Lawyers and the Constitution: A Study of the Uses of a New Constitutional Remedy in France

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I. INTRODUCTION

The procedure of Priority Preliminary Rulings on the Issue of Constitutionality (hereafter, QPC) was inserted into the French Constitution in July 2008, in the most important constitutional revision of the 5th Republic. It was effectively implemented in March 2010. Before

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this date, the French Constitutional Council exercised a strictly *a priori* check on the constitutionality of law, that is, constitutional review prior to enactment (the Kelsenian model). Since the implementation of QPC, it now also exercises *a posteriori* review, objective and abstract in nature, by means of recourse specifically allowing abrogation of previously-enacted legislative provisions. A QPC application may be filed during any regular trial. In a separate submission, the remedy is formulated with respect to a legal provision which might infringe on a Constitutionally guaranteed right or freedom. The system is based on a rather particular filtering mechanism. The transferring of a QPC to the Constitutional Council requires prior referral by the Council of State and the Court of Cassation (where necessary following an initial hearing in the competent court). This initial screening consists notably in determining the "serious" nature of the application in question.

In a previous Article I studied the changes provoked by the QPC procedure with reference to the effects of constitutional norms *in* and *on* the law. A consideration of the procedure from a comparative perspective helps to advance knowledge of the phenomenon of the constitutionalization of the law.[1] The French example of QPC demonstrates that the abstract oversight of constitutionality is a powerful motor of constitutional development in the different legal domains.

This reform has favored, in France, an acculturation of constitutional law and a culture of constitutionalism among legal professionals. The presence of the constitutional perspective has incontestably increased. Frequent mention is made in the discourse of French jurists of a "constitutional reflex" which identifies it as much as it promotes it. However, from a rigorous methodological point of view, there is a lack of detailed empirical analysis to verify the reality of the situation and to evaluate it. It is this aspect that we have attempted to address in this study.

The present Article is based on the results of research I directed with the support of the French Constitutional Council,[2] with a view to taking stock of ten years of QPC practice in France. Our research is focused on

1. Mathieu Disant, « The Constitutionalization of Law. General Considerations Based on a French Example », *Tulane European & Civil Law Forum*, 2019, vol. 34.

2. In view of the 10th anniversary of the introduction in France of the Priority Preliminary Rulings on the Issue of Constitutionality, the French Constitutional Council sought to support the realization of research relevant to an interim assessment of the procedure. A call for selective projects, entitled QPC 2020, was launched. The research projects chosen were realized between August 2018 and June 2020. Of course, the content of the present Article is the sole responsibility of its author. The complete research report of QPC 2020 is available online at the following address: https://www.conseil-constitutionnel.fr/la-qpc/qpc-2020.

lawyers and the evolution of their practices. This is one of the least visible and least studied aspects of constitutional litigation. In France, this is understandable because until 2010 lawyers were not involved in pre-enactment review (*a priori*) of the constitutionality of the law, itself the sole source of scrutiny until 2010. After 2010, however, French lawyers were for the first time put into direct contact through litigation with the Constitution. It was a profound development. The doors to the Constitutional Council were thrown open: they produced observations, they pleaded at public hearings. They have become essential actors on the constitutional stage and, more generally, in the constitutionalization of the law.

That is why it is now important to study the professional practices involved in the QPC procedure, to understand the factors that encourage some lawyers to make use of QPC while others prefer to keep their distance, to understand the uses lawyers make of QPC and the elements that promote its use, or, on the contrary, that dissuade practitioners from using it. Who are the lawyers resorting to the QPC? What is their perception of the QPC? How are they appropriating (or not) QPC? What are the obstacles they encounter? What are the strategies employed? Is there a disciplinary specificity? On the basis of what client dialogues is an application to QPC made? In other words, what relationships do lawyers have with the QPC?

Lawyers merit the title of "auxiliaries of constitutional justice," as I have previously characterized them.[3] It is they who appropriate, render dynamic, and contribute to its success. Without their engagement, the diffusion of a constitutional reflex would have been reduced to a hypothetical. Establishing a blueprint of uses and practices of QPC among lawyers allows us to evaluate the way in which the actors appropriate the procedure and understand the modalities of its employment. The present Article thus attempts to update the perceptions, uses, and strategies of implementation of the QPC as employed by lawyers a decade after it was put into effect. The study I directed is, in France, the first study of its scale on the subject. It is part of an empirical analysis of constitutional litigation practices as I understand them in France and in the Francophone sphere.

