Article

Constitutional Norms in French Tax Law

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ABSTRACT:

In France, a Constitutional Tax Law has been built from the activity of the Constitutional Council, during the last decades. The French Constitution does not offer an exhaustive statute of tax regulations, however the activity of this judicial body has allowed the development of a constitutional doctrine in the tax field, making use of the constitutional preamble. This paper seeks, first of all, to explain the scope of these different principles (equality, freedom rights, right to private life, right to legal defense, etc.) and their impact on tax reforms, both in terms of It refers to the substantive rules that govern the calculation of the tax, as well as the rules of tax procedure. Secondly, it tries to present the different ways in which, in France, tax provisions can be submitted to the control of the constitutional judge, and the scope of the decisions that he is called upon to issue.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; derechos de los contribuyentes; jurisprudencia constitucional.

RESUMEN:

En Francia se ha ido construyendo un Derecho Constitucional Tributario a partir de la actividad del Consejo Constitucional, durante las últimas décadas. La Constitución francesa no ofrece un estatuto exhaustivo de normas tributarias, sin embargo la actividad de ese órgano judicial ha permitido desarrollar una doctrina constitucional en el ámbito tributario, haciendo uso del preámbulo constitucional. Este paper busca, en primer lugar, explicar el alcance de estos diferentes principios (igualdad, derechos de libertad, derecho a la vida privada, derecho a la defensa judicial, etc.) y su impacto en las reformas tributarias, tanto en lo que se refiere a las normas sustantivas que rigen el cálculo del impuesto, como a las normas de procedimiento tributario. En segundo lugar, intenta presenta las diferentes formas en que, en Francia, las disposiciones tributarias pueden someterse al control del juez constitucional, y el alcance de las decisiones que éste está llamado a dictar.

MOTS CLES :

constitution politique ; régime fiscal; principes fiscaux; droits des contribuables; jurisprudence constitutionnelle.

RESUME :

En France, une loi fiscale constitutionnelle s'est construite à partir de l'activité du Conseil constitutionnel, au cours des dernières décennies. La Constitution française ne propose pas un statut exhaustif de la réglementation fiscale, cependant l'activité de cet organe juridictionnel a permis l'élaboration d'une doctrine constitutionnelle en matière fiscale, s'appuyant sur le préambule constitutionnel. Cet article cherche, dans un premier temps, à expliquer la portée de ces différents principes (égalité, liberté, droit à la vie privée, droit à la défense, etc.) et leur impact sur les réformes fiscales, tant du point de vue de la les règles de fond qui régissent le calcul de la taxe, ainsi que les règles de procédure fiscale. Dans un deuxième temps, il tente de présenter les différentes modalités selon lesquelles, en France, les dispositions fiscales peuvent être soumises au contrôle du juge constitutionnel, et la portée des décisions qu'il est appelé à rendre.

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1 INTRODUCTION

Since the 1970s and 80s, a “constitutional tax law” has emerged in France, resulting from the interpretation of the Constitution by the Constitutional Council and its comparison with the tax laws submitted to it.

At first reading, the text of the Constitution of October 4, 1958 may seem almost without impact on tax reforms, because most of its provisions govern the relationship between public authorities. It thus only mentions tax in its article 34, which gives the legislator exclusive competence to set the tax rules, in its article 47 relating to the procedure for adopting finance laws (which set the annual budget of the State) and, since a revision of 2003, in its article 72-2 under the terms of which the local authorities can collect all or part of the taxes.

However, the case law of the Constitutional Council has gradually led to the “discovery” of many constitutional principles governing tax rules – both substantive and procedural – for two reasons. On the one hand, from a founding decision of July 16, 1971, it conferred constitutional value on the various texts to which the Preamble of the Constitution of 1958 refers, beyond its very text. These are the Declaration of the Rights of Man and of the Citizen in 1789, a declaration of economic and social rights appearing in the preamble of the old Constitution of 1946 and, finally, the "fundamental principles recognized by the laws of the Republic”, which are the principles constantly observed by republican laws. On the other hand, the Constitutional Council has developed a dynamic and even constructive interpretation of these texts, by updating their reading in the light of changes in society. Thus, from article 16 of the Declaration of 1789 which lays down the principle of "guarantee of rights", he deduced respect for the right to recourse, the rights of the defense, and even recently a protection of " legitimate expectations” of litigants.

