The French Parliament and the Priority Preliminary Ruling on Constitutionality

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The preface to the history of the Priority Preliminary Ruling on Constitutionality; PPRC) began in 1958, though it was soon cut short. It took three more decades for François Mitterrand, acting on the suggestion of Robert Badinter, then the President of the Constitutional Council, to be able to take the initiative in creating a constitutional bill to introduce an “exception of unconstitutionality.” The head of state saw this as a tangible way of celebrating the bicentennial of the Declaration of the Rights of Man and of the Citizen of 1789, a document which had already linked “the maintenance of the constitution and [the] happiness of all.”

Although the National Assembly agreed to it at a first and then a second reading, it did so against the wishes of the Communist Party, Rally for

1. In the minutes of the meeting of the working group that had worked on creating the draft Constitution, held on July 8 1958, it says of the Constitutional Council: “Mr. Aurillac believes that such a Council is only useful if it can be the judge of constitutionality by referral from the Council of State or the Court of Appeal.” However, this proposal was rejected “almost unanimously” (Documents pour servir à l’histoire de l’élaboration de la Constitution du 4 octobre 1958, La Documentation française, vol. I, 382). A reference to it can be found in the following biting comment (ibid, vol. IV, 190), according to which: “[...] it would not easily be accepted that a law passed by Parliament could be suppressed by judges after it had been enacted. Moreover, the judges themselves have always refused to exercise this control, which the Constitution of 1875, for example, did not forbid them from doing.”

the Republic, and the majority of the Union for French Democracy. The Senate, meanwhile, methodically sabotaged the reform, not by voting against it but rather by weighing it down with extras that it knew would be unacceptable. The government did not rule out getting the second chamber to take a more constructive stance, or failing that to make it be more open in its rejection of it. However, judging that his own objectives had been fulfilled, the President of the Republic preferred not to insist on the matter.

Following the work carried out by the Vedel Committee, Mitterrand tried again, albeit in March 1993, a moment when the initiative had little chance of succeeding. Unsurprisingly, it did not do so.

It was on the third attempt that the initiative was successful. Following in-depth discussions the Balladur Committee produced Proposal no. 74; this was inspired more directly by the 1993 text than the 1989 one, and the Committee made no claims as to the Proposal’s originality. Article 26 of the constitutional bill put forward by Nicolas Sarkozy on April 23, 2008 contained its ideas, while at the same time, bizarrely, proposing to limit it to laws that came into force after 1958.

This restriction was shrugged off by the National Assembly at its first reading. The Senate performed a timely excision of it and it was not given any further consideration. The new Article 61-1 of the Constitution was soon ready.

The PPRC, however, had not yet been brought into existence. The constitutional provision, in effect, merely laid down principles and rules for it – the a posteriori review during litigation, limited to the rights and freedoms guaranteed by the Constitution – and contained decisive signs

3. At its first reading on April 25, 1990 the text was approved by 306 votes to 246. All socialists (272) voted in favor, as did also fourteen centrists (including Jacques Barrot, now member of the Constitutional Council and Jean-Jacques Hyest, now Chairman of the Senate Judiciary Committee), four Union for French Democracy members (Pascal Clément, François Léotard, Alain Madelin, and Andrew Rossi), and fourteen non-attached members. All the Communist Party, all of Rally for the Republic (except the non-voting Michel Noir), and a very large majority of the Union for French Democracy voted against it (JO AN, 730). Sixteen deputies (two abstainers, one non-voter, and thirteen who voted against) later made it known that they had wanted to vote in favor (ibid. 732)

4. Among these was specifically the desire to cut massively the right of “last word” that the last paragraph of Article 45 of the Constitution conferred only on deputies.

5. JO (February 16, 1993): 2538.


7. Projet de loi constitutionnelle de modernisation des institutions de la Ve République, AN, n° 820.

8. Where the bill said “under the conditions and subject to the reservations set by an organic law,” the second chamber suppressed these “reservations.”
of it – the reference to the Council of State and the Court of Appeal, and the time-frame – but there still remained a wide range of possible outcomes. There was no assumption that it would take the form of a “question” – it could have instead been an “exception” – nor that it would be “priority” in nature – because it could well also have taken an *ex ante* or preliminary form.

In short, there still remained much to be done following the passage of the bill, which, as envisaged by the second paragraph of Article 61-1, would fall under organic law.