Legal representation is certainly not obligatory in QPC. In point of fact, though, lawyers are present in a large majority, if not in almost all, of the proceedings (more than 95%) of QPC cases brought before the

3. Mathieu Disant, « Les auxiliaires de justice constitutionnelle », in *Libertés, (l)égalité, humanité*, Essays in Honour of Président Jean Spreutels, Bruylant, Belgium, 2018, pp. 381-400.

Constitutional Council. French lawyers enjoy a monopoly over public hearings on QPC brought before the Constitutional Council. Only lawyers may make oral submissions. It is a sign of the professionalization of the constitutional remedy. It is through lawyers that legal positions are asserted on the validity of initiating a QPC, or an intervention in an existing QPC, either in favor of or contrary to, the question of unconstitutionality. Moreover, if the defense of the legislation is exercised by the Government, represented by its General Secretariat, they are normally joined by the party that stands to gain from the contested law.

In my study, two considerations have been taken into account.

Firstly, the identification of professional profiles based on organizational features (size of the organization, status, specializations, development of areas of expertise within firms), financial aspects (costs of the proceeding), and sociological characteristics (geographical provenance, disciplinary field, nominal and training fees). The study also takes into account the juridical characteristics of the represented parties (private individuals, companies, trade unions, associations, non-governmental organizations). By way of reflection, it illustrates the perceptions and representations that legal professionals have of QPC and, more generally, of the Constitution.

Secondly, there is an examination of strategies of a technical nature (litigation, media, communications) used by these actors with respect to the objectives assigned to the QPC. The theory is that these strategies bear on the decision to launch (or not) a QPC, or even to take part in an existing QPC (in the case of intervening parties), depending on several factors: the opportune moment in which to undertake a QPC, the "selection" of the central piece of litigation, a cost- benefit analysis measuring effectiveness and foreseeable risks.

It should be noted that the QPC has a specific legal nature. It is an abstract legal application with the abrogation of law as a general effect. It also has a wide media and social impact. In this respect, a study of the strategies employed in a QPC constitutes an important contribution to the knowledge of legal practice in general, of constitutional law in particular, and the uses of this new constitutional remedy.

II. METHODOLOGY AND DATA COLLECTED

Knowledge of the identities, purposes, and strategies of the actors imposes, in terms of practice, an empirical approach that goes beyond the traditional sources upon which lawyers, particularly in Europe, most

commonly base their studies. As much as possible, the lacunae have been compensated for by a systematic study of the practices of the main actors.

The approach adopted here is empirical in nature yet engages with the sociology of litigation and the sociology of the legal professions. An openness to the sociology of public action and of access to the law also allows for attention to be drawn to the political uses of the QPC.

An examination of financial aspects is also indispensable in order to carefully consider not only the "cost" of a QPC (the micro-economic approach) as a potential obstacle to its usage, but also the accessibility and integration of the QPC procedure within the "legal market," as well as its adaptation to a quasi-oligopolistic and functionally pseudo-monopolistic framework (a macro-economic approach).

It should be highlighted that these aspects, largely ignored in France up until now, contribute new understanding of the QPC by considering it in the light of opening up a new field of economic activity. This way of examining the actors in the legal debate is not frequent in the area of constitutional litigation. Indeed, it is virtually nonexistent, at least in France.

We have mobilized various investigative tools and techniques. The data has been gathered by means of two complimentary techniques of information collection. One element was the utilization of an electronic questionnaire. It was created, edited, and put online following an initial pre-test with a reduced sample of respondents. A second element included some forty semi-structured interviews conducted with lawyers. We thus combined techniques relevant, respectively, to quantitative and qualitative analysis. The corpus was refined into sub-populations by function of the characteristics of the lawyers, their experience, and their location in Paris or the regions outside Paris. The cross-referencing of data allowed for the initial work of standardization and the highlighting of differences between the strategies pursued by lawyers.

Several significant observations are worth pointing out. We direct the attention of an international legal audience to three principal conclusions. Firstly, a strong disparity of perceptions and actions exists depending on the professional involved and the type of clientele concerned. Secondly, we have observed that lawyers have rapidly refined their uses of QPC favoring new strategies of interpretation of the law. Finally, the QPC is considered a relatively attractive application because the advantages of the procedure outweigh the various impediments that lawyers face in launching the constitutional review.

III. DIVERSITY OF PERCEPTIONS AND ENGAGEMENT: A LITIGATION ELITE?

First of all, one point should be emphasized. For the great majority of lawyers surveyed, QPC cases remain, with respect to the volume of business, a marginal action in their firms. In France there are no firms with an identity that specializes in constitutional law. We have not observed new managerial strategies at firms seeking to optimize legal performance based on this constitutional remedy either.