This contribution aims, firstly, to explain the scope of these different principles and their impact on tax reforms, both in terms of the substantive rules governing the calculation of tax, and the rules of tax procedure. Secondly, it presents the different ways in which, in France, tax provisions can be submitted to the control of the constitutional judge, and the scope of the decisions that the latter is called upon to render [1].

2 CONSTITUTIONAL NORMS GOVERNING TAX RULES

2.1 THE PRINCIPLE OF EQUALITY, THE MAIN STANDARD GOVERNING THE DETERMINATION OF THE AMOUNT OF TAX DUE

The principle of equality is, by far, the constitutional principle that constrains tax reforms the most. It is also the principle most often invoked by parliamentarians and taxpayers when they challenge the tax law, and frequently leads to its censorship. The other constitutional rights and freedoms are, in practice, irrelevant to the rules for determining the tax. For example, if case law agrees to control compliance with the right to property by tax law, it has rendered its invocation useless in relation to that of the principle of equality: either the law imposes an excessive burden on the taxpayer, and then it is censured for ignorance of equality (without any need to invoke the right of property); or it respects the contributory faculties, and then the invocation of the right of property is set aside as a consequence of that of equality [2].

In French constitutional law, the principle of equality has two branches that should be clearly distinguished. On the one hand, equality before the law precludes the legislator

[1] *For a more detailed account, cf. B. Lignereux, Summary of constitutional tax law , Lexisnexis, 2020.*

[2] *See e.g. cons. const., 29 dec. 1998, n° 98-405 DC, Finance Law for 1999 , considering. 23.*

from treating differently two categories of taxpayers placed in an identical situation with regard to the objective it pursues. This branch results from Article 6 of the Declaration of Rights of 1789, which provides that the law "must be the same for all, whether it protects or punishes". On the other hand, equality before public charges implies that the contributory faculties of those liable for tax be taken into account. Unlike equality before the law, this branch does not necessarily require a comparison between categories of taxpayers. It is deduced from article 13 of the Declaration of 1789, according to which the common contribution "must be equally distributed among all citizens, by reason of their faculties".

2.1.1 Equality before the law

Equality before the law leads to verifying whether any difference in tax treatment is justified by a difference in situation or by an objective of general interest in relation to the object of the law. The case law of the Constitutional Council thus retains that "The principle of equality does not preclude the legislator from regulating different situations differently, nor from derogating from equality for reasons of general interest, provided that, in either case, the resulting difference in treatment is directly related to the object of the law which establishes it [3].

This principle prohibits first of all treating differently, without justification, taxpayers who are in the same situation. Thus, the Constitutional Council did not allow the law to grant a tax reduction to salaried workers, to the exclusion of non-salaried workers, since this reduction was intended to promote the activity of all workers [4]. This principle also prohibits unjustified differences between base elements (categories of income, property, transactions, etc.). The Constitutional Council thus censured a law which exempted severance pay only when it was allocated by virtue of a judgment, whereas that which is paid in application of a transaction or an arbitration award, which is taxable, is not were not in a different situation [5].

On the other hand, the principle of equality before the law does not oblige different situations to be treated differently: it is open to the legislator to apply the same tax regime to taxpayers placed in different situations. The Constitutional Council has consistently held that although the principle of equality requires in principle that people who are in the same situation be treated in the same way, "it does not follow from this that the principle of equality requires treat people in different situations differently [6]. In this, French constitutional law differs from the law resulting from the European Convention on Human Rights: the requirement of non-discrimination [7] resulting from the combined stipulations of its Article 14 and Article 1st of its Additional Protocol may be usefully invoked to maintain that the tax law is the source of unjustified discrimination between taxpayers [8]. For example, seized in 1999 of the law relating to the civil pact of solidarity (PACS), the Constitutional Council rejected the challenge of the parliamentarians petitioners who saw a breach of

