inconstitutionnalité*). Secondly, this was reinforced by the persons who could refer matters to the relevant organ. Apart from the reference to the 'petition of the people' in the Second Empire, only the legislature and the Government were empowered to make such an application.

[17] The Constitution resolved the question by reference to the provisions of a standing order of the National Assembly that had never been made.

Thirdly, the organ of constitutional review was a political body, not a judicial institution, though it was sufficiently distinct to have some claim to be an independent guarantor of the Constitution. In many ways, the Conseil constitutionnel of the Fifth Republic is the heir to, and an improvement on, these institutional mechanisms of the past, rather than being designed as a constitutional court in its own right.

The Doctrinal Debate In the realm of ideas, constitutional review did not loom large as an issue in the public imagination. During the Third Republic, chiefly in the 1920s, the issue did excite constitutional writers, much as the Bill of Rights debate engages academic attention in the United Kingdom today. Indeed, the arguments deployed in that period bear striking similarity to those currently voiced on this side of the Channel. The specific problem that caused the controversy was that the Constitution of the Third Republic was made up of three *lois* of 1875 that briefly outlined the major organs of government, but little more. Even as institutional rules, they required much elaboration, and there was no declaration of rights, as there has been in every other Constitution before and since. Additional rules on both institutions and civil liberties were passed by ordinary *lois* over succeeding years. The Constitution did have a procedure for amendment to the constitutional texts of 1875, which involved both chambers of Parliament meeting as a single body. But this was rarely needed. With no formal limits on the legislative power of Parliament, and no institutional checks other than the agreement between the two chambers, there seemed little scope for constitutional review. All the same, measures of social reform and of emergency powers passed in the early years of the twentieth century generated discussion about constitutional controls over Parliament. This was fuelled after the First World War by the creation of constitutional courts in Europe and by consideration of the activity of the US Supreme Court.

The principal argument in favour of constitutional review was that the Constitution provided a higher norm, which bound the legislature just as much as any other organ of government. As Maurice Hauriou put it: 'Under the rule of a national constitution, no public authority is sovereign in the sense that it cannot be controlled in the exercise of its power or in the performance of its function. . . . Uncontrollable sovereignty lies only in the nation and is not delegated at all. All delegated sovereignty is controllable.'[18] For him and for others such as Duguit and Jèze, the need for control arose from the very nature of the legal authority granted to the legislature by the Constitution. Drawing on Kelsen, Eisenmann supported this view of the hierarchy of

[18] *Précis de droit constitutionnel* (2nd edn., Paris 1929), 266.

legal norms, and considered, as did Kelsen, that this in no way compromised legislative sovereignty: 'Any supposed *loi* which, from whatever perspective, infringes one of these provisions [of the Constitution] is in reality only a pseudo-norm. And . . . in refusing to take notice of it, the judge does not refuse to apply a legislative rule, but a rule that, improperly, claims to be legislative.'[19]

That remark, however, was written in a note on a case in which the Conseil d'État had stated that 'in the current state of French public law' an argument that a *loi* was unconstitutional could not be discussed by it. Both Jèze and Eisenmann were clear in recognizing that the argument from the hierarchy of norms, though logically impeccable, enjoyed no judicial support, and could not be said to be part of positive law.[20]

Duguit and Hauriou argued that declarations of rights and other values could be included among constitutional norms, despite their absence from the enacted texts of the 1875 Constitution. Duguit argued that the State was not absolutely sovereign, but existed to promote social solidarity, a public service in the interests of society. The State's authority was derived from a higher, pre-political norm, and this was binding on any constituent assembly drawing up a constitution: 'The system of the declarations of rights serves to define the limits that are imposed on the State, and, for that, higher principles are formulated, which the constituent legislator must respect just as much as the ordinary legislator. Declarations do not create these higher principles; they identify them and proclaim them solemnly.'[21] Hauriou wanted such declarations to protect the citizen from the arbitrariness of the State.[22] But such arguments ran contrary to the legal positivism that predominated in French legal thought. As Henkin points out, the French have typically believed in rights through law, rather than in some pre-political rights that define the legitimacy of the law.[23] Even when declarations were put into the Fourth Republic's Constitution, some leading writers argued that many of their provisions did not have constitutional force.[24]

Those authors who adopted one of these points of view argued that the task of identifying properly enacted *lois* falls within the competence

[19] Note on CE, 6 Nov. 1936, *Arrighi*, DP 1938.3.1.

[20] A similar view was taken under the Fourth Republic: see M. Mignon, 'Le Contrôle juridictionnel de la constitutionnalité des lois' D. 1952 Chr. 45.

[21] Léon Duguit, *Traité de droit constitutionnel* (2nd edn., Paris, 1923), iii. 560: see K. H. F. Dyson, *The State Tradition in Western Europe* (Oxford, 1980), 146-9.

[22] *Précis de droit constitutionnel*, 731-5; Dyson, *The State Tradition*, 162-3.

[23] L. Henkin, 'Revolutions and Constitutions' (1989) 49 *Louisiana Law Review* 1023 at 1044-5.

[24] F. Gény, 'De l'inconstitutionnalité des lois ou des autres actes de l'autorité publique et des sanctions qu'elle emporte dans le droit nouveau de la Quatrième République française', *JCP* 1947, I. 613.

of the ordinary judge; it does not involve trespassing on the legislative function, since he is merely following the declared will of the higher (constituent) legislator. Most rejected the idea of a special court to review the constitutionality of legislation, on the ground that it was unnecessary to create a specific institution for such a small amount of litigation, and its special status might seem more of a threat to Parliament. In any case, the issue of the constitutionality of legislation would inevitably arise before the ordinary courts after the enactment of the legislation, and would occur when political passions were less heated.[25] On the other hand, Eisenmann, whose thesis was on the Austrian Constitutional Court, saw merit in having a specialist tribunal as a channel for constitutional issues, and from which a single, definitive answer could be obtained.[26]

The main arguments used against constitutional review focused on the status of *loi* and the separation of powers.

Article 6 of the Declaration of 1789 stated that *loi* is the supreme expression of the *volonté générale*. This was interpreted as meaning that Parliament was the representative of the general will of the nation, and that its enactments thus enjoyed the status appropriate to the expression of the will of the sovereign. On this view, the State was the voice of the nation, and its authority was a pre-condition for liberty.[27] In no sense was it argued that constitutional review was incompatible with the idea of sovereignty. The people could easily agree to restrict that authority, and Carré de Malberg considered that such limitations were very much expressions of sovereignty. All the same, the introduction of constitutional review would be a change in the way in which it was to be exercised.[28]

The argument from the separation of powers has two elements. On the one hand there is the statement of the appropriate function of each organ; on the other, there is the appropriate deference that must be paid by other organs of government.

The function of the legislature was, according to Carré de Malberg, to be the continuing representative of the will of the nation, and, as such, to complete the task of making the Constitution.[29] The French situation under the Third Republic was different from that in other countries, since Parliament had the power to alter the Constitution, and was not subordinated in this task to a prior or external institution or mechanism. In addition, the legislature was to be the interpreter of

[25] Hauriou, *Précis de droit constitutionnel*, 267, 270-1.

[26] *La Justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche* (Paris, 1928), 292.

[27] Carré de Malberg, *La Loi: Expression de la volonté générale* (Paris, 1931), 115 ff.: see Dyson, *The State Tradition*, 162-3.

[28] Ibid. 125.

[29] Ibid. 120.

the Constitution; this was appropriate, since it was representative of the people who made it. Parliament was to interpret the Constitution when it came to passing legislation, and if it decided that its interpretation was compatible with the Constitution, this could not be gainsaid by any other organ:

> Nothing is more natural than to make interpretation an act of the very person who made the text . . . In other words, it is for the legislature, at the very moment of making laws, to examine if the *loi* being considered is consistent with the Constitution, and to resolve the problems that may arise on this point. The legislature interprets in this way by virtue of its popular representation.[30]

The appropriate role of the judiciary here was to defer to the decision of the legislature. The demarcation of powers was to be understood not as a separation of functions, as in the United States, but as a separation of organs of government. In making constitutional amendments, Parliament had to meet in a different way from when it passed ordinary legislation, but it was still Parliament that was acting. For both ordinary and constitutional *lois*, the separation of powers required the judiciary to respect the actions of Parliament. To try to impose the will of Parliament constituted as constitutional legislator over Parliament constituted as ordinary legislator did not make sense.[31] The revolutionary texts, attacked as outdated by the proponents of constitutional review, were seen as merely expressive of the appropriate separation of powers in a democracy, since judges could not stand in the way of the will of the people.[32]

A significant concern of the writers was the conservative effect of providing constitutional review based on any declarations of rights. The authors like Duguit and Hauriou who proposed some form of substantive review envisaged that this would strike down measures such as the anticlerical laws of 1905, the provisions on secrecy of tax returns (which enabled private settlements between the revenue and the taxpayer), the granting of judicial powers to parliamentary committees, and attacks on property.[33] To Jèze, this would simply make the judiciary a block to social progress: 'Against a democratic Parliament, product of universal suffrage, and against its possible will for reform, it is desired in reality to set up bourgeois judges for the defence and irreducible preservation of the possessing classes characterized as élites.'[34] This concern seemed to be supported by the highly

[30] Ibid. 131.
[31] Ibid. 115.
[32] A. Esmein, *Éléments de droit constitutionnel français et comparé* (8th edn., Paris, 1927), 645.
[33] See Hauriou, *Précis de droit constitutionnel*, 289–90.
[34] G. Jèze, cited in L. Hamon, *Les Juges de la loi* (Paris, 1987), 75; id., *Les Principes généraux du droit administratif* (3rd end., Paris, 1925), 368.

influential study of the US Supreme Court published by Édouard Lambert in 1921. He described it as 'doubtless the most perfected tool of social inertia to which one can currently resort to restrain workers' agitations and to hold back the legislator from the slippery slope of economic interventionism'.[35] Time and again the opponents of constitutional review would point to the experience of the United States in the 1910s as an illustration of what could happen in France.