The model of the QPC's dissemination in the profession is diffuse. Ten years after its adoption, QPC is predominantly perceived as a veritable "cultural revolution" that has now become firmly established and well-appreciated. This inquiry allows us to verify the emergence of a constitutional reflex that lawyers feel they have acquired.

In terms of general perception, the dominant impression of lawyers, whether or not they have used QPC recourse, is a favorable one. This is in part the result of an active campaign of diffusion, if not promotion, of the QPC initiated by the President of the Constitutional Council Jean-Louis Debré since its introduction in 2010.

The success of QPC in terms of opinion and image are clear. Expressions of hostility to QPC from within the profession are fairly rare. French lawyers sometime express an intellectual interest in QPC, perceiving it as a process that challenges the key principles of law. It is an aspect particularly brought to the fore in their discourse, often associated with a "passion" for the law and the appetite for the "transversality" of the issues and "academic reflection." The use of QPC depends, in fact, on conditions of receptivity to these ideas, of the entry costs to employing it for the first time and the ability to establish it as regular activity in a quotidian practice that can seem far removed from it. We will see that the perception of QPC varies considerably depending on the professionals and the type of clientele concerned.

IV. QPC TRAINING METHODOLOGIES

From the perspective of training in the use of the procedure within the profession, we can observe two important elements. In the first place, QPC is implemented in contrasting ways depending on the type of lawyer. In the second place, the training lawyers receive for QPC is, in fact, a key issue.

A. The Affirmations of Lawyers at the Councils

A distinct difference exists between the two types of lawyers in France: the lawyers to the Councils and the lawyers in the Court.[4]

The *lawyers to the Councils* report routinely exercising constitutional review from the moment that their methods meet legal impediment. They almost systematically display their expertise in the ways of constructing a QPC. They consider it inherent to their traditional activity of oversight of legality and the attention that they devote to "developing the law" in their capacity as judicial officers delegated by the State. They are committed to the image their firms must reflect and affirm a careful monitoring of the seriousness of the QPC once the question of an application is raised.

By contrast, claims of expertise with QPC competency on the part of *Court lawyers* are quite exceptional. A development in favor of increased awareness of QPC is noticeable here, yet far from being generally applicable. Many lawyers consider themselves to be little informed, either on QPC procedure or on Constitutional Council case-law. Legal professionals who see themselves as non-specialists often report, without really challenging it, their lack of expertise. This phenomenon adds to the nominal cost. As a result, an elite group of professionals emerges, if not in the actual QPC application, at least in the division of labor once a QPC is engaged and/or pleaded.

We clearly observe that lawyers at Councils are in a more advantageous position than Court lawyers in filing a QPC. Constitutional issues that have no great financial stakes or those that are not brought by or supported by institutional claimants have fewer chances of being the object of a QPC.

The cross-referencing of the collected data has yielded the following trends:

1. For lawyers to the Councils defending an institutional client (companies, associations, trade unions. . .) the material and procedural impediments are very reduced. The QPC expedient is perceived as an efficient medium through which to weigh on legislation, obtain an abrogation, or interpretive reservation, even a modification of judicial or administrative case-law.

4. In French law, "Lawyers to the Councils" is the commonly used name for "lawyers to the Council of State and the Court of Cassation." Council lawyers have a monopoly on the representations of litigants before the Council of State and the Court of Cassation. There are 119 lawyers of the Council of State and the Court of Cassation from among 64 firms. Court lawyers number little more than 68,000.

2. For lawyers to the Councils defending a private individual, the material and procedural obstructions are reduced. The choice of undertaking a QPC is actually made by considering the legal issues raised in the dossier and the chances of obtaining the desired outcome. This choice takes account of the *pourvoi* or appeal.[5]
3. For Court lawyers, the decision to undertake a QPC depends upon infinitely more varied factors, notably relating to the subject matter of the dossier. Lawyers defending an individual in litigation on tax matters will encounter fewer adverse effects, with the exception of the "social" risk of a new law less favorable to the taxpayers involved. By contrast, for lawyers defending individuals on penal matters, the procedural and material impediments are numerous and do not appear to be offset by a gain in terms of outcome, both as a result of unpredictability and the risk of deferral of the abrogation to a later time.

B. Essential Practical Training

As it stands, learning about QPC is largely accomplished "through cases," that is, an essentially informal and experiential self-directed study. Of course, training sessions offered by various organizations exist, but these are either judged to be superfluous (by the lawyers to the Councils), or they are underutilized by Court lawyers.