As a result of this, Parliament had a lot of scope for discussing and deciding on the matter. The shadow of the head of state hangs over constitutional bills, an intimidating prospect for the majority, who did not want to risk going against his wishes or not serving them properly. At the same time this majority felt freer when faced with an organic law and expected that their voices would be heard. In this particular case, the majority was all the more enthusiastic as it knew the opposition was similarly inclined to contributing to a joint initiative. The organic bill presented various choices – and did so clearly – but they all had to be considered through an open discussion, and it was from this that the PPRC was really born. Parliament is thus entitled to consider the PPRC as its baby. As such it is unsurprising that it has shown itself to be so attached to it.

**The PPRC, Parliament’s Baby**

A precedent to this situation is the LOLF organic law on finance laws, which was the result of a 2001 initiative by the assemblies themselves that rebuilt the whole budgetary-law framework. However, this case is less striking in its originality as the law that was created came from a government bill and not a proposal. Nevertheless, the fact remains that the essential choices were made, following some very intense exchanges and reflections, by the members of the assembly, who were under the watchful eyes of a government that exercised a substantial level of influence over them.

The text of the bill brought many answers to certain outstanding questions, the majority of which were welcome ones, though the essential elements of the bill remained. Two of these questions were particularly

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important: how could it be ensured that this filter did not turn out to be a plug? And how could it be ensured that conventionality review did not provide a diversionary channel?

With regards to the first question, it did not fall within parliamentary authority to handle decisions that would have to be taken by the Council of State and the Court of Appeal. Having taken the step of establishing the filter – the only such one in Europe – they then had to hand it over to those to whom they had entrusted it.

However, the members of parliament did see to it that it had the best possible chance of operating smoothly. They filled in an area on which the bill was silent by determining that *a quo* judges should rule “without delay” (Article 23-2); they then decided that in the case of a delay that was to the detriment to the parties involved, if a decision by the highest courts was not forthcoming within a time limit of three months there would be a “transmission” to the Constitutional Council. 10 The legislature could hardly do more, except to point out that there could be implications as much for the law itself as for its interpretation, something that was raised, though in too much of a sudden fashion for its importance to be evaluated. 11 Perhaps later setbacks could have been avoided, but the fact is that no one imagined at the time that the issue of supra-constitutional jurisprudence might unexpectedly crop up, 12 through which interpretations are miraculously detached from the law they relate to and become external to them.

Parliament was particularly decisive on the matter of the second outstanding question. A real risk was quickly identified. Knowing that conventionality reviews and constitutionality reviews can establish the same – or at least very similar – principles, any judge could initially carry out his or her own conventionality review, if necessary making use of a preliminary question. Then, in cases where he or she was led to dismiss the law, state that it would, therefore, not be “applicable to the dispute or procedure,” rendering its referral to the Constitutional Council both impossible and futile.

10. It is regrettable, incidentally, that it was so undermined by this choice of phrase. In the organic law’s other provisions, and consistent with Article 61-1, it was a question of “transmission” between *a quo* judges and the Council of State and the Court of Appeal, and “referral” between them and the Constitutional Council. It would have been better to write in article 23-7 that in these circumstances the question would be “sent” to the Constitutional Council.


Such an apparently very plausible scenario – the widening of the channel through which matters appropriate for constitutionality review might be diverted towards conventionality review – would have brought down the PPRC. Firstly, with regard to the same principle, judges would have had some difficulty in considering, based on conventionality, whether or not it had been violated and also, on the other hand, in judging, based on constitutionality, that the method they had just rejected was nevertheless valid, meaning that the number of referrals would have fallen considerably. Secondly, it may have led to constitutionality review playing only a residual role; although the intention of the constitutional reform was to finally allow litigants to gain protection from the Constitution, it may have offered it, at best, only in cases where no other method would have allowed an equivalent result. In other words, legislation that was contrary to the Constitution would never have been declared as such, because it would instead have previously been found to be contrary to European Union law or France’s international commitments. Thirdly and finally, although such legislation would have been neutered, it would have survived as a result of it having simply been cast aside, with the power to repeal laws only possible through constitutional review.

It was to avoid such a result that Parliament – for this was where the idea was born – chose to transform the bill’s “issue of constitutionality” into the “preliminary priority ruling on the issue of constitutionality” of the organic law. In adopting Paragraph 5 of Article 23-2 the deputies therefore truly brought the PPRC into being, as well as christening it through consequently changing the title of Chapter II (a) of ordinance 58-1067 of November 7, 1958, regarding the organic law on the Constitutional Council.