Other arguments centred on the effect that this would have on the judiciary. Currently, this career civil service was strongly influenced in its appointments by the Government, and there was no strong, fearless independence equivalent to the Supreme Court of the United States. In any case, judges would inevitably be drawn into the political forum by constitutional review, and this would lead to attacks on them for their political views that would further reduce the reputation of the French judiciary.[36]

In any case, if Jèze and Eisenmann were right about the nature of the Constitution of 1875, reduced to mere rules of procedure without any declarations of rights, an institution of constitutional review would have very little impact and importance, and would thus not be worth while.

The Intentions of the Drafters of the Constitution As originally conceived, the Conseil constitutionnel was not to be a radical departure from what had gone before in terms of its institutional competence. The essential difference was the new view of parliamentary sovereignty as limited by the role accorded to the executive. The Conseil was merely one institutional mechanism to ensure that this new function of Parliament was adhered to. The Comité consultatif constitutionnel saw the Conseil as 'a corset', 'an essential element for the harmonious operation of public authorities',[37] a body to keep Parliament and the executive within their proper limits. It was not to be some form of supreme court in constitutional matters, along the lines of the German Constitutional Court, a specialist body to which references can be made from all courts during litigation. As the *commissaire du gouvernement* (the civil servant representing the Government), Janot, stated:

> Such a system would be tempting intellectually, but it seemed to us that constitutional review through an action in the courts would conflict too much with the traditions of French public life. To give the members of the Conseil constitutionnel the power to oppose the promulgation of unconstitutional texts appeared sufficient to us. To go further would risk leading us into a kind of

[35] *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, 1921), 224.
[36] Ibid. 235.
[37] *Avis et débats*, 205.

government by judges, would reduce the legislative role of Parliament, and would hamper governmental action in a harmful way.[38]

The nature of the body was shown by its composition. The debate in the Comité consultatif constitutionnel was on whether its membership would be incompatible with elective office. Like the Comité constitutionnel of the Fourth Republic, its structure was essentially political, and the mode of designation reinforced this, given that three politicians—the Presidents of the Republic, the National Assembly, and the Senate—nominated members.

Its functions were a bundle of tasks that were being withdrawn from Parliament. Debré wanted electoral litigation to be judged independently. In the past, Parliament itself decided on the lawfulness of parliamentary elections, and this gave rise to a number of partisan decisions. The Conseil would have more authority here, especially if its members were not currently active in political life. The reason for giving the competence over the constitutionality of treaties to the Conseil was likewise to avoid past difficulties, particularly the recent experience over the Treaty of Rome, which Debré had argued went contrary to national sovereignty, but which could never be put to the test before the Comité constitutionnel.

The new institutional arrangements justified further competences. The competence of the Conseil over parliamentary standing orders was justified differently, namely that, in the new system, Parliament could not be left to decide its own rules, since these might interfere with the proper function of the executive. Giving powers to the President to act in a state of emergency required some safeguards. Charles X had tried to use such powers against Parliament in 1830, and could only be prevented by revolution. The Conseil was empowered to provide a more practicable check on that power.

The primary function was, however, to check the constitutionality of legislation produced by Parliament, to make sure that it did not overstep the competence given in article 34 of the Constitution, discussed below in Chapter 3. Proposals that the Conseil should judge the constitutionality of executive *règlements* made under article 37 were quickly crushed by Debré. Likewise, proposals that the ground of review should include the Preamble to the Constitution and the declarations of rights to which it referred were rejected by the Government and by other members of the Comité. For instance, Teitgen argued: 'In empowering the Conseil to check whether a *loi* voted by Parliament is consistent with the Preamble to the Constitution, you fall back into government by judges, each one assessing subjectively the

[38] Ibid. 57.

express or implied meaning of this text.'[39] All the same, some did find it strange for the *commissaire du gouvernement* to argue that these principles would be applied by the Conseil d'État, but not by the Conseil constitutionnel.[40]

The longest debate in the Comité was on the question of who should be able to refer matters to the Conseil. The draft—as, indeed, the final text put to the people—only enabled the President of the Republic, and the Presidents of the Senate and of the National Assembly, and the Prime Minister to do so, representing the Parliament and the Government. Triboulet successfully moved an amendment in the Comité consultatif constitutionnel to allow one-third of the members of either Assembly to refer a *loi* to the Conseil. The argument was one of protecting the position of minorities within Parliament. Since the Presidents of the National Assembly and the Senate were, on past experience, likely to belong to the majority, the opposition had no way of having a matter raised before the Conseil.[41] Debré argued that this would be incompatible with parliamentary government, and that the constant participation in political life that such a proposal would entail could not be accepted. Similarly, Teitgen argued, 'Every time that a *loi* has given rise to an impassioned debate, the opposition will not fail to refer it to the Conseil constitutionnel, and in the end effective government will be in the hands of the pensioners who will sit in the Conseil.'[42]

The Conseil constitutionnel

The institution of constitutional review in France has been described as belonging to the 'European model', in that it is a specialist tribunal, independent of Parliament, making decisions binding on other bodies and courts, with constitutional questions concentrated before it.[43] That description hardly fits the original intention of the drafters of the Constitution, and demonstrates how far ideas have had to be revised since 1958. Indeed, in 1987 Raymond Barre commented:

> In France we have too often held the view that there was nothing but parliamentary law. Now parliamentary law can change according to majorities. But we have understood in the course of recent years that there is a constitutional law that is stronger than parliamentary law. Let us not remove this fundamental acquisition, because the guarantee of democracy and of citizens rests

[39] Ibid. 77.
[40] See Coste-Floret (later a member of the Conseil constitutionnel), ibid. 102.
[41] Triboulet, ibid. 76. See also the views of Malterre, ibid.
[42] Ibid.
[43] L. Favoreu, *Les Cours constitutionnelles* (Paris, 1986), 14–15.

on this recognition of a legal order emanating from the Conseil constitutionnel that is higher than the parliamentary order.[44]

That a potential presidential candidate could speak in this way shows the extent of the change.

The role of the Conseil constitutionnel has increased significantly since 1974, when members of Parliament were permitted to make references to it, and since 1981 it has considered most major pieces of legislation.[45] Developments have not been linear, and they have owed much to particular individuals within the Conseil. These individual contributions have left a legacy to the institution. In addition, the rolling renewal of membership every three years, and the collegiality of the Conseil's operation do justify the assertion of an institutional ethos when talking of the Conseil's role and performance.

The Functions of the Conseil constitutionnel The Conseil has five broad heads of jurisdiction, which are not necessarily related.

First, the Conseil is an election court and returning officer. It determines the existence of a presidential vacancy or incapacity, oversees the election process, and announces the results. It has a similar supervisory function in relation to referendums. With regard to parliamentary elections, it rules on disputed elections.[46] It also rules on the ineligibility of members of Parliament. The case-load is quite considerable. As a result of the parliamentary elections of June 1988, some eighty-five decision on electoral matters are reported in the annual *Recueil* of decisions of the Conseil constitutionnel.

In the case of parliamentary elections, the Conseil will judge after the event, though it has recognized that it may be appropriate to rule on an issue before elections taken place, where this affects a large number of constituencies. Thus in *Delmas*[47] it ruled on whether the duration of the election campaign was not too short, in breach of the Electoral Code. This affected all elections. In this area the Conseil is like any judge, seeing that the provisions of the Electoral Code have been obeyed. As an election court, it does not have jurisdiction to challenge the validity of the *lois* that set out the rules for elections.[48]

[44] *Le Monde*, 27 Jan. 1987: 8.

[45] L. Favoreu notes that the period from Feb. 1980 to Feb. 1989 accounts for 61.1% of the Conseil's decisions on the constitutionality of *lois*, 77.9% of the annulments of such texts, and 87.45% of the paragraphs setting out the reasons for decisions (called *considérants* because they always begin 'considering that . . .'): 'Le Droit constitutionnel jurisprudentiel', *RDP* 1989, 399 at 408–9.

[46] See arts. 7, 58, 59, 60 of the constitution (below, Part Two, Section I).

[47] CC decision of 11 June 1981, *Delmas*, D. 1981, 589, note Luchaire.

[48] CC decision of 5 May 1959, *A. N. Algérie, circ.* 15, *Rec.* 215. Equally, since the administrative orders and decrees governing elections are administrative decisions, they come within the competence of the administrative courts alone: Genevois, §§49–50,

Secondly, the Conseil also advises the President both when he seeks to use emergency powers under article 16 and on the rules made thereunder. Such advice is not binding, but it is of considerable authority all the same. The practice of 1961 would suggest that the Conseil's formal advice is preceded by informal advice. This may, however, be due to the particular personalities involved in the 1961 crisis, and might not be so easily repeated.[49]

Thirdly, the Conseil may also be asked to rule on the constitutionality of treaties. Treaties are signed by the President, but require parliamentary legislation in most cases before they can be ratified. Once ratified, they have a status superior to *lois* (article 55). Although the Conseil constitutionnel will not strike down a *loi* for incompatibility with a treaty, other courts may refuse to apply it in such a case.[50] Prior examination of the compatibility of a treaty and the Constitution is thus desirable.