Training is essentially acquired by practical means, on the basis, notably, of varied support and pooling of resources, conducive to a sharing of experiences. The occasional reliance on academic expertise with a specialization in this area forms part of this training. These aspects have the potential to reinforce inequalities between professionals, given the cost of access to the procedure, certain forms of self-censorship, but also aspects relating to specializations in the profession. The distance between positions that are "expert" or by contrast "non-expert" have become pronounced, even if the areas that are likely to be the object of a QPC have become wider and the notional accessibility of the instrument to all lawyers constitutes one of its attractions, along with the political impact of a QPC that permits litigants and their lawyers to take on a role of "constitutional entrepreneur," or even, in tandem with other legal

5. The « pourvoi » is the appeal exercised specifically in the Court of Cassation or the State Council.

mechanisms, such as class actions or recourse to the European Court of Human Rights (ECHR), a "sentinel of democracy."

To improve upon this practical training, I believe the instruments of training should be adapted accordingly. There are two reasons for this. Firstly, there are several factors undermining the possibilities for following-up this training: working conditions, including pressures, the inequality of the resources available to professionals, the challenges and the uneven costs of the QPC depending particularly on the types of cases and clients as well as the residual, if not exceptional, nature of the QPC in the cases and revenue of the firms. One must, no doubt, revise basic legal education so as to give more prominence to this kind of legal procedure.

Because, in addition, it is not the QPC procedure in itself that requires the acculturation of the lawyers. Rather, it is the possibilities and opportunities of the procedure which do not appear, in their view, always obvious and warrant the necessity for training courses. QPC is a trial within a trial. The capacity to appreciate the "desynchronization" of constitutional remedy relies on the construction of a fine and complex methodology.

We must add an important observation that contradicts a widespread preconception. There is no apparent generational difference amongst lawyers with respect to the QPC. The procedure does not appear to rely solely upon the new generation of legal professionals. Lawyers educated since 2008 are not viewed as more competent than the older colleagues in the process, nor are they effectively better trained than the previous generation of lawyers in the mechanism.

V. METHODS OF MOBILISATION FOR QPC, A CAUSALIST LAWYER *À LA FRANÇAISE*?

The expansion of QPC raises a new question in France: that of the role acquired by the lawyers in the production of constitutional law. It is still difficult to precisely evaluate their role because French studies have not examined this aspect. With this study, however, we can make three observations.

A. The Incremental Impact of Lawyers' Awareness

We sometimes observe a change of role with the deposition of a QPC. A QPC offers a new dimension to lawyers' activities. Among them, some state that they have had to change their professional objectives in view of the positioning of a QPC: the defence of their client gives way to the

protection of a fundamental principle or civil liberty. Starting from a legal issue, lawyers must comprehend its larger significance by reasoning from fundamental constitutional rights, these lawyers attest to finding themselves, without necessarily having wished it, representing a cause against political power, or more precisely, tackling a "public affair" or issue in a judicial framework. The QPC has more clearly opened up this perspective or has enlarged it to include new space perceived as the "center of power," represented in the specific characteristics of the Constitutional Council, compared to the temples of justice lawyers are accustomed to occupy.

Even if this remains marginal, the perception can generate, amongst legal professionals themselves and particularly among Court lawyers, a change in the role they adopt. The lawyer would be inclined, *via* the QPC, to bear the grievances in the field, resulting perhaps even in a veritable social engagement, often to the great surprise of the lawyer themselves. A QPC is never experienced like a banal legal procedure. A QPC provokes, quite broadly, new questions among the lawyers relative to their professional identity, well beyond those who are already invested in evaluating conformity to conventionality and used to engaging the European Courts on the terrain of major fundamental principles. A consciousness of the possibilities of the QPC thereby lead certain lawyers to reconsider their responsibilities in this process.

B. The Phenomenon of Appropriation of the QPC

Although the phenomenon is still hard to assess, we sometimes note an appropriation of the QPC by lawyers, beyond the investment of the clients. Over the years lawyers have found themselves at the heart of the QPC system. Their relationships with clients are quite varied on this issue: they sometimes initiate the application, at other times they follow their clients into the process or guide clients through the QPC. This may depend on the requests of their clients or, alternatively, on their own initiative and investment in the defense of the legal case. It does not simply mirror the usual client relationships that are inherent in the legal professional sphere.

Our examination shows the dominant role of the lawyer regarding QPC and a (noble) desire for controlling the process. It also sometimes occurs that a QPC is filed without consultation with the client, as if the mechanism had been appropriated by the legal professional. We can provide two main reasons for this development.