This did not happen without pointless quarrels over the respective roles of national and supranational law, disputes in which priority was confused with primacy and precedence, in spite of pertinent comments made by calmer figures. As the ECJ rightly adjudged, the point was to speed up constitutionality review without even momentarily delaying or denting conventionality review; one only has to imagine a

13. “In any event, the court shall, upon receipt of a challenge to the conformity of an item of legislation, on the one hand, to the rights and freedoms guaranteed by the Constitution and, on the other, to France’s international commitments, decide as a priority on the transmission of the question of constitutionality to the Council of State or the Court of Appeal.”


fight between Usain Bolt and Wladimir Klitschko to understand that being the fastest is not synonymous with being the strongest.

The priority was therefore exclusively procedural, something that was both necessary and sufficient. To their credit the deputies persuaded themselves of this and then put it into the text. In addition, to avoid putting the judges in the occasional embarrassing situation or finding themselves taking inopportune initiatives, Articles 23-1 and 23-5 of the text of the organic law prohibit the constitutional route being taken automatically.

Overall, the feeling of having accomplished something useful at a moment in which the different party-political boundaries had become blurred explains why the organic law needed only three readings – two in the National Assembly and one in the Senate – and above all why all of these ended in unanimous votes. There are fewer opportunities than we would like to point out the quality of parliamentary work. This is one such opportunity, and as such it should be unreservedly applauded. From a bill that was properly designed but incomplete, the parliamentary debates created a functional and well-thought-out organic law. Through them the Constitutional Question became the PPRC, and since the deputies could legitimately claim collective paternity of it, it is natural that they were both collectively and legitimately attentive to the future of their baby.

Parliament’s Attentiveness to its Growing Baby

March 1st, 2010 marked the PPRC coming into effect. Although the Council of State immediately and fully played along, without this being enough to provide definitive reassurance that its earlier reluctance had disappeared, we know that the Court of Appeal adopted a less cooperative – if not sometimes frankly hostile – attitude.

This is not the place to comment on this clear unwillingness, but rather to observe the reactions it provoked from Parliament. Its members were livelier, faster, and more consensual than usual, and what followed – and moreover in a very quick fashion – was retaliation and threats.

With regards to this retaliation, the Court of Appeal had insisted during the drafting of the organic law that the handling of PPRCs was to be entrusted to an ad hoc body of its own that would be under the authority of its First President. The Senate took the first opportunity to express concern, with a delightful sort of duplicity, about the multiple
and exhausting nature of the First President’s duties, 16 deciding to relieve him of this particular one by simply getting rid of this special body. 17 The National Assembly followed suit, by itself citing with equally cheerful hypocrisy a concern for simplifying things. 18 As with the Council of State, the outcome of PPRCs would henceforth be settled by the usual bodies, which the parliamentarians hoped would be less mean-spirited, or maybe less uniform, than the ephemeral special body had been.

Based on the possibility that this retaliation might not be enough, further steps were taken. Jean-Jacques Hyest, the Chairman of the Senate’s Law Commission, was the quickest and most determined; on July 9, 2010, he put forward a draft organic law 19 which in its explanatory memorandum denounced the “blockage” caused by the Court of Appeal and envisaged “at the parties’ initiative, the possibility of challenging any refusal to make a transmission at the Constitutional Council.” This rather aggressive approach raised a serious constitutional problem: given that Article 61-1 solely mentions a referral “when made by the Council of State or the Court of Appeal,” could the organic law arrange a process that did away with such a referral? Of course, the Constitutional Council may have been tempted to be lenient towards a proposal that was friendly towards it, but for that very reason such leniency could carry even more culpability from a constitutional perspective.

The most interesting thing here is less the content of this proposal than the desire it expressed of a prominent and probably not at all isolated member of the second chamber to mobilize any means to let the PPRC live, if necessary by coercing anyone who got in the way.