The Presidents of the Republic, the National Assembly, and the Senate, or the Prime Minister or 60 deputies or senators may refer a treaty for consideration by the Conseil to determine whether it is contrary to the Constitution. If it is, then it can only be ratified after a constitutional amendment has been passed (article 54). This procedure is merely an extension of the competence of the Comité constitutionnel under the Fourth Republic, about which there was controversy when the EEC Treaty was ratified. The President of the Republic has been the only one to make use of it in relation to EEC taxation (1970), European elections (1976), the additional Protocol to the European Declaration on Human Rights on the death penalty (1985) and the Maastricht Treaty (1992).

Fourthly, the Conseil also examines the constitutionality of organic laws and parliamentary standing orders. Both are subject to compulsory review by the Conseil before they are promulgated (article 61 §1).

Organic laws are required in a number of areas, such as on the judiciary, on the composition of Parliament, on finance laws, and on the procedure of the Conseil constitutionnel. The process for passing them is stricter than for ordinary *lois*, requiring the agreement of the Senate or an absolute majority of members of the National Assembly (article 46). Since these organic laws may be used subsequently as a basis for judging the constitutionality of *lois*, and may extend the body of constitutional rules, it is appropriate that the Conseil should review them before enactment.

The scrutiny of *parliamentary standing orders* is justified by the desire to ensure that Parliament does not overstep the boundaries set out for

[49] J. Boudéant, 'Le Président du Conseil constitutionnel', *RDP* 1987, 589 at 628.

[50] For a recent reaffirmation of this, see CC decision no. 91-293 DC of 23 July 1991, noted in *AJDA* 1991, 631. Treaties figure among the 'infraconstitutional values' discussed

it in the Constitution. If Parliament were to adopt procedures that blocked the dominance of the executive, this could clearly upset the new arrangements of 1958. It may have been all right to leave such matters to the sole judgment of Parliament in an era of parliamentary sovereignty, but this could no longer be the case in the 1958 regime. This area will be examined further in Chapter 4.

Fifthly, the Conseil had, as its primary original function, to police the boundaries of the legislative competences of Parliament and of the executive. This is performed in any of three ways.

(1) Under article 37, the Government can only amend or repeal provisions in *lois* passed after 1958 by way of *règlement* if the Conseil constitutionnel has first declassified them, in other words, if it has ruled that the provision does fall within the domain of executive legislative competence. In this way, it ensures that the Government does not overstep its competence. The Government must take the initiative, and refer provisions of *lois* to the Conseil if it wishes to have them declassified.

(2) When private members' bills or amendments are proposed in Parliament that stray into the area of the executive's legislative competence, the Government may seek to have the proposed provisions ruled out of order. Where the President of the relevant chamber of Parliament disputes the claim of the Government, either he or the Prime Minister may refer the dispute to the Conseil, which has to give a ruling within eight days (article 41). Since 1979, this procedure has rarely been used.

(3) Once a *loi* has been passed by Parliament, the Conseil has jurisdiction to rule on its constitutionality if a reference is made to it by the President of the Republic, the President of either the National Assembly or the Senate, the Prime Minister, or (since 1974) sixty members of either Assembly (article 61 §2). The reform of 1974 effectively gave the opposition a chance to challenge legislation, and it has become almost the only challenger to *lois*.

Although originally designed to keep Parliament within the competences set out in article 34, the reference of enacted *lois* to the Conseil has become a procedure for challenging them on wider, substantive grounds, particularly for breach of fundamental rights. The importance of this procedure can be seen from Table 1.1.[51]

The Conseil only has jurisdiction to challenge a *loi* before it has been promulgated. In early decisions it stated that references cannot be used to challenge the validity of previously promulgated *lois*.[52] But in 1985

[51] Reproduced from J. Fournier, *Le Travail gouvernemental* (Paris, 1987), 93 (updated).

[52] CC decision no. 78–96 DC of 27 July 1978, *Monopoly on Radio and Television, Rec.* 29; see generally J.-Y. Cherot, 'L'Exception d'inconstitutionnalité devant le Conseil constitutionnel', *AJDA* 1982, 59.

TABLE 1.1. *References to the* Conseil constitutional *under article 61 § 2 of the Constitution*

Period	References under art. 61 § 2	Number not consistent	Proportion not consistent (%)
1959–September 1974	9	7	77.0
October 1974–April 1981	47	13	28.0
May 1981–March 1986	66	33	50.0
April 1986–January 1989	32	19	64.6

the Conseil declared *obiter*: 'though the validity with respect to the Constitution of a promulgated *loi* may properly be contested on the occasion of an examination of legislative provisions that amend it, complement it, or affect its scope, this is not the case when it is a matter of simply applying such a *loi*.'[53] More recently, the issue has arisen indirectly in relation to tax law. Procedures under article L96 of the Code of Tax Procedures for recovering penalties for infringements of stamp-duty legislation enabled the Fisc to impose a penalty without hearing the taxpayer beforehand. In the *Finance Law for 1990*[54] this procedure was extended to breach the new rule that non-businessmen should not use cash to pay for goods or services above a value of 150,000 F. The Conseil held that the application of article L96 to this case violated constitutional rights of due process, because, since no tax was involved, the normal safeguards inherent in tax procedures did not apply. Again, in the *Finance Law for 1991*,[55] an additional levy was imposed on betting tickets, and article L96 was to apply to failure to pay the levy. The Conseil noted that these provisions in no way obliged the tax authorities to observe due process before imposing a penalty, and accordingly struck down the provision. In these decisions the Conseil was effectively casting doubt on the validity of the provisions of article L96. Since the administration is bound by a general principle of law to withdraw illegal measures,[56] the decisions of the Conseil constitutionnel provide strong, but not binding, encouragement to the administration at least to reform its procedures, if not to encourage Parliament to repeal the dubious provision.

[53] CC decision no. 85-187 DC of 25 Jan. 1985, *Urgency in New Caledonia*, D. 1985, 361, note Luchaire.

[54] CC decision no. 89-268 DC of 29 Dec. 1989, *RFDA* 1990, 143, note Genevois: see p. 218 below.

[55] CC decision no. 90-285 DC of 28 Dec. 1990, *RFDC* 1991, 136.

[56] CE Ass., 3 Feb. 1989, *Cie Alitalia*, *RFDA* 1989, 391, *conclusions* Chahid-Nourai; *GA*, no. 116.

Composition of the Conseil constitutionnel Unlike the ordinary courts, there are no criteria for membership of the Conseil other than having been nominated by either the President of the Republic, the President of the Senate, or the President of the National Assembly. One member is appointed by each of these three every three years for a non-renewable term of nine years. Should a vacancy occur in the meantime, the office-holder who nominated the previous member nominates his replacement for the remainder of the term.[57] In addition, all past Presidents of the Republic are members for life. In practice, only the former Presidents of the Fourth Republic, Auriol and Coty, have ever taken their seats, and no past President has taken part in a decision since 6 November 1962.

The absence of specific qualifications for the post means that there are few limits on choice. The *ordonnance* of 7 November 1958 does set out certain functions that are incompatible with membership of the Conseil, and this does somewhat restrict the field of those willing to accept nomination. Under article 4, a member cannot also hold a position in the Government, in Parliament, or on the advisory Economic and Social Council. Thus Pompidou had to resign in 1962 to become Prime Minister, and Michelet resigned in 1967 to become a member of the National Assembly. Giscard d'Estaing ceased to be eligible to sit when he entered the National Assembly in 1984. During membership of the Conseil a person may not be nominated for any public employment or be promoted within the public service, except by reason of advancing age. Members are prohibited from taking a public position on questions that might be the subject-matter of a decision by the Conseil. In practice, this involves retirement from active political life, which few are willing to accept until the end of their careers. Despite suggestions to the contrary in the Comité consultatif constitutionnel, the Conseil constitutionnel is a committee of retired persons, with an average appointment age of 65 (the 1989 Conseil had an average age of 69, and that of 1992 has an average age of 64). It may well be that the absence of any political future gives the members the luxury of independence, and cushions them against adverse reactions from erstwhile colleagues.

The pattern of appointment is similar to the independent Comité constitutionnel of the Fourth Republic. Together with the designation of the Conseil as a 'Council' rather than a 'Court', this provides a clue to what was originally anticipated of its members. They are to be independent guardians of the republican constitutional tradition, freed

[57] Since that person is then usually nominated for a 9-year term in his own right, a member may serve for longer than 9 years. For instance, Louis Joxe served from Oct. 1977 until Feb. 1989.

from the vagaries of partisan politics, but also to typify the various strands within the mainstream of political life. Appointed by the three figure-heads of the State, they are meant to be more than mere party representatives. At the same time, the three nominators are unlikely to be from the same party. The nomination procedure provides for some form of participation by the expected protagonists—the Government and the Parliament. The sharing of power also confers legitimacy in the eyes of each.[58]

The most difficult feature of the nomination process concerns the dimension of competence. What characteristics make someone a suitable spokesperson for the republican constitutional tradition? First, since that tradition has, before 1985, been mainly a political one, experience in politics might be thought necessary. Two forms of experience might be distinguished here. On the one hand, there is party political, and in particular parliamentary experience, which lays stress on the democratic and parliamentary traditions of government. On the other, there is experience in government, related to the traditions of governmental effectiveness, public service, and the like. Both features are political, but in different ways. The distinction between the two has become more marked in the Fifth Republic, but it could be said to have existed before. In addition, since the contexts for decision-making will sometimes be politically charged, and since the Conseil cannot rely on long-standing authority for its judgments, some political sensitivity will be necessary to ensure that there is an awareness of the context of decisions and the limits of the Conseil's powers therein. Secondly, many of the constitutional values also have a legal source and force. Since the members of the Conseil have to interpret texts and to draft decisions that will have legal application and will be analysed by lawyers, some legal experience might also seem relevant. Thirdly, the persons appointed should command authority for their statements of the tradition. If the Conseil consisted of political hacks, its decisions would be effective, but not authoritative; every effort would be made to reverse them as soon as was opportune. If the Conseil is to help provide a stable political framework, which was certainly desired in 1958, then its decisions must carry some authority. The nomination process effectively secures a significant degree of independence from momentary political pressures, so that members can feel free to decide on the basis of tradition rather than on political expediency, but the character of the nominees is also important.