Firstly, this stems from the particular nature of the QPC. We must remember that it concerns a temporary stage of a case, a trial within a trial.

The QPC may permit the lawyer a win that the client might not, in reality, benefit from, such as when the Constitutional Council defers or postpones the abrogation of a law. It seems that this explains, incidentally, how after ten years of QPC practice, the question of billing for a QPC has still not been clarified among legal professionals.

Secondly, lawyers tend to assert institutional or political responsibility in the regulation and the proper functioning of the QPC, even for the collective good, given the possible effects of a potential abrogation of the law. We might add that this constitutional remedy, not its potential effects, has an important impact on reputation in the professional community.

Sometimes, among lawyers who are most proficient in QPC procedures, some come to see themselves as guardians of the institutional system and as intermediaries in a collaborative transaction with the Constitutional Council so that certain issues may be brought before it. There is a trend towards the construction of a new legal imaginary, based on a sense of implicit cooperation with the Constitutional Council: it counts on lawyers to monitor the situation in the field and to alert it in the case of irregularity, permitting lawyers to assert the authority of the Court and incidentally, their own.

C. The Absence of Activist Lawyering

Contrary to the situations most commonly examined in the sociology of "cause lawyering," particularly in the sociology of law in North America, we do not observe genuine activism amongst French lawyers. The QPC does not appear to be perceived as a political weapon at the disposal of the legal professions. With the exception of certain QPCs of a technical and dispassionate nature, it is, rather, a procedure selectively deployed within the context of the debates of civil society.

Moreover, in the area of QPC, the functional classical divisions of the professions are maintained, without evidence of a special position for Court lawyers who might be in contact with the various social struggles or activist terrains. Activist organizations seeking a QPC seem to turn towards lawyers to the Councils for representation in the Constitutional Council, without being especially constrained by the fact that the lawyers or firms they solicit otherwise consecrate the majority of their professional activities to cases that have no link to political struggles.

The lawyers surveyed maintain, for the most part, a distant relationship to the "causes" of their clients, and they stay generally on the sidelines of struggles that seek to thrust social debates onto the courts. If

lawyers make a point of explaining their participation during interviews, it is primarily in technical terms: more often, they do not feel the need to see themselves as lawyers of emblematic causes. In sum, QPC has not altered the distinction between the struggles of civil society and the professional activities of lawyers. In marginal cases, a QPC might prompt a lawyer to prioritize the public interest, in the name of a "legal cause" (unconnected with the clients' interest), of whom they find themselves the guarantor, assuming the designation of *causalist lawyer* despite themselves.

VI. THE REFINEMENT OF QPC IMPLEMENTATION STRATEGIES

In ten years of practice, the execution strategies of the QPC have been refined. The abrogative effect remains a particularity of this procedure, but other objectives have been assigned to it in terms of interpretation of the law.

A. The Strength of the Abrogation Effect

The QPC is not a legal appeal like any other. It can have significant consequences, particularly the abrogation of a legislative provision (the *erga omnes* effect). This is an exceptional weapon. Lawyers are perfectly aware of this effect. It is not unusual that some lawyers use charged language to express its potential effects: "machine-gun fire," or "a weapon of massive destruction." The QPC is also compared to "nitroglycerin," "it's like cannonball fire, it can sweep away the law."

French litigation practice provides two insights with respect to the abrogation effect of general application.

First, the initiative of a QPC, particularly on behalf of non-institutional clients, is not always to seek the specific effects of abrogation. Lawyers seek, above all, the effect that a QPC can have for a client without the determination that the results might also satisfy general interest objectives. The abrogation effect is more pointedly sought out by institutional claimants, and the abrogation of a legislative provision is sometimes that much more efficiently obtained if the law has not yet been applied.

Second, the strength of the abrogation effect leads a significant portion of lawyers to develop an ethic of the QPC. I mean, by this expression, an attention brought not only to the impact of nullifying a statutory instrument, but more generally, the unintended effects for the collectivity and the field of law in question.

B. Critical Issues in Interpretation of the Law

The effects sought by lawyers *via* a QPC have gained considerably in subtlety. Apart from abrogation, two main objectives have clearly been assigned to the QPC.

Firstly, the securing of a *Réserve d'interprétation* or Interpretive Reservation by the Constitutional Council. The technique of interpretive reservation permits the Constitutional Council to declare a provision in conformity with the Constitution subject to its interpretation or application in the manner thus indicated by the Council. This technique is common in QPC, allowing for the validation of a provision, which, without the interpretive reservation, might, or could be, immediately supressed.[6] The strategy consists in requesting an interpretation of the law, which will be imposed upon the administrative and judicial authorities. It's a strategy that institutional clients are particularly invested in. Forty-one percent of lawyers who have filed a QPC declare having pursued the objective of an interpretive reservation of the law.