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[3] *See Cons. const., 7 Jan. 1988, no. 87-232 DC, Pooling of the national agricultural credit fund , consider. 10. The requirement of a "direct" relationship between the difference in treatment and the object of the law was only added in 1996 with the decision Cons. const., 9 Apr. 1996, no. 96-375 DC, Law containing various economic and financial provisions , recital. 8.*

[4] *cons. const., 29 dec. 2015, n° 2015-725 DC, Finance Law for 2016 , considering. 28: "the legislator has thus treated differently people who find themselves in identical situations since under article L. 841-1 of the Social Security Code are eligible for the activity bonus "workers in modest resources, whether salaried or self-employed".*

[5] *cons. const., Sept. 20, 2013, No. 2013-340 QPC, Mr. Alain G. , cons. 6. The official comment states that "On the constitutional level, the Constitutional Council considered that the fact of having or not having let the employment contract judge decide does not constitute a difference in situation in line with the difference in treatment with regard to tax law between the compensation received by employees whose employment contract is terminated".*

[6] *Decision no. 2003-489 DC of December 29, 2003, Finance Law for 2004 , considering. 37.*

[7] *See , for example, ECHR, 6 Apr. 2000, no. 34369/97, Thlimmenos v. Greece , para. 44, holding that a State cannot without justification refrain from applying different treatment to persons whose situations are significantly different.*

[8] *CE, ass., opinion, April 12, 2002, no. 239693, Labeyrie financial SA , concl. F. Seners.*

equality in the choice of the legislator to apply the same regime joint taxation for spouses and PACS partners when, according to their grievances, the former were in a different situation due to the recognition of marriage as the founding element of the family [9].

The control of compliance with equality before the law is particularly thorough when a behavioral tax measure is in question. Indeed, the requirement that tax differentiations be "directly related to the purpose of the law" leads the Constitutional Council to verify whether the scope of incentive tax benefits and dissuasive taxes is fully consistent with the objective they continue. Thus, in a resounding manner, in 2009 it censured a "carbon tax" project on the grounds that the legislator had exempted many economic sectors from it, without justification with regard to the objective of reducing CO2 emissions pursued:[10] to be consistent with its behavioral objective, a dissuasive tax must embrace all the harmful behaviors targeted. The tax should not be too broad either: hitting taxpayers who have not adopted the harmful behavior targeted would be inconsistent. For this reason, in 2000 the Constitutional Council censured the extension to electricity of a "general tax on polluting activities" since the objective of the tax was to "combat the greenhouse effect". and "that due to the nature of the sources of electricity production in France, the consumption of electricity contributes very little to the release of carbon dioxide and makes it possible, by replacing that of fossil energy products, to fight against "greenhouse effect" [11].

2.1.2 Equality before public offices

Equality before public office has, in the case law of the Constitutional Council, a different scope from equality before the law. Indeed, it leads to verifying whether the legislator has adequately taken into account the contributory faculties of taxpayers. Unlike equality before the law, it presupposes not a comparison between two categories of taxpayers, but an examination *per se* of the level of tax burden borne by a category of taxpayers.

The requirement to take contributory faculties into account, applicable to both personal and corporate taxation, first leads to a control of the type of base chosen by the legislator. The choice of base is in principle free, except for a manifest error of assessment: the Constitutional Council rules that "it is up to the legislator to determine, in compliance with constitutional principles and taking into account the characteristics of each tax, the rules according to which must be assessed the contributory faculties of taxpayers" [12]. To date, it has only once invalidated the base chosen by the legislator, by a decision which reminds us that the latter must be consistent with the nature of the activity or of the chargeable event imposed. Indeed, examining a law which intended to allow municipalities to introduce a tax on seasonal activities based on the surface in square meters used by them, applicable for the year from the first day of installation, the Council judges "that 'by not taking into account the duration of installation in the commune of non-sedentary commercial activities, the legislator disregarded, in this case, the principle of equality before public charges' [13].