When one looks at the forty-eight appointments to the Conseil since

[58] On the characteristics of judicial selection processes, see J. Bell, 'Principles and Methods of Judicial Selection in France' (1988) 61 *Southern California Law Review* 1757 at 1769–79.

1959,[59] the features of parliamentary, governmental, and legal experience, as well as personal authoritativeness, can be seen to have shaped nominations. Of the forty-eight, fourteen had been Government ministers, and twenty-two had been members of Parliament at some time. Only eight had no known political affiliations, and ten had governmental experience as holders of a ministerial office. As far as legal experience is concerned, only eleven had no legal training. Of the rest, eleven were law professors, eleven were members of the Conseil d'État, twelve had been in private practice, and four were judges of the Cour de cassation; a further four had law degrees. The high proportion of law professors is explained by the fact that this is one of the few careers in the public service that can be pursued at the same time as membership of Parliament. It can also be continued during membership of the Conseil constitutionnel, and this has typically been done, with two members becoming Presidents of their university while they held office. The current President of the Conseil, Robert Badinter, continued to teach at the University of Paris 1 during his political career, and carries on while a member of the Conseil constitutionnel. A parallel explanation in the private sector can be offered for the number of practitioners. These two groups constitute the most likely source of lawyers with political or governmental experience. The Conseil d'État offers a career that enables members to move from judicial and legal advisory activity to work in a government department, or even to hold office as a minister.[60] Personal authoritativeness and distinction are evident among the lawyers, who include a President of the Criminal Chamber of the Cour de cassation, one past and one future Vice-President of the Conseil d'État, a former judge of the European Court of Justice, a First Advocate-General of the Cour de cassation, and five of the leading constitutional lawyers in recent times. Among the politicians, there have been a former President of the Senate, three Ministers of Justice, a former *médiateur* (Ombudsman), two ambassadors, and three leading figures in the human rights movement.

Despite the absence of any vetting procedure, few nominations have caused much criticism. The appointment of Robert Badinter, the Minister of Justice, as President of the Conseil in February 1986, just one month before the Socialists were almost certain to lose office, did give rise to disapproval. Since the existing President had 'resigned' after only three years, but was remaining on the Conseil, it appeared

[59] For a full list of the qualifications of members of the Conseil constitutionnel, see L. Favoreu, *RFDC* 1990, 604–5, supplemented by *Le Monde*, 27 Feb. 1992. See also below, Table 1.2.

[60] 5 Prime Ministers have come from this corps this century, including 3 in the Fifth Republic—Debré, Pompidou, and Fabius.

that the President of the Republic was trying to rig the composition of the Conseil in anticipation of a difficult period during which he would have to preside over a Government composed of his political opponents.[61]

The Conseil in office from March 1989 consisted of its President, Badinter (aged 61), a former Minister of Justice, criminal advocate and law professor; Mayer (79), a former minister and President of the League of Human Rights; and Faure (67), a former Minister of Transport, head of a political party, and doctor in geography and law, all nominated by the President of the Republic. The President of the Senate nominated Jozeau-Marigné (81), a former senator and honorary *avoué* with a doctorate in law; Latscha (62), a company director, company legal adviser, and (briefly) a professor of constitutional law; and Cabannes (64), a former First Advocate-General at the Cour de cassation, and head of the Minister of Justice's private office (*directeur de cabinet*). The President of the National Assembly appointed Fabre (74), a former Socialist deputy and *médiateur*; Mollet-Viéville (71), a distinguished advocate; and Robert (61), a leading professor of constitutional and civil liberties law. In February 1992 the first woman was appointed, Mme Noëlle Lenoir (aged 43). She was a member of the Conseil d'État, and an experienced administrator in government departments and in committees on civil liberties and bio-ethics. The other nominations were Rudloff (68), a leading senator and a practising *avocat*, and Abadie (63), an experienced prefect and administrator in a government department. All have law degrees. Of the eight appointees since March 1986, only two (Faure and Rudloff) have held office in Parliament, in Government, or in a political party. Most of the rest (Mollet-Viéville, Latscha, Cabannes, and Robert) have predominatly legal distinction, while the 1992 nominees, Lenoir and Abadie, are principally administrators. Indeed, the Conseil in March 1989 was the first to have a majority who had not been ministers or parliamentarians. This may be a reaction to the Badinter controversy of February 1986, but it also reflects the fact that nominees have not always been of the same political persuasion as the nominator, and quality has often prevailed over political allegiance.[62]

Even if nominees have been chosen with their political affiliations firmly in mind, their perfomance has not always conformed to the views of their nominators. The first Conseil was strongly marked by allegiance to de Gaulle, and was subservient to his ideas for the new

[61] See *Le Monde*, 21–2 Feb. 1986: 7; *Libération*, 20 Feb. 1986: 9–10.

[62] Even in an analysis of the early membership of the Conseil, it was noted that attention to political allegiance and experience did not diminish the legal and other distinctions of nominees: L. Favoreu, 'Le Conseil constitutionnel: Régulateur de l'activité normative des pouvoirs publics', *RDP* 1967, 5 at 73–88.

TABLE 1.2. *Membership of the* Conseil constitutionnel

Term of office	Name of member	Political experience	Legal qualification	Other experience
1959–62	POMPIDOU	activist	CE	adviser to President
1959–62	DELEPINE	—	*avocat*/CE	—
1959–62	CHATENEY	deputy	law degree	—
1959–62	PATIN	activist	Cass.	—
1959–65	NOEL	activist	law degree	ambassador/ CCC/*cabinet*
1959–65	LECOQ DE KERLAND	—	*avocat*	—
1959–65	PASTEUR VALLERY-RADOT	deputy	—	doctor
1959–68	GILBERT JULES	senator	*avocat*	CCC
1959–68	MICHARD-PELLISIER	deputy	*avocat*	—
1962–4	CHENOT	activist	CE	—
1962–7	MICHELET	minister/ deputy	—	—
1962–71	WALINE	activist	professor	CCC
1962–71	CASSIN	—	CE/*avocat*/ professor	ECHR
1964–8	DESCHAMPS	activist	CE	—
1965–74	PALEWSKI	minister/ deputy	—	diplomat
1965–74	LUCHAIRE	activist	professor	*cabinet*/adviser to CCC
1965–74	MONNET	activist	*conseiller juridique*	—
1967–74	ANTONINI	—	law degree	*cabinet*
1968–77	SAINTENY	minister/ deputy	—	colonial governor
1968–77	DUBOIS	—	Cass.	—
1968–77	CHATENET	minister	CE	—
1971–7	REY	minister/ deputy	—	—
1971–9	COSTE-FLORET	senator	professor	CCC
1971–80	GOGUEL	activist	professor	S-G Senate
1974–83	FREY	minister/ deputy	—	CCC
1974–83	MONNERVILLE	minister/ senator	*avocat*	President of Senate
1974–83	BROUILLET	activist	—	*cabinet*/ Comptes

TABLE 1.2. (*cont.*)

Term of office	Name of member	Political experience	Legal qualification	Other experience
1977–83	PERETTI	deputy	*avocat*	prefect
1977–84	GROS	senator	*avocat*	—
1977–86	SEGALAT	—	CE	S-G Govt
1977–89	JOXE	minister/ deputy	—	S-G Govt
1980–9	LECOURT	minister/ deputy	*avocat*/ECJ/ Cass.	—
1980–9	VEDEL	activist	professor	ESC
1983–6	LEGATTE	senator	CE	*cabinet*
1983–7	MARCILHACY	senator	*avocat*	CCC
1983–92	MAYER	minister	—	HR
1983–92	JOZEAU-MARIGNE	senator	law degree	—
1984–8	SIMMONET	minister/ senator	professor	—
1986–	BADINTER	minister/ deputy	professor/ *avocat*	HR
1986–	FABRE	deputy	—	*médiateur*
1987–92	MOLLET-VIEVILLE	activist	*avocat*	—
1988–	LATSCHA	—	professor	businessman
1989–	FAURE	minister/ deputy	—	—
1989–	ROBERT	—	professor	HR
1989–	CABANNES	—	Cass.	—
1992–	LENOIR	—	CE	*cabinet*
1992–	RUDLOFF	senator	*avocat*	—
1992–	ABADIE	—	law degree	*cabinet*/prefect

Note: *cabinet* = civil servant in ministerial office; Cass. = judge of Cour de cassation; CCC = Comité consultatif constitutionnel (member, unless otherwise indicated); CE = member of Conseil d'État; Comptes = member of Cour des comptes; ECHR = judge of European Court of Human Rights; ECJ = judge of European Court of Justice; ESC = member of Economic and Social Council; Govt. = Government; HR = human rights activist; S-G = Secretary-General.