Secondly, because of its filtering effect, the QPC is used as a means to pressure the Court of Cassation or the Council of State to produce, secure, or clarify an interpretation of the law, or even to modify their jurisprudence regarding the legislative provision in a particular sense. This strategy can encourage lawyers to file a QPC though the chances of success are slim, perhaps even inexistent, with legislation whose conformity to the Constitution is not really in doubt. The only goal of such an appeal is to constrain both higher courts to rapidly take a position on a problem of controversial legislation and to use it to satisfaction on the substance of the case. The QPC emerges therefore as a quick means by which to determine the state of jurisprudence, to clarify a jurisprudential position, and where appropriate to demonstrate that the interpretation retained by the trial judges should be revised. This can also be the means to accelerate the development of case-law (administrative or judicial) or to prompt its reversal.

This aspect reveals that lawyers increasingly make a strategic use of the filtering of QPC. They make pragmatic use of the QPC. The more experienced lawyers develop a strategy of legislative interpretation at the

6. We can distinguish typically three types of qualified interpretations: There are (1) qualifications known as "neutralizing" which eliminate interpretations which are potentially contrary to the Constitution; (2) qualifications known as "directives" which include a prescription regarding a legislator or an authority of the State charged with the application of the law; finally, (3) qualifications known as "constructive" where the Council adds to the law to render it conform to the Constitution.

filtering stage before the Council of State or the Court of Cassation. This development favors the transformation of the screening process into a mechanism of interpellation of the judge ("to weaken a reasoning"). The filtering then loses it chosen purpose. On the contrary, with this strategy it is the refusal of the referral of the QPC to the Constitutional Council that is the vector of the interpretation sought.

We should indicate that at times the Council of State and the Court of Cassation go beyond their prerogatives of screening in exercising, in an excessive way, a check on constitutionality pure and simple. This is a sentiment often expressed by the lawyers. The projection according to which the Constitutional Council, if it had received the application, would have retained a different opinion from that which led to several refusals of referral, is fairly widespread. We should remember that an appeal from this refusal of referral is impossible under current French law.

VII. THE RELATIVE ATTRACTION OF THE QPC

The QPC can be considered a relatively attractive remedy because the advantages of this procedure generally outweigh the impediments encountered by lawyers entering into a QPC.

In order to evaluate the advantages of constitutional remedy, lawyers carry out a cost-benefit analysis based on perceived parameters, in terms of favorable conditions and in terms of obstacles to the filing of a QPC. The method does not appear to be profoundly different from an analysis of expediency and ethics that is normal practice within the profession. It is linked to the context of the dossier and to the appraisal of the desired, or reasonably feasible, outcome.

However, the different parameters taken into account for the remedy are diverse in nature. They can be either procedural (filtering procedure, time to create the separate submission, influence of the QPC on the length of the procedure), or material (cost of the QPC, time required by the process), or connected to outcomes of the application (estimate of chances of success, the possibility of obtaining the desired outcome). In the relations with clients, lawyers also consider the proportionality of the QPC relative to the challenges of the case.

The procedural parameters are generally favorable to the attractiveness of a QPC. In particular, this mechanism has a great strength: it is very quick. At the screening stage, the QPC should be examined by the Court of Cassation or Council of State within a fixed time period of three months. If the QPC has been sent to the Constitutional Council there is a three-month time limit. In the longest possible scenario (when the QPC

is raised before a trial judge[7]), the French system allows for a resolution of the constitutional appeal, with general effect, within a delay inferior to nine months. The other parameters are variously assessable and more unpredictable. The analysis of expediency carried out by the lawyers is itself variously understood. It constitutes, depending on the case, the obstacles and the elements neutral or favorable to the QPC.

Our study allows us to highlight differences of assessment depending on the areas of intervention. Thus, for example, in litigation within the administrative jurisdiction, the QPC procedure is perceived as an accelerator of the procedure and, as a consequence, an advantage for the client. The perception is broadly reversed for the lawyers dealing with litigation of a judicial order.

Occasionally, the QPC appears ill adapted to certain client-specific parameters or to certain litigation. The QPC procedure can then present "undesirable" elements. In the context of criminal cases the decision to stay proceedings can result in a prolongation of preventative detention or a remand to preventative detention.