However, the control of the base goes further since, when the legislator decides to tax income or property, the Constitutional Council verifies that the latter is indeed available to the taxpayer. It is a question of verifying the existence of a real contributory faculty: the

[9] *cons. const., Nov. 9, 1999, no. 99-419 DC, Law relating to the civil solidarity pact , recital. 41 and 42.*

[10] *cons. const., 29 dec. 2009, n° 2009-599 DC, Finance Law for 2010 , considering. 81 and 82.*

[11] *cons. const., 28 dec. 2000, n° 2000-441 DC, Amending Finance Law for 2000 , consider. 35 to 38.*

[12] *cons. const., 30 dec. 1981, n° 81-133 DC, Finance Law for 1982 , consider. 6.*

[13] *cons. const., 29 dec. 1999, no. 99-424 DC, Finance Law for 2000 , consider. 49.*

legislator cannot tax an income which is only latent, or uncertain. Thus, if the Council allowed the taxation of income from life insurance contracts at a date when they are not yet definitively acquired, it is because the law provided for the reimbursement to the taxpayer of any overpayment if , at the time of the effective realization of the income (that is to say in this case of the outcome or the repurchase of the contract), the tax due is lower than what has been paid; it also requires that the taxpayer can claim default interest in this case [14]. Moreover, for the taxation of capital gains from the sale of assets, it requires that monetary erosion be taken into account: the legislator cannot tax the gross capital gain, which is greater than the income actually realized taking into account of inflation [15].

The requirement to take into account the contributory faculties is not limited to the control of the tax base: it also involves a control of the rate which affects it. The Constitutional Council judges in fact "that this requirement would not be respected if the tax were of a confiscatory nature or placed an excessive burden on a category of taxpayers with regard to their ability to pay" [16]. In this respect, in 2012 it clarified its method of controlling the confiscatory nature of taxes weighing on income: it adds up all the taxes likely to affect the same income, considering each one at its maximum marginal rate. This is the so-called "millefeuille and marginal rate" method. When the maximum overall rate thus obtained exceeds approximately 66%-75% of the income, it deems the tax confiscatory [17], except if it is a tax intended to combat fraud or tax evasion [18].

Finally, when the legislator decides to apply a substantial rate for the taxation of assets, the Constitutional Council requires that the tax be capped according to the income of the person liable [19].

2.2 THE RIGHTS AND FREEDOMS THAT TAX PROCEDURES AND SANCTIONS MUST RESPECT

The rules of procedure and tax penalties are, of course, also subject to the principle of equality : it is here essentially equality before the law that applies. The Constitutional Council in fact infers from Article 6 of the Declaration of 1789 "that, if the legislator can provide for different rules of procedure according to the facts, the situations and the persons to whom they apply, it is on the condition that these differences do not arise from unjustified distinctions and that litigants are guaranteed equal guarantees" [20].

But tax procedures and penalties are above all subject to a set of specific principles, which have no impact on the rules for determining the amount of tax.

2.2.1 Respect for privacy, home, personal data

First deducted from individual freedom [21]that article 66 of the Constitution places under the protection of the judicial authority, then attached since 1999 to the principle of freedom protected by article 2 of the Declaration of 1789, [22]the right to respect of private life

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[14]*cons. const., Sept. 17, 2015, No. 2015-483 QPC, Jean-Claude C. .*

[15]*cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 46.*

[16]*See, for example, Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 10.*

[17] *cons. const., 29 dec. 2012, n° 2012-662 DC, Finance Law for 2013 , considering. 19, 81, 101.*

[18] *cons. const., 28 June 2019, n° 2019-793 QPC, Épx C ., paragr. 11.*

[19]*cons. const., August 9, 2012, no. 2012-654 DC, Amending Finance Law for 2012 , considering. 33.*

[20]*cons. Const., July 23 2010, n° 2010-15/23 QPC, Languedoc-Roussillon Region and a. , considering 4. – Cons. const., July 31 2015, n° 2015-479 QPC, Sté Gecop , consider. 13.*

[21]*cons. const., 18 Jan. 1995, no. 94-352 DC, Orientation law relating to security , considering. 3.*

[22]*cons. Const., July 23 1999, no. 99-416 DC, Law establishing universal health coverage , consider. 45.*

must be respected by the legislator when he defines the rules of procedure, and in particular of tax control. The Constitutional Council thus rules that "it is up to the legislator to ensure the reconciliation between, on the one hand, the exercise of the constitutionally guaranteed freedoms, among which is the right to respect for private life which derives from Article 2 of the Declaration of 1789 (…), and, on the other hand, the prevention of breaches of public order and the fight against tax evasion which constitute objectives of constitutional value" [23]. However, it only censures disproportionate infringements of this right with regard to the objective pursued [24]. Respect for privacy has many facets, in particular respect for the home and the protection of personal data, frequently questioned in tax matters.