It is also striking that the same will also manifested itself in a more civilized form in the National Assembly. Here too the initiative came back to the Chairman of the Law Commission, since it was he who, having been referred to it by President Accoyer, decided, in what was quite an unusual procedure for a recent piece of legislation, to organize a study session for September 1st, 2010, which led to a briefing report. 20

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17. Article 12 de la loi organique 2010-830 du 22 juillet 2010 relative à l’application de l’article 65 de la Constitution.
18. The Senate amendment was adopted by deputies without even being discussed on May 3, 2010 (third session), after the Rapport (No. 2511, p. 20) had provided a pacifying presentation of them.
Twelve hearings, in the presence of quite a few deputies, who posed many questions that were often well-informed and precise, testified to the attentive interest they felt in the matter, and this was once again displayed by all political groups. At the same time other alterations to the organic law that were less radical than the one proposed in the Senate but were motivated by like-minded concerns were also considered.  

Jean-Luc Warsmann, the Chairman of the Commission, was also very clear in stating that since legislators may be called on again in relation to organic law, not least to give life to Article 71-1’s rights-defense authority, this “will give us the chance, if a legislative provision strikes us as important, to specifically discuss one.” He also added, so that there was no ambiguity about it: “Today’s discussion has not revealed any sort of conspiracy, rather merely that the will of those responsible for implementing the organic law do so as best they can for the benefit of our citizens.”

Everyone had been clearly warned: either, as was desirable, everyone contributed faithfully to the success of the reform, or else Parliament would not hesitate to intervene again as needed.

Wielding such retaliation and threats, and moreover in such a rapid and cross-party fashion, Parliament demonstrated an attachment to the PPRC that it is far from usual for it to do on other subjects, including institutional or legal matters.

The fact is all the more remarkable given that a priori one would have thought that Parliament might have had a few reasons to distrust this innovation.

Firstly, it would allow all protected laws – not only the oldest but also the most recent and even the most unanimous ones – to be submitted to Article 61’s reviews. Parliamentarians, however, gave way gracefully to the increased surveillance of their own productive output. This, incidentally, also makes them even more obstinate when faced with others’ attempts at judicial circumvention. If they themselves agree to make laws obey the Constitution, they have not done this so the judicial system can evade it. Secondly, future repeals of legislation will force them to legislate once more, with the parliamentary agenda now no longer dependent only on political bodies but also, to some extent, on the consequences of decisions made by the of the Constitutional Council. No one, however, has expressed any regret or even annoyance when the first decisions began to

place a burden on the national representatives to address within a deadline issues that would not have otherwise been included in their priorities. Conversely, politicians have proved to be rather pleased to regain control of subjects – for example the unfreezing of pensions or custodial questions – that governments have not been too eager to invite them to discuss. Thirdly, a superficial examination of this area and some foreign examples could have suggested that 61-1 would kill Article 61, or that the existence of the PPRC would cause parliamentary referrals to disappear by having rendered them moot, thereby reducing the role of elected officials. This has not happened and will definitely not happen. Quite apart from the fact that the opposition has embraced this initiative in a way it does not usually do, the implementation of this law has some primarily political motivations. There is no reason for these motivations to disappear simply because, by law, the same result could be obtained later by others, through the PPRC. Moreover, the purpose of review is not the same – conformity to the Constitution in the first case, the rights and freedoms it guarantees in the second – meaning the range of measures that can be taken under Article 61 is wide and that the procedure, in particular, can suffice to justify appeals to the Council. Parliamentary referral still has a bright future, but this does not cast a shadow over the other procedure. Finally, it was seemingly without any reluctance that Parliament fathered the PPRC. On the contrary, it did so first through the constitutional reform and then the organic law. This could well be the best scenario for the PPRC, since not only did Parliament give it life but it also offers it attentive, active and probably long-lasting protection.

23. Such as that of Spain (Article 162 of the Constitution) where only a few times during a year do fifty senators or fifty deputies petition the Constitutional Court, with other modes of referral, including the use of amparo having supplanted parliamentary referral.
ABSTRACT

While the 2008 revision of the French Constitution paved the way for the Priority Preliminary Ruling on Constitutionality (PPRC), it was in fact Parliament that truly gave birth to it by framing it as a “question” rather than an “exception,” and giving it priority rather than ex ante or preliminary status. Viewing itself as the father of this new mechanism, parliament nurtured the PPRC, reacting angrily to the obstacles it faced and remaining at the ready to intervene to protect it if necessary, even though Parliament itself is the one that stands to suffer the most from the PPRC’s successes through its legislative measures being judged negatively and the need to redraft them within an imposed time limit.