A. The Cost of the QPC Can be an Impediment but not an Obstacle

Our study allows us to show that the cost of a QPC is a more or less determining factor. The results of our questionnaire have shown that in 21% of cases, lawyers have not raised the option of a QPC due to the costs for the client. Of the lawyers who responded to the questionnaire 38.5% view the prohibitive cost of the QPC as an obstacle. However, almost half of lawyers (48.7%) who had already participated in a QPC procedure responded that they had not passed on the cost of the QPC to their client. Interviews allowed us to identify certain lawyers who, convinced of the importance of the QPC, decided to reduce their fees, if not entirely renounce their fees (*pro bono*). This shows that the "QPC market" is resistant to an economic analysis, as confirmed by the hypothesis, fairly common according to those surveyed (26.5% of lawyers surveyed), of QPC financed entirely by legal aid.

On the micro-economic level, the billing practices of lawyers for QPC frequently reflect a construction in stages of the procedure itself. The fixing of the "QPC cost" can resemble two different situations: a single tariff (comprehensive cost) or a differential tariff (incremental cost). These

7. Before the courts of first instance, it is expected that judges decide "without delay" on a QPC. In French procedural law, the term "without delay" signifies the briefest of delays, as quickly as possible. In practice, the average delay here is approximately three months.

two billing practices are equally common. Billing of QPC at marginal cost is slightly more representative of practices in the profession. The majority of lawyers surveyed (54.3%) do not separately bill a QPC, it is instead included in the fees due for written submissions.

Furthermore, fees are determined considering other criteria, notably the financial situation of clients. The method of estimating this cost can be seen as a *strategic interaction*. In this respect the analysis of the QPC from the financial point of view puts economic theory in front of a new situation insofar as it is characterized by non-competitivity (a bilateral monopoly situation). Consequently, there is not, properly speaking, an oligopolistic market for QPC, but a discriminating monopoly. The power of the lawyer is almost entirely exclusive, to the extent that the lawyer alone estimates the costs of the QPC and appreciates, in advance, the financial capacity of the client.

Where it exists, the impact of the costs of a QPC on overall pricing is not assessable from the data collected. This last, subject of a corpus that ought to be expanded, allows nevertheless for the determination, according to those surveyed, that the median amount of differentiated billing of a QPC are: 3,500 euros as deposit, 5,400 euros in the instance of reliance on a lawyer to the Councils, and median additional charges of 2,000 euros for the presentation of oral submissions before the Constitutional Council.

B. The Risk of Lack of Effectiveness of the QPC

In accordance with Article 62 of the Constitution, the Constitutional Council disposes of the authority to adapt, or even to defer, the impact of an abrogation.[8] Such a deferral is likely to remove the benefit to the client. This constitutes the major criticism and a significant barrier to the individual claimant. In fact, it can lead to a strange situation at first instance: winning a QPC may not necessarily benefit the case. There is thus a risk, to be sure it is fairly rare, but impossible to foresee, that a decision for abrogation may deprive the applicant of a beneficial outcome.

In practice, this situation can result from three situations:

1. The issuance of a ruling of unconstitutionality founded on an adverse infringement to principles of equality. In the language of litigation, we call this oversight *en tant que ne pas* or "insofar as

8. On this topic, see Mathieu Disant, « Les effets dans le temps des décisions QPC. Le Conseil constitutionnel, ''maître du temps'' ? Le législateur, bouche du Conseil constitutionnel ? », *Nouveaux Cahiers du Conseil constitutionnel*, 2013, n° 40, pp. 63-83 (accessible online).

it does not": the constitutional sanction deprives everyone of the original benefit granted to a few (but does not permit the petitioner who solicits the advantage to benefit from it).

2. A ruling of unconstitutionality directed to a rule of procedure does not always result in the calling into question previous acts occurring in conformity with the unconstitutional law.
3. A decision of unconstitutionality by the Constitutional Council which defers the moment of abrogation to a later date because the immediate effects of a repeal would have consequences that are manifestly excessive[9] or, were the consequences to be drawn immediately, it would lead to a perceived substitution of the Parliament by the Constitutional Court.[10] The Constitutional Council sets, in its decision, the date at which the repeal handed down will take effect, so as to permit the legislator to remedy the legislation in the interim. In recent years,[11] the Constitutional Council has developed a technique called "temporary reservation" to designate the methods of execution of these decisions and of the transitional regime subsequent to such decision.

How is this risk managed by the lawyers?

The practices are fairly heterogenous and consist in addressing, in their submissions, the question of the delayed impact of a decision.

The majority of lawyers to the Councils deal with it systematically, either in submissions or pleadings. It is a lot less systematic for lawyers at the Court who consider sometimes that it is a matter for the discretion of the Constitutional Council alone. However, if the QPC is referred to the Constitutional Council, the question of the utility of the legal effect is now well integrated in the argumentation.