Thus, as early as 1983, he censured for ignorance of the inviolability of the home the first attempt by the legislator to define a system of tax search. It notes that the provisions referred "do not clearly limit (...) the field open to investigations", "that they do not explicitly assign to the judge having the power to authorize the investigations of the agents of the administration the task of concretely verifying the merits of the request submitted to it" and "that they ignore the possibilities of intervention and control by the judicial authority in the course of the authorized operations" [25].

The right to respect for private life also governs the obtaining of data by the tax administration in order to facilitate the checks it carries out. With regard to data files, the Constitutional Council rules that "the collection, recording, storage, consultation and communication of personal data must be justified by a reason of general interest and implemented in a manner adequate and proportionate to this objective" [26]. In this regard, it validated, in 2019, the experimental collection of data on social networks by the tax administration, while specifying that this data could not be collected on the pretext of establishing an offense of which the administration has already knowledge [27]. The requirement to regulate the conditions of access to tax data files also implies the prohibition, in principle, of making them public: thus, in 2016, it censored the creation of a public register of trusts, deemed manifestly disproportionate to the aim of combating tax evasion and evasion pursued [28]. Moreover, as well as respect for private life, freedom of enterprise is an obstacle to the publication by name of data transmitted by companies to the tax administration: it is for this reason that the Constitutional Council censured, in 2016, the publication of "country-by-country declarations" of multinational groups, on the grounds that "the obligation imposed on certain companies to publish economic and tax indicators corresponding to their activity country by country, is likely to allow the all operators operating in the markets where these activities are carried out, and in particular their competitors, to identify the essential elements of their industrial and commercial strategy", and that "such an obligation therefore entails the freedom to undertake an infringement that is manifestly disproportionate to the objective pursued" [29].

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[23] *cons. const., 4 dec. 2013, n° 2013-679 DC, Law relating to the fight against tax evasion and serious economic and financial crime , recital. 32.*

[24] *See, for example, Cons. const., 29 dec. 2013, n° 2013-684 DC, Amending Finance Law for 2013 , considering. 14.*

[25] *cons. const., 29 dec. 1983, n° 83-164 DC, Finance Law for 1984 , consider. 29 and 30.*

[26] *cons. const., March 22, 2012, no. 2012-652 DC, Law relating to the protection of identity , recital. 8.*

[27] *cons. const., 27 dec. 2019, n° 2019-796 DC, Finance Law for 2020 , par. 94.*

[28] *cons. const. · Oct. 21, 2016, No. 2016-591 QPC, Ms. Hélène S. , para. 6.*

[29] *cons. const., 8 dec. 2016, n° 2016-741 DC, Law on transparency, the fight against corruption and the modernization of economic life, par. 103.*

2.2.2 Rights of defense and right to appeal

If they are not explicitly proclaimed by the constitutional text, the rights of the defense were elevated to constitutional rank in 1976 [30], first as a "fundamental principle recognized by the laws of the Republic", then attached from 2006 to the guarantee of rights proclaimed by article 16 of the Declaration of 1789 [31]. The Constitutional Council thus judges "that article 16 of the Declaration of 1789 implies in particular that no sanction having the character of a punishment can be inflicted on a person without that person having been given the opportunity to present his observations. on the facts with which he is charged [32]. In several decisions, the Constitutional Council has also applied this principle to non-repressive administrative decisions of a certain gravity taken into consideration of the person [33]: its scope is therefore not limited to sanctions. It implies that, as soon as the taxpayer is accused of not having complied with his tax obligations, he can present his observations to the administration, before being subject, if necessary, to a tax adjustment and sanctions.