Republic. Its President, Noël, was a close confident of de Gaulle and was consulted on numerous political matters, tending to defer to his interest in his decisions.[63] His successor, Palewski, admitted that the Conseil had acted as 'yes-men' to the General in the 1960s, but argued

[63] See Boudéant, 'Le Président du Conseil constitutionnel', 627–32.

that it was absurd to contradict the author of the Constitution as to its interpretation.[64] This is most clearly illustrated by the 1962 decision on the *Referendum Law*.[65] Nevertheless, it was the same, previously subservient Conseil under Palewski that decided that it could review legislation on grounds of conformity to fundamental rights in the *Associations Law* decision of 1971. Again, as Favoreu and Philip remark, 'In reality, the Conseil of 1977–1980, which one might consider one of the most political (Frey, Monnerville, Peretti, Joxe, Coste-Floret), was one of the most active, least servile, most protective of freedoms and most juridical.'[66]

Despite the absence of any member appointed by a Socialist, the Conseil of 1982 was not manifestly obstructionist to the Socialist change of direction, and, as has been noted, placed less constitutional objections in the way of the reforms than the Conseil d'État would have done. It has been argued that 'experience shows that nomination transforms the politician into a constitutional judge, i.e. that it substitutes for the passion, the commitment, and the partiality of the former, the serenity, wisdom, and loftiness of perception necessary to accomplish the tasks of the second.'[67] Shorn of its Gallic floridness, the comment rightly underlines the different kind of role that the member of the Conseil sees himself as undertaking. The appointment of distinguished individuals at the end of their careers enables the 'nine wise men of the rue de Montpensier' to stand somewhat aloof from political influence and to give effect instead to their own perceptions of the Constitution and the republican constitutional tradition. In this, they are more likely to have views in common with others who have been engaged in the various facets of that tradition, than over more clearly partisan questions. Although standing within the political process, the Conseil aims to impose stable and fundamental values in a situation where opportunism and short-term considerations have a significant place in the motives of the principal actors. The particular character of the political decisions to be taken by the Conseil may mean that members will frequently unite despite their party allegiances. But there will still be issues on which the Conseil divides along lines that correspond to party opinion. Voting figures are not known, but it has been widely stated that the decision of 23 January 1987 on the *Séguin Amendment* was adopted on the casting vote of the President, Badinter, after the four Socialists (Badinter, Fabre, Marcilhacy, and

[64] Ibid. 637.
[65] Ibid. 631–3, and below, p. 133.
[66] *GD* 378.
[67] C. Debbasch, J. Bourdon, J.-M. Pontier, and J.-C. Ricci, *Droit constitutionnel et institutions politiques* (Paris, 1984), 492.

Mayer) tied with the more right-wing members (Jozeau-Marigné, Lecourt, Simmonet, and Vedel) in the absence of Joxe.[68]

Apart from the lack of partisan pressure, the collegial character of the institution will tend to reinforce an independent line. Since the members have to work with each other over a significant period, they will tend to adjust to these internal constraints and expectations as well as to external pressures and expectations. The internal dynamics of the Conseil are not well known, but there are sufficient indications that a collegial spirit operates to produce unanimity in most cases. The importance of this will depend on the character of the persons in question—whether they operate entirely on their own or not—and on the animation that the President gives to team-work. Experience of working in such an environment may be more important than the particular origins of members.

The complexity of the factors that influence decision-making by any judge suggests that there is no straight correlation between any one element, such as political opinions or experience, and votes on particular decisions. Since the assumption is that several factors are relevant to appointments, and since internal institutional ethos may moderate the influence of external expectations about an individual's performance, the significance of any one feature of the members may not be great in determining the outcome of cases. It is the fact that certain experiences give a general sensitivity to problems, and confer a kind of *ex ante* authority on the members of the Conseil that is the most important element of the nomination process. The effect of all this on decisions is rather contingent, especially as there is no mechanism of control or formal criticism of the decisions made (and it is hard to know how individuals voted in any case).

Procedure and Methods of Working in the Conseil constitutionnel Since the Conseil is not formally a court, its procedures are not fully judicial, and in many ways they resemble those of an administrative inquiry. There is no set of procedural rules, other than the exiguous organic law contained in the *ordonnance* of 7 November 1958 (extracts from which are reproduced in Part Two, 'Constitutional Texts', Section IV). The fact that members of the Conseil are bound to secrecy about their deliberations has led to an air of secrecy about the way in which it functions. The following description of the procedure draws on a number of disparate remarks in the literature, and on discussions with members of the Conseil and especially of its legal service.

The procedure before the Conseil varies significantly depending

[68] CC decision no. 86-225 DC of 23 Jan. 1987 (DECISION 16); Boudéant, 'Le Président du Conseil constitutionnel', 620.

on the task in hand. It is most judicial when dealing with electoral disputes, and least judicial when dealing with the declassification of *lois* under article 37 §2.

Acting as an election court for parliamentary elections, the Conseil operates very much like the Conseil d'État when it deals with disputed local elections. Here the *ordonnance* of 7 November 1958 is at its fullest, providing fourteen detailed articles on the procedure to be adopted.

Within ten days of the election result, any candidate or elector for the constituency concerned may present a petition by way of a letter to the Conseil, or to the local prefect, or to his or her equivalent, setting out the grounds of complaint. For election matters, the Conseil then divides into sections of three members, chosen by lot, who are assisted by associate reporters selected from the Conseil d'État or the Cour des comptes on an annual basis. One of the associate reporters is appointed to act as reporter (*rapporteur*) on the particular petition. His task is to provide the analysis of facts and rules on which the section can prepare a report for discussion by the whole Conseil. This process of *instruction* is closely modelled on the procedure of the Conseil d'État.[69] Petitions that are inadmissible for some reason—because the petitioner is not an elector of that constituency, for example—or that clearly cannot affect the result of the election can be rejected without *instruction*. In other cases the reporter will collate the allegations and any observations from the elected deputy or senator. The section can conduct hearings under oath, and can require the communication of any official document relating to the election. A member of the Conseil or the reporter may be sent to conduct a site inspection. The results of these enquiries are provided to the parties concerned, who then make their observations (with or without the help of lawyers). Once the *instruction* is complete, the report is presented to the Conseil. Only members of the Conseil have a vote, though the reporter may present cases to the meeting.

It is clear that here the Conseil is operating much as any administrative court, with all the safeguards of hearing both sides.

The rules on the procedure for referring legislative texts are more exiguous. The *ordonnance* of 7 November 1958 merely states who should transmit the text, who should be notified in the case of a reference made by members of Parliament, and that decisions should be reasoned. For the rest, it is a matter of practice and personalities, both of which have changed over time.

Where there is a compulsory reference, the text is transmitted by the Prime Minister in the case of an organic law, or by the President of the relevant Assembly in the case of parliamentary standing orders. Since

[69] See Brown and Bell, *French Administrative Law*, ch. 5.

both have been the subject of a public vote in Parliament or in one of its Assemblies, there is no need to warn anyone that a reference has taken place, nor are there specific grounds for it.

Where the reference is optional, as in the case of ordinary *lois* and treaties, then notification of the fact that this has been done might appear more necessary. All the same, it is only formally required where a reference is made by sixty senators or deputies, so that the office-holders—the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate—are aware of this and can make observations.

The Conseil must reach its decision within a short period of time. This is normally one month, though it can be reduced to eight days where the Government claims that it is a matter of urgency. The issue of who is to judge 'urgency' has never been put to the test, and is left obscure by both the Constitution and by the *ordonnance*. In practice, there is a *gentleman's agreement* not to use this procedure, and it was only officially requested in one case between 1981 and 1986 (the second decision on *nationalizations* in 1982).[70] Usually, the Secretary-General of the Conseil and the Secretary-General of the Government come to an arrangement about the time-scale for decision. It is notable that the urgency procedure was not invoked in the case of the *Urgency Law for New Caledonia* in January 1985, when the Conseil took barely twenty-four hours to make its decision. Equally, at the Government's request, the Conseil published its first decision on *Nationalizations* on a Saturday, when the Stock Exchange was closed, since the decision was bound to affect dealings in the companies in question.

There is no requirement that the President should wait to see whether there will be a reference before promulgating the *loi*. This can lead to nervousness on the part of members of Parliament that the text will be promulgated before a reference can be made, and this results in a number of stratagems. The most extreme came with the *Urgency Law for New Caledonia*, where a courier was stationed outside the Conseil with a reference already signed. When the final vote on the text had been taken in Parliament, he was contacted on citizens' band radio and promptly marched in to present the reference. It is more usual for the text of the reference to be discussed in the parliamentary group of the party wishing to make a reference, and then signed by the requisite number of deputies or senators, before the final vote is taken on the text.[71] Because the reference has been drawn up before the bill has been approved by Parliament, it can happen that it complains about articles that are not in the final text of the *loi*.

[70] CC decision no. 82-139 DC of 11 Feb. 1982, *Nationalizations II*, Rec. 31. See Fournier, *Le Travail gouvernemental*, 97.

[71] See M. Charasse, 'Saisir le Conseil constitutionnel' (1986) 13 *Pouvoirs* 81.

The reference can take the form of a single letter or several letters from individual deputies or senators; the Conseil only counts the first sixty, to reach the requisite number. It is usually reasoned, setting out grounds for challenging particular articles of the *loi*, but, as in the case of the *Associations Law* of 1971, the letter may simply request the Conseil to examine the constitutionality of the whole text.[72] In addition, the party leader may submit a memorandum containing more detailed arguments; this occurred in the *Vehicle Searches* case of 1977, for instance. These days the references are usually well reasoned, and are often based on legal arguments drawn up by consultants (frequently professors of constitutional law). They may, at times, be excessively inventive in argumentation. Since 1983, the text of the reference has often been published in the *Journal officiel*. (An illustration of a reference is provided in Part Two, DECISION 12.)