When dealing with clients, lawyers do not always inform their clients of the risk, which is perceived as difficult to explain as well as to anticipate. Indeed, it is viewed as a random variable. It may be an impediment, certainly, but not an obstacle on principle. It is rare that its consideration leads to renouncing a QPC.

In order to minimize it, lawyers tend to consistently reinforce a QPC by concurrent reference to the provisions of international covenants. It is a reflex that a majority of lawyers have. This strategy is justified by the fact that they use both means to achieve the same ends: to change

9. Cons. const. n° 2010-14/22 QPC of 30 July 2010.
10. Cons. const. n° 2010-108 QPC of 25 March 2011.
11. Cons. const. n° 2014-400 QPC of 6 June 2014.

legislative text in the defense of their dossier. This is facilitated by the relevance of significant protections, due in particular to the desire of the Constitutional Council not to diverge significantly from the jurisprudence of the European Court of Human Rights (ECHR).

This proximity between the jurisdictions is nevertheless not identified as double oversight. Other than some variations in standards of protection, lawyers identify and compare the advantages and disadvantages respective to each procedure.

From the point of view of the procedure, the QPC is perceived as much more efficient than a preliminary referral to the Court of Justice of the European Union or an application brought before the ECHR. It does have more weight and is more expensive than an immediate application to the European Convention by national judges. This last option is the most integrated into quotidian practice.

From the point of view of the effects of an abrogation (*erga omnes* versus *inter partes* effect of the oversight), the perceptions are quite varied. Certain lawyers do not see the significant difference as long as the outcome is favorable to their client, others associate the QPC as being more adapted to institutional or activist clients.

Finally, to these different parameters we can add the perception and practices of lawyers. The perceptions are those that they make of judges and their greater or lesser openness to this kind of means. Ordinary judges (administrative and judicial) are often considered fairly cautious in matters of conventionality review (ECHR) but the QPC seems to have initiated an evolution on their part towards a greater openness to arguments on the basis of rights and freedoms. Practices are associated with the lawyers' reflexes, towards QPC or towards conventionality, that they have due to their specialization or to their greater or lesser facility in appropriating the different instruments. In this regard, conventionality review appears to be one of the factors that has particularly aided the development of the QPC, as the working methods of the two types of review are similar.

VIII. SUMMARY

A legal procedure is nothing without those who make it their own and make it "live." In France, since 2010, the Priority Preliminary Rulings procedure on issues of Constitutionality (QPC) is a remedy specifically permitting the contestation of conformity with the Constitution of a legislative provision, applicable during a trial. In a country with a strong tradition of legal centrism, this has provoked a profound change. This Article studied the uses that lawyers have made in ten years of practice of

the QPC procedure. To this end, empirical research was conducted on their professional practice.

From a diversity of perceptions, uses and strategies, it is possible to bring to the fore some general trends. The research shows a still important divide between, on the one side, lawyers for whom the QPC remains an unsuitable instrument for their cases, not adapted to their resources and alien to their professional practice, and, on the other side, the lawyers who quickly integrated its use, to multiply their chances of success, in the public interest or in commitment to a cause.

Among the professionals having resorted to a QPC, the strategies vary according to the lawyer's profile (lawyers to the Councils or lawyers to the Court), the clients (private or institutional) and sometimes depending on professional area.

Lawyers to the Councils see few material or procedural impediments to the usage of QPC. They avail themselves of the QPC when a case meets an obstruction whose source is legislative in nature. For an institutional client, this is sometimes reinforced by a more normative strategy when the objective is, aside from the case itself, of obtaining an abrogation, an interpretive reservation or new judicial or administration case-law.

Practices are more diversified among lawyers at Court. The considerations of cost, duration, effectiveness, and expected outcomes are weighed for each case without an evident evocation of that analysis. Some specific features by area emerge, however: lawyers defending an individual on fiscal matters, where it would be easier to engender litigation launching a QPC, experience few adverse effects. By contrast, those defending an individual in penal matters encounter material and procedural barriers that dissuade from a QPC and support the advantages of an application of unconventionality on the basis of the European Convention of Human Rights (ECHR).

Beyond these differences in strategies, lawyers who have resorted to QPC all report an easy appropriation of the procedure, generally well-appreciated for its rapidity and its simplicity. Criticism is mainly focused on the unpredictability of the jurisprudence of the Constitutional Council and the effects over time of rulings of unconstitutionality, despite the evolution that the Constitutional Council has achieved on the issue.