Like the rights of defence, the right to appeal is not explicitly proclaimed by any provision of the Constitution; the Constitutional Council deduced its constitutional value, in the mid-1990s, from the guarantee of rights protected by article 16 of the 1789 Declaration [34]. It considers that “it follows from this provision that, in principle, there should be no substantial interference with the right of the persons concerned to exercise an effective remedy before a court”. Thus, the decision to collect a tax contribution must be able to be contested by the person liable for it [35]. The same applies to the decision to pronounce a tax penalty [36]. The right to appeal must be open to any taxpayer, whether the taxpayer or his joint and several co-debtor: Thus, with regard to the solidarity of the business manager for the payment of tax fines, the Constitutional Council ruled "that the managers (...) jointly and severally liable for the payment of the penalty imposed on the company must be able to challenge both their status as joint and several debtor and the merits and the exigibility of the penalty and oppose the proceedings” [37]. Furthermore, the Constitutional Council has developed case law according to which the persons directly targeted by certain inspection operations adversely affecting them – these are mainly searches – must be able to have a direct appeal, without waiting for the rest of the procedure.

2.2.3 Framework for tax penalties: necessity, proportionality, non-retroactivity, etc.

Constitutional case law consistently accepts that the administrative authorities may be authorized to pronounce sanctions without the prior intervention of the judge, provided that the latter are exclusive of any deprivation of liberty [38]. No constitutional rule therefore precludes the tax administration from imposing pecuniary penalties on taxpayers without prior judicial authorization.

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[30] *cons. const., 2 dec. 1976, n° 76-70 DC, Law relating to the development of the prevention of accidents at work , recital. 2. See also Cons. const., 2 feb. 1995, n° 95-360 DC, Law on the organization of courts and civil, criminal and administrative procedure, recital. 5.*

[31] *cons. const., March 30, 2006, no. 2006-535 DC, Law for equal opportunities , considering. 24.*

[32] *cons. const., 30 dec. 1997, n° 97-395 DC, Finance Law for 1998 , considering. 38. – Cons. const., Oct. 24, 2014, No. 2014-423 QPC, Mr. Stéphane R. and a. , considering 17.*

[33] *cons. const., 28 dec. 1990, n° 90-286 DC, Amending Finance Law for 1990 , consider. 23.*

[34] *cons. const., 9 Apr. 1996, n° 96-373 DC, Organic law on the statute of autonomy of French Polynesia , consider. 83.*

[35] *See, for example, Cons. const., July 31 2015, n° 2015-479 QPC, Sté Gecop , consider. 14.*

[36] *See, for example, Cons. const., Jan. 21, 2011, No. 2010-90 QPC, Mr. Jean-Claude C. , consider. 8.*

[37] *cons. const., Jan. 21, 2011, No. 2010-90 QPC, Mr. Jean-Claude C. , consider. 8.*

[38] *cons. const., July 28 1989, n° 89-260 DC, Law relating to the security and transparency of the financial market , recital. 6.*

Although they must comply with all the constitutional principles already mentioned, in particular the principle of equality before the law and the rights of the defence, administrative sanctions, and in particular fiscal sanctions, are also subject to a body of specific constitutional rules. Articles 8 and 9 of the Declaration of 1789 set out several principles governing the punishment of those who have violated the rule of law: from its article 8 [39] derive the principles of necessity, legality and non-retroactivity of offenses and penalties , to which case law has added those of proportionality and individualization, while Article 9 [40] enshrines the presumption of innocence, from which derive the principles of personal criminal responsibility and personality of sentences.

The principle of legality of offenses and penalties implies the requirement that the definition of the offense and that of the penalty be sufficiently precise so as not to leave the tax administration an excessive margin of appreciation in their application. For example, the Constitutional Council did not accept that the law punishes with an 80% tax increase the fact of having set up an operation which, seeking the benefit of a literal application of the law to contrary to the intention of its authors, was inspired by a "primarily" fiscal motive [41]. He considers this criterion of the "main" reason, which was intended to replace that of the exclusive reason previously applicable, to be too imprecise.