The Conseil considers itself free to examine any part of the text, not merely the specific articles contained in the reference. Since the decision certifies the constitutionality of the *loi*, the Conseil considers that it has the right to raise issues ex officio. This was done, for example, in the *Feminine Quotas* case of 1982,[73] where the article of the electoral law providing for a minimum of 25 per cent of candidates of each sex on the lists for local elections was struck down as unconstitutional, even though this point was not discussed in the reference. On the whole, issues are only raised ex officio where there is an obvious and serious question of unconstitutionality.[74] This practice has become more frequent in recent years, rising from one decision in twenty between 1974 and 1981, to one in ten between 1981 and 1986, one in three in 1986–7, and one in five from 1987 to 1989, and there were twelve such arguments raised by the Conseil ex officio in 1989–90.[75]

The short time-scale for deliberation, and the limited scope of the argumentation in the reference may require the Conseil to do a lot of work very quickly. Quite sensibly, the Conseil has developed a practice of jumping the gun. When a bill is presented to Parliament, opponents will usually move a motion that it or some of its articles are unconstitutional, and are thus out of order, and will set out the reasons for this view. The Government will provide a reasoned reply to the motion, thereby making sure that the basic issues have been aired. Such motions put the Conseil on alert, and the President may well

[72] DECISION 1: there was a subsequent supplementary reasoned memorandum in this case, but this is not a requirement of a reference.

[73] DECISION 34.

[74] B. Genevois, *RFDA* 1990, 406 at 408.

[75] Favoreu, 'Le Droit constitutionnel', 426–7, and L. Favoreu and T. Renoux, *RFDC* 1990, 780.

then decide to appoint a reporter to start work, building up the file on the potential reference. The choice of reporter is at the discretion of the President. Attention will be paid to a reasonable distribution of the work-load, but also to the expertise of particular members. Although the identity of the reporter is not officially made public, it is known that Chatenet and Lecourt acted as reporters on European Community matters, Segalat on finance bills, Gros on broadcasting laws, and Vedel on nationalizations (1982), university professors (1984), privatizations (1986), the Competition Council (1987), and the press (1984 and 1986).[76]

The file will be built up by the reporter, acting usually with the help of the Secretary-General (an expert lawyer) and the small legal service under him.[77] This will consist initially of three elements. First, there are the legal texts (constitutional and otherwise) on this particular area, to show the context and scope of the contested provisions. Secondly, there are the parliamentary debates, with special attention to the arguments on constitutionality developed at different stages in the parliamentary proceedings (the Conseil is equipped to listen into parliamentary debates at any time). Thirdly, there will be other materials, such as case-law in the public or private law courts, doctrinal legal writings, or memorandums produced by the legal service to help the reporter (which can be more or less detailed). The advice that the Conseil d'État gives on a Government bill is not published, and there is no formal mechanism for it to be transmitted to the Conseil constitutionnel. Nevertheless, since a member of the Conseil d'État is likely to be on either the Conseil constitutionnel or its legal staff, no difficulty is usually encountered in obtaining the text of the advice. Depending on the personality and legal expertise of the reporter, the Secretary-General and the legal service may well have an important role in the preparation of the file and in the drafting of the text of the decision presented to the Conseil. (It is not, however, unknown for a reporter to seek legal advice from outside the Conseil's staff.)

Once a formal reference has been made, the reporter will have a precise set of grounds to work from, though they will be almost identical to points made earlier. The text of the reference is sent to the Secretary-General of the Government, who will usually provide observations on it or on the *loi* in general. These observations do not represent a full defence. As a recent Secretary-General has written:

[76] Boudéant, 'Le Président du Conseil constitutionnel', 615 nn. 107, 108; Favoreu, 'Le Droit constitutionnel', 411.

[77] The legal service is small; in 1986 it consisted of 3 people, with an additional consultant and 2 researchers. The President may well have his own advisers; for instance, the present President is advised by Luchaire, a former member of the Conseil and a leading constitutional expert.

'The written observations presented by the Secretary-General of the Government in no way constitute a memorandum in defence. Most often, they remain limited to replying to questions asked by the member of the Conseil constitutionnel designated as reporter during a working meeting held at the Conseil constitutionnel.'[78] Sine 1986, this memorandum has been sent to the authors of the reference, so that they can make comments. All the same, there is not the same kind of hearing of each side that occurs in disputes over electoral matters.

The reporter remains master of the procedure. He may consult or listen to whomsoever he likes, and take note of whatever he wishes. It is up to him how much of what he learns in this way is communicated to his colleagues when the Conseil meets. He may often confer with the reporters of the parliamentary committees that examined the bill. On 3 June 1986 Badinter suggested that this might be formalized, and that the reporters might be consulted officially. This proposal was rejected by the Presidents of both chambers on the ground that the committee reporters had no standing to speak on behalf of the whole chamber. All the same, the practice is of some importance.[79] The authors of the reference and the Secretary-General of the Government may well be called to meetings with the reporter, so that he can clarify issues. In addition, others may be invited to attend or may seek an audience. Pressure groups may telephone the reporter at home or invite him out to lunch. For example, in the *Nationalizations* case some of the directors of the affected companies were seen by the reporter. Interested persons may write letters to the reporter, and he makes such use of them as he considers fit. These are not necessarily referred to in the *visas* (the introductory phrases beginning 'Vu . . .') of the decision.[80] The point is that, like an administrator compiling a dossier, the reporter follows up all interesting leads until he considers that he has seen all sides of the question.

Reporters work in different ways: some very much on their own, others discussing matters with the legal service, and others discussing with colleagues. Since not all of them are in Paris, this last may be difficult to arrange much before the decision-making meetings. The

[78] R. Denoix de Saint-Marc, in *Conseil constitutionnel et Conseil d'État* (Paris, 1988), 108.

[79] See L. Favoreu (ed.), *Nationalisations et Constitution* (Paris, 1982), 29; Boudéant, 'Le Président du Conseil constitutionnel', 618.

[80] See the letter of the Green party (*Les Verts*) to the Conseil constitutionnel concerning a provision in a *loi* submitted to it that permitted new tourist developments in mountain regions: *Le Monde*, 17 July 1990. Although the Conseil constitutionnel annulled the provision criticized by *Les Verts* (art. 16) ex officio, and even though it was not challenged by the authors of the formal reference, commentators are sceptical of any link between the letter of *Les Verts* and the willingness of the Conseil to challenge the provision of its own motion: see Favoreu and Renoux, *RFDC* 1990, 730, and J.-C. Douence, *RFDA* 1991, 346. For the text of the decision, see CC decision no. 90-277 of 25 July 1990, *RFDA* 1991, 354.

President of the Conseil may play an important part. He may keep in touch with a reporter to see how things are going, and may suggest meetings of a few members from time to time. (Unlike members of the Conseil d'Etat, members of the Conseil constitutionnel have their own individual offices, and may well thus work on site.) The President may prefer just to have an occasional lunch with the reporter or with other members of the Conseil. Other Presidents have left reporters very much on their own. Although he does not act as a reporter himself, the President may well secure a good sense of how the draft judgment is going to look, and may seek to influence its content. But he is not typically a dominant figure among so many authoritative individuals. One former member of the Conseil wrote:

> In truth, important though the role of its President is in the functioning of the Conseil constitutionnel, this is only through the climate that he creates between its members, by the tone that he contributes to deliberations, and by the way in which he conducts these. This role includes no interference with the judgment of each of the Conseil's members. It would be altogether wrong to contrast the Gaston Palewski case-law or the Roger Frey case-law with the case-law of Léon Noël: there is only a case-law of the Conseil constitutionnel, the development of which is explained essentially by the widening of the grounds on which references are made.[81]

The reporter produces a draft judgment, which is circulated to all members of the Conseil at least one day before the decision-making meeting. These other members may also receive a general file from the Secretary-General setting out the legal texts, the parliamentary debates, and other matters that the reporter considers would be useful.

The actual decision-making occurs in the meeting-room of the Conseil, part of the Palais-Royal fitted out for Napoleon III's sister. Only members of the Conseil attend, and no minutes are kept. The report is discussed, and votes, if necessary, are taken after that. No time-limit is set on discussion, and some cases take more than one day (hence they have two dates in their official reference). It is not generally known how people vote. It is known that the Conseil split 6 to 4 on the *Referendum Law* (DECISION 14) decision, and that it split 4 to 4 on the *Séguin Amendment* (DECISION 16). However, it is reliably said that unanimous decisions are common, and that members do not necessarily vote in the way that their party allegiances might suggest. Once they are in the Conseil, with no political future ahead of them, they can act as free agents. In any case, the dynamics of collective decision-making, free from the public gaze, may produce different pressures from those in a politicized forum.

When the Government wishes to legislate by way of decree, using its

[81] F. Goguel, 'Le Conseil constitutionnel', *RDP* 1979, 5 at 24.

powers under article 37, it may need to ask the Conseil to declassify a provision contained in a *loi* enacted after 1958. (It does not have to follow the declassification procedure for earlier *lois*.) The procedure is entirely *ex parte*, in that nobody other than the Government and the Conseil is involved. The Government will submit a list of texts that it wishes to amend or repeal by decree, together with drafts of the provisions that it proposes to enact. This last part of the procedure is not necessary, but it helps the Government to obtain a useful ruling from the Conseil, in that the latter will try to frame its decision in such a way as to provide guidance to the Government on what it has specifically in mind.

Authority of Decisions of the Conseil constitutionnel Article 62 states that a provision that the Conseil has declared unconstitutional cannot be promulgated or implemented. That aspect of the decision effectively binds the President on *lois* and treaties, the Government on proposed *règlements*, or Parliament in respect of proposed bills, amendments, or standing orders. More widely, the same article states that its decisions 'are binding . . . on all administrative and judicial authorities'. In the case of the administration, a circular of the Prime Minister of 25 May 1988 reminded civil servants of the need not only to respect decisions of the Conseil constitutionnel, but also to anticipate potential breaches of the Constitution.[82] If the purpose of this kind of constitutional review is to obtain early and authoritative rulings on all aspects of a *loi*, then it is important that the decisions are adhered to by the courts. But French courts do not have a formal doctrine of *stare decisis*, and were initially reluctant to treat rulings on abstract points of law as authoritative when they come from what is, formally at least, a non-judicial body, though attitudes have changed in more recent years.

The normal policy for French courts, set out by article 5 of the Civil Code, is that they cannot lay down general rules for the future. The formal authority of the decision is thus confined to the case itself, and appeal to previous judgments is not, as such, a sufficient reason for a judicial decision. All the same, in practice, courts will follow earlier judicial decisions, especially those of the highest courts. *La jurisprudence* has thus a real authority, even if there is no rigid, formal rule of *stare decisis*.

Unlike the ordinary courts, the Conseil is not solving particular disputes between parties, but ruling in abstract on the validity of a *loi* that will affect a variety of future cases. It is said to judge a text, not litigants. In addition, the Conseil recognizes its responsibility for creating constitutional doctrine, a doctrine far more unsettled than

[82] See *RDP* 1989, 436.

private, criminal, or administrative law. In its decisions the Conseil has tried, therefore, to set out general principles of constitutional law, rather than simply to make specific rulings relating only to the particular *loi* under discussion. In this way general guidance can be offered to the Government, the Parliament, and the courts.

The Conseil takes a wide view of the binding force of its decisions. In the *Agricultural Orientation Law* of 1962.[83] the Conseil stated 'that the authority of the decisions [of the Conseil constitutionnel] mentioned [by article 62 of the Constitution] attaches not only to their result (*dispositif*), but also to the reasons that are its necessary support and constitute its very foundation'. The Conseil had already ruled in two decisions of 1961[84] that certain parliamentary amendments to an agricultural bill that sought to fix prices fell within the legislative competence of the Government under article 37. When asked the same question by the Government in relation to a *loi* of 1960, the Conseil merely replied that it did not require an answer since it had already ruled on that matter.

The scope of such binding authority extends to any provision with the same effect as one on which the Conseil has already ruled. Thus, in the case of the *Amnesty Law of 1989*[85] a provision was introduced both to amnesty and to make eligible for reinstatement those who had been guilty of serious fault during industrial disputes. A clause to this effect had already been struck down in the case of the *Amnesty Law of 1988* because it would impose an excessive burden on the victims of the fault.[86] Although the legislature had tried to modify the 1988 provision by making an exception for employers thus affected, on the Conseil did not consider that this had cured the problem, particularly in relation to the burdens that reinstatement would place on fellow employees. Relying on its previous decision, the Conseil struck down the new provision because it 'violates the authority that attaches, by virtue of article 62 of the Constitution, to the decision of the Conseil constitutionnel of 20 July 1988'.

The private and administrative courts have used techniques similar to those known in common law to distinguish decisions of the Conseil constitutionnel that they have not wished to follow. The first technique is to confine the decision to the text that was before the Conseil. This is often combined with a second technique of restrictive interpretation of the reasoning. Thus, in a decision of 1977 the Conseil held as unconstitutional a *loi* that intended to confer on the police an unlimited

[83] CC decision no. 62-18 L of 16 Jan. 1962, *Rec.* 31.
[84] CC decision nos. 61-3 FNR of 8 Sept. 1961, *Rec.* 48, and 61-4 FNR of 18 Oct. 1961, *Rec.* 50.
[85] DECISION 4.
[86] DECISION 3b.

power to search vehicles on the highway even where no crime had been committed and there was no threat to public order, on the ground that the imprecise nature of the grounds of intervention by the police threatened individual liberty. In 1979 the Chambre criminelle of the Cour de cassation held that the police could search vehicles belonging to any person under the general provisions relating to the investigation of 'flagrant offences'.[87] While formally consistent, the latter decision did much to undermine the effect of the decision of the Conseil constitutionnel.

The third technique is to draw a distinction between the necessary reasons for the decision and other points that may be raised (in other words, between the *ratio decidendi* and mere *obiter dicta*). This again arose with regard to criminal penalties. These are divided in French law between *crimes*, *délits*, and *contraventions*. Article 34 of the Constitution states that *loi* should lay down the rules for 'the determination of *crimes* and *délits* and the penalties applicable thereto'. A provision of the Rural Code established the fines for illegal joinder of agricultural properties (an offence in the nature of a *contravention*). In declaring this to be within the competence of the executive to amend by way of *règlement*, the Conseil constitutionnel ruled that 'the determination of *contraventions* and the penalties applicable to them falls within the province of *règlement* when those penalties do not include measures depriving a person of their liberty'.[88] The *procureur général*, Touffait, sought to argue in a subsequent case that the proviso relating to measures for the deprivation of liberty did not bind the criminal courts, because 'the Conseil constitutionnel stressed its reasoning by inserting a general principle, which in this case was incidental, not to say superfluous'.[89] The necessary reasons were only those most directly concerned with disposing of the case before the Conseil, namely, the classification of those provisions submitted to it, and Touffait was followed by the Cour de cassation in thinking that the proviso did not fall within that specific category.

Although the formal *ratio* of the Conseil's decisions may be understood narrowly, their practical importance reflects its function of giving authoritative rulings on the meaning of the Constitution upon which a variety of public authorities can rely.

Article 62 states that the decisions of the Conseil constitutionnel bind public powers and administrative and judicial authorities. In the first group are included the President, the Government, and the

[87] Cass. crim., 8 Nov. 1979, *Triganol*, D. 1980 Chr. 102; cf. CC decision no. 76-75 DC of 12 Jan. 1977, *Vehicle Searches*, DECISION 17.

[88] CC decision no. 73-80 L of 23 Nov. 1973, *Criminal Penalties (Rural Code)*, DECISION 10.

[89] *Conclusions* to Cass. crim., 26 Feb. 1974, *Schiavon*, D. 1974, 273.

Parliament. The President is not permitted to promulgate a *loi* or any provisions of it that have been declared unconstitutional by the Conseil, nor can he promulgate a text where the unconstitutional provisions have not been declared to be severable from the *loi* as a whole. It is up to the President to decide whether to promulgate a text without the severable, unconstitutional provisions, to require a new deliberation by Parliament on the whole text submitted to the Conseil, or merely on those articles that were declared unconstitutional,[90] or to require a new *loi* to be presented to Parliament. Decisions on declassification restrict matters on which the Government can legislate by way of decree. Similarly, decisions on the admissibility of amendments bind the parliamentary chambers as to the proposals that can be discussed or adopted. In each case, the binding effect of the decision is very firmly limited to the text considered by the Conseil.

As far as the Conseil itself is concerned, it is in no way bound by its previous decisions. All the same, to ensure its authority and effectiveness, these 'must be marked with the seal of continuity and coherence'.[91] From the earliest days, the Conseil has sometimes referred to its previous decisions either in the *visas* or in its actual reasons. But such citations are confined to instances where these do have binding force, as in the *Amnesty Law of 1989*, and the Conseil does not explicitly discuss how the current decision fits into the pattern of previous case-law, even though the precedents are frequently cited in the letter of reference to it. Where it intends to follow earlier rulings, it adopts the practice of the higher French courts of repeating the wording of the previously declared principle verbatim, but without attribution. As with these courts also, changes in the case-law can be noticed by attending to the formulations adopted. In some areas the Conseil has departed from its previous decisions. For example, on the matter of whether a decree can alter the constituent elements of a criminal offence, the Conseil constitutionnel has aligned itself with the Conseil d'État.[92]

The possibility that the Conseil will overrule its previous decisions to some extent justifies the narrow view of binding judgments taken by the ordinary courts. All the same, although these courts may have been wary of, or even hostile to, the Conseil in the 1960s and the early part of the 1970s, more recently they have accorded more authority to the Conseil's decisions.[93] This happens in two ways, reflecting the different levels of authority that these enjoy.

[90] Art. 10 §2 of the Constitution, a practice declared licit by the CC decision no. 85-197 DC of 23 Aug. 1985, *Elections in New Caledonia, Rec.* 70.

[91] D. Labetoulle, 'Les Méthodes du travail au Conseil d'État et au Conseil constitutionnel', in *Conseil constitutionnel et Conseil d'État*, 249 at 255.

[92] See below, Ch. 3.

[93] See generally Genevois, §§107–9. H. Donentwille identifies 3 stages in the attitude

Where a decision of the Conseil constitutionnel has binding force, this will provide a sufficient reason for the judgment of a subsequent court. This has been clearly recognized by the Conseil d'État, which applied a decision of the Conseil constitutionnel that certain 'pollution payments' made to water authorities constituted taxes, thereby reversing its own previous decisions on the matter.[94] Similarly, the Tribunal des conflits has applied a decision of the Conseil constitutionnel on the classification of sewage payments.[95] In both cases the decision of the Conseil constitutionnel was cited as the reason in the judgment itself. As yet, no decision of the Cour de cassation has formally been based on the findings of the Conseil constitutionnel, though some cases do refer to its rulings.