Explicitly stated in Article 8 of the Declaration of 1789 and enshrined in the case law of the Constitutional Council since 1980 [42], the principle that criminal law must have been enacted prior to the offense gives full scope to the principle of legality of offenses and penalties: no one can be penalized except in application of a prior text which he could not ignore on the date of the offence. Like the principle of legality, the principle of non-retroactivity applies both to the qualification of the offense and to the determination of the penalty: the legislator can neither penalize *a posteriori* behavior which, on the date in which they intervened, were legally admitted, nor increase the penalties for offenses committed previously.

However, non-retroactivity applies only to more severe penalties; when the legislator softens a tax penalty, it is on the contrary a mandatory retroactivity that applies. Although it does not appear explicitly in the Declaration of 1789, this so-called rule of retroactivity *in mitius* was raised to constitutional rank in 1981. The Constitutional Council in fact judges that "the fact of not applying to offenses committed under the influence of the old law the new criminal law, milder, amounts to allowing the judge to pronounce the penalties provided for by the old law and which, according to the very assessment of the legislator, are no longer necessary "and thus deduces from the principle of the necessity of the penalties "the rule according to which the new criminal law must, when it pronounces less severe penalties than the old law, apply to offenses committed before its entry into force and not having given rise to convictions which have become effective judged" [43].

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[39] "The law should only establish penalties that are strictly and obviously necessary, and no one can be punished except by virtue of a law established and promulgated prior to the offense, and legally applied. »

[40] *"Any man being presumed innocent until he has been declared guilty, if it is deemed essential to arrest him, any rigor which would not be necessary to ascertain his person must be severely punished by law. . »*

[41] *cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 112 to 119.*

[42] *cons. const., 9 Jan. 1980, no. 79-109 DC, Law on the prevention of illegal immigration , consider. 7. – Cons. Const., July 22 1980, n° 80-119 DC, Law on the validation of administrative acts , considering. 3. – Cons. const., 30 dec. 1980, n° 80-126 DC, Finance Law for 1981 , consider. 8.*

[43] *cons. const., 20 Jan. 1981, n° 80-127 DC, Law reinforcing the security and protecting the freedom of persons , considering. 75. See also Cons. const., July 28 1989, n° 89-260 DC, Law relating to the security and transparency of the financial market , recital. 40. – Cons. Const., July 25 1990, n° 90-277 DC, Law relating to the general revision of the assessments of buildings used for the determination of the bases of local direct taxes , consider. 26. – Cons. const., 21 Feb. 1992, n° 92-305 DC, Organic law amending ordinance n° 58-1270 of December 22, 1958 on the organic law relating to the status of the judiciary, consider. 112.*

From article 8 of the Declaration of 1789 which proclaims that: "The law must establish only strictly and obviously necessary penalties", the Constitutional Council has also deduced a requirement of proportionality of penalties in relation to the offenses they punish. . It is this principle of proportionality that most frequently leads him to censure tax penalties. Jurisprudence in particular regulates the application of proportional fines to sanction documentary obligations relating to elements intended to facilitate cross-checking in the context of tax audits, and not to establish the tax: proportional fines according to the turnover cases are considered disproportionate for this type of offence [44].

The principle of the necessity of penalties, explicitly proclaimed by Article 8 of the Declaration, governs in particular the accumulation of different fiscal penalties, as well as the accumulation of a fiscal penalty with a criminal penalty. Indeed, if "the principle of necessity of offenses and penalties does not prevent the same acts committed by the same person from being the subject of different proceedings for the purposes of administrative or criminal [or disciplinary] sanctions in application of separate bodies of rules" [45], *conversely* the accumulation of identical proceedings is prohibited. The Council deduced from this that criminal penalties for tax evasion could only be combined with tax fines provided that they targeted the "most serious cases of fraudulent concealment of sums subject to tax" [46].

2.3 CONSTITUTIONAL NORMS APPLICABLE TO BOTH SUBSTANTIVE AND PROCEDURAL TAX RULES

2.3.1 The exclusive competence of the legislator

Article 34 of the Constitution of October 4, 1958, which limits the "domain of the law", provides in its fifth paragraph that: " *The law establishes the rules concerning (…) the base, the rate and the methods of recovery taxes of all kinds* ". Only the legislator thus has the power to create a tax and modify the tax rule. "Taxes of all kinds" are broadly defined by case law, including any compulsory levy paid without direct consideration. This exclusive competence of the legislator constitutes the legal translation of the principle of consent proclaimed by article 14 of the Declaration of the rights of 1789: "All the Citizens have the right to note, by themselves or by their representatives, the need for the public contribution, to consent to it freely, to monitor its use, and to determine the proportion, basis, recovery and duration".