Beyond this, the Conseil constitutionnel frequently provides the inspiration for decisions of the courts. For example, the Cour de cassation held that criminal judges were competent to judge the legality of identity checks made by the administrative police. The justification for the decision was that article 66 of the Constitution confers the protection of civil liberties on (private law) judges. As the conclusions of the *avocat général* make clear, this was taken directly from the case-law of the Conseil constitutionnel.[96] Currently, the civil and criminal courts do pay attention to developments in the case-law of the Conseil, but this merely aids the discovery of principles leading to a solution, rather than providing the solution itself.[97] Like lower courts faced with rulings by the Cour de cassation or the Conseil d'État, they prefer to use their own judgment in deciding what the Constitution requires, while according great respect to the Conseil constitutionnel.

All the same, there have been significant divergences of opinion. In later chapters reference will be made to differences on the status of

of the courts to the Conseil constitutionnel: indifference, distance or resistance, and emergence: 'De l'effet des décisions des juridictions constitutionnelles à l'égard des juridictions ordinaires en droit pénal français', *Journées de la Société de législation comparée*, 1987, 431 at 435.

[94] CE Ass., 20 Dec. 1985, *Établissements Outters*, *RFDA* 1986, 513, *conclusions* Martin, applying CC decision no. 82-124 L of 23 June 1982, and reversing both an *avis* of 1967 and a decision of CE 21 Nov. 1973, *Société des papeteries de Gascogne*, *AJDA* 1974, 489. See generally B. Genevois, 'Continuité et convergence des jurisprudences constitutionnelle et administrative', *RFDA* 1990, 143; L. Favoreu, in *Conseil constitutionnel et Conseil d'État*, 178–81, 185–9.

[95] TC, 12 Jan. 1987, *Cie des Eaux et de l'Ozone* c. *SA Établissments Vetillard*, *RFDA* 1987, 284, *concl.* Massot. See generally L. Favoreu, 'Le Juge constitutionnel, le juge administratif et le juge des conflits: Vers une harmonisation des jurisprudences', *RFDA* 1987, 264; and id., *RFDA* 1989, 142.

[96] Cass. crim., 25 Apr. 1985, *Bogdan* and *Vuckovic*, D. 1985, 329, *concl.* Donentwille. See also 'La Cour de cassation, le Conseil constitutionnel et l'article 66 de la Constitution', D. 1986 Chr. 169.

[97] G. Rouhette, 'L'Effect des décisions du conseil constitutionnel à l'égard des juridictions civiles', *Journées de la Société de législation comparée*, 1987, 399 at 407.

treaties and criminal penalties but these are not the only ones.[98] Such a situation is not at all unusual for a supreme court in France. The highest courts of each judicial system meet resistance from below, and this may well cause them to reverse their original opinions. Uniformity is not as highly valued as correctness in the legal system as a whole, and the Conseil constitutionnel cannot expect any special treatment if it is to act as a court.

It must not be forgotten that the Conseil d'État also acts as adviser to the Government, vetting all bills before they are presented to Parliament. A significant part of its advice consists of deciding whether provisions, as drafted, are constitutional or not. In doing this, the Conseil d'État is inevitably driven to study carefully the case-law of the Conseil constitutionnel and to predict its likely reactions.[99] This advice will, as we have seen, find its way unofficially to the Conseil constitutionnel, so that there is an indirect dialogue between the two institutions over the scope and content of legislation. All the same, there may be differences of opinion. The most famous one was over the law on nationalizations passed in 1982. The Conseil d'État considered that certain changes had to be made to the indemnity provisions proposed by the Government in their draft bill. The Government followed this advice, only to find that the changes were condemned as unconstitutional by the Conseil constitutionnel.[100] While such a pre-emptive control may not be infallible, it does reduce the litigation before the Conseil constitutionnel and increase its influence over the whole legislative process.

Techniques of the Conseil constitutionnel The influence of the Conseil is also extended by the character of its judgments. It is not content simply to answer the straightforward question of whether a particular provision is constitutional or not. Because it is deciding the issue once and for all and in abstract, it tries to anticipate the various situations that may arise and to provide guidance as to the *manner* in which the provision can be constitutionally valid. The guidance comes in the form of 'reservations of interpretation' that condition the constitutionality of the clauses considered, so that the judgment may state that 'subject strictly to the reservations of interpretation' set out in the decision, the

[98] See notably Cass. Ass. plén., 19 May 1978, *Dame Roy*, D. 1978, 541, *concl.* Schmelck; *JCP* 1978, II. 19009, *rapport* Sauvageot: a Catholic school could legitimately dismiss a teacher who remarried following a divorce, despite a Conseil constitutionnel decision of 1977 recognizing the freedom of conscience of teachers.

[99] See Y. Gaudemet, 'Le Conseil constitutionnel et le Conseil d'État dans le processus législatif', in *Conseil constitutionnel et Conseil d'État*, 87.

[100] See *GD* 500–1, and see DECISION 29.

loi is not contrary to the Constitution. This technique dates from one of the earliest decisions of the Conseil.[101]

Three different forms of such reservations can be identified, and they can be illustrated from the important decision on *Security and Liberty* of 1981.[102] The first is *interpretation*, whereby the Conseil offers a reading of the text that will be consistent with the Constitution. Thus, in that case a provision made it an offence, *inter alia*, to use any means to hinder or obstruct the passage of vehicles on the highway. It was objected that this might interfere with picketing or demonstrations connected with the right to strike. The Conseil simply stated in paragraph 14 of its decision that 'there is no possibility that the application of these provisions might, in whatever way, prevent or interfere with the lawful exercise of the right to strike or union action.' The text was 'emptied of its venom' so that it could not be applied in an unconstitutional way. The second technique is that of *addition*, whereby the provision is filled out in such a way as to make it constitutional. Thus, article 39 of the *loi* simply provided that an extension of detention before being charged could be authorized by the investigating magistrate or by the President of the local criminal court. It was objected that, in the latter case, the detention would be extended without the judge having read the file. The Conseil replied in paragraph 19 that the judge authorizing the extension 'will necessarily have to examine the file to authorize the extension of the detention before charge'. A third technique is to address *injunctions* to the administration about how the law should be administered. Thus, in relation to identity checks, the Conseil remarked in paragraph 64 that:

> with a view to preventing abuses, the legislature has surrounded the procedure for controlling and checking identity that it has created with numerous precautions; that it is up to the judicial and administrative authorities to ensure that they are fully respected, as well as to the competent courts to punish, where necessary, illegalities that are committed and to provide compensation for their harmful consequences.

This was a strong encouragement to the courts, who are normally loath to provide damages for illegal acts by the police.

The use of such techniques depends on both the nature of the *loi* in question and on the body charged with its implementation. Where the *loi* is very general and really is no more than a framework for future Government discretion or for legislation that will not be subject to control by the Conseil, then there is good reason for the Conseil

[101] CC decision no. 59-2 DC of 17, 18, and 24 June 1959, *Standing Orders of the National Assembly*, DECISION 13.

[102] CC decision no. 80-127 DC of 19, 20 Jan. 1981, DECISION 17. On the interpretative techniques, see *GD* 452–4.

constitutionnel to be expansive in the reservations of interpretation that it lays down. This was noticeable in the range of *ordonnances* issued in 1986. In the context of privatization, there were detailed reservations on the way in which the price was to be calculated and on the protection of national independence.[103] On more specific *lois*, the extent of reservations may be more limited.

The other consideration is the body that has to implement the *loi*. In *Security and Liberty* the body in question was the police. The guidance provided in the decision was adopted by the *Garde des Sceaux* (Minister of Justice) and incorporated in a circular on the application of the *loi*. In many cases judges will control the implementation, and it will be relevant to consider their normal principles of interpretation (and, indeed, their attitude to the decisions of the Conseil). The more the interpretation put forward departs from established principles within the relevant jurisdiction, or the more there is resistance to the Conseil, the more the reservations will have to be set out. In an extreme case the Conseil may prefer to quash the *loi*, if it is not likely that these reservations will be adopted.

On the whole, however, the Conseil will prefer to uphold a text as constitutional rather than strike it down. The inconvenience of a ruling of unconstitutionality against a text is significant. The Conseil's decision will usually come after the end of the parliamentary session, with perhaps three months until the next session is due to commence. Unless a provision is minor and severable, the Government may be forced to convene an extraordinary session of Parliament just to get the bill passed. Interpretation may well be a kindness in preference to nullity. Total unconstitutionalities are very rare. In part this is because severance is used to a significant extent, though this itself will require some interpretation of the text.

The scope and procedure of the constitutional review now operated by the Conseil constitutionnel is very much like that of a constitutional court, but with substantial differences from the kinds of court that exist in the United States and Germany. The Conseil constitutionnel is a court in all but name, though its procedure for reviewing legislation lacks significant attributes of a judicial process, even when compared just to ordinary French courts. Its jurisdiction is limited to reviewing *lois* before they are promulgated; once promulgated, a *loi* becomes immune from challenge in the ordinary courts.[104] At the time of the bicentenary, proposals were made by the President of the Republic and the President of the Conseil constitutionnel that the ordinary courts

[103] See DECISION 30, and O. Beaud and O. Cayla, 'Les Nouvelles méthodes du Conseil constitutionnel', *RDP* 1987, 677 at 682.

[104] See recent reaffirmations of this by Cass. 1ère civ., 1 Oct. 1986, *Bulletin de la Cour de cassation*, I. 232; and CE Ass., 21 Dec. 1990, *AJDA* 1991, 158 (1st case).