It follows from article 34 of the Constitution, on the one hand, the unconstitutionality of any regulatory act which, without being taken for the application of the law, determines the base, the rate or the methods of recovery of taxation. Such an act incurs the cancellation for excess of power by the administrative judge [47]. The taxpayer can obtain discharge from the tax levied on the basis of regulatory provisions taken without jurisdiction, for example by making the benefit of an exemption subject to a condition that the law does not provide for [48].

On the other hand, if the legislator does not discharge the obligation to fix the base, the rate and the methods of collection of the tax, his law incurs the censure by the Constitutional Council for not having exhausted his competence: this is the so-called control of "negative incompetence". Admittedly, the principle of legality does not preclude certain

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[44] *See Decisions No. 2013-679 DC, considered. 43 and no. 2013-685 DC, consider. 97 and cons. 110.*

[45] *cons. const., 17 Jan. 2013, n° 2012-289 QPC, Mr. Laurent D. , consider. 3.*

[46] *cons. const., June 24, 2016, nos · 2016-545 QPC and 2016-546 QPC, M. Alec W. et a. and Mr. Jérôme C. , para. 20 to 23.*

[47] *See for example, CE, ass., 20 Dec. 1985, No. 28277, Synd. National Association of Animal Feed Manufacturers , Concl. P.-F. Racine, annulling a decree fixing the amount of a storage tax deemed to constitute a tax of any kind.*

[48] *Cf. e.g., CE, 9th and 8th ss -sect., 25 July. 1986, no. 44966, concl. Ph. Martin.*

details from being referred to the regulations [49]. But case law only accepts it if the law regulates this intervention, by fixing with sufficient precision the applicable rules. In 1985, the first censorship of a tax provision took place for disregard of article 34 of the Constitution, being a rule of base "susceptible to at least two interpretations" [50].

Negative incompetence often results from the imprecision of the terms used by the law, which leads to burdening other authorities, jurisdictional or administrative, with the task of specifying them. In this respect, the constitutional judge identified, in 1999 [51], an objective of constitutional value of accessibility and intelligibility of the law which, with the full exercise of the competence that the legislator derives from article 34, "impose on him to adopt sufficiently precise provisions and unequivocal formulas; it must indeed protect the subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness, without deferring to administrative or judicial authorities the task of setting rules whose determination has been entrusted by the Constitution only 'to the law' [52]. For example, was censored on this basis a device for the reintegration of profits transferred abroad by the transfer of " one or more functions or one or more risks to a related company", terms deemed too imprecise [53].

2.3.2 The "guarantee of rights" and the temporal applicability of the tax rule

Apart from the principle of non-retroactivity of criminal law proclaimed in Article 8 of the Declaration of 1789 (see above), no provision in the Constitution seems to frame the modalities of application over time. of the law. However, by a constructive interpretation of the guarantee of rights proclaimed by article 16 of the Declaration ("Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution"), the Constitutional Council has gradually forged case law framing, first, the possibility for the legislator to make the tax law retroactive – that is to say, to apply it to triggering facts prior to its entry into force – , then even its modification for the future.

Firstly, from the 1980s to the 1990s, constitutional case law required, in order to admit the constitutionality of retroactive laws, that they be justified by an aim of general interest. For example, in 1998 the Constitutional Council censured a provision which retroactively modified the base and the rate of an exceptional contribution charged to pharmaceutical companies during 1995 alone, three years earlier. It notes "that the criticized provision would have the effect of increasing, for a significant number of undertakings, a contribution which was only due for the 1995 financial year and was collected during the 1996 financial year" and "that the concern to prevent the financial consequences of a court decision censoring the method of calculating the base of the contribution in question did not constitute a reason of general interest sufficient to retroactively modify the base, the rate and the terms of payment of a tax, when it was

[49] *cons. const., 4 Apr. 1968, no. 68-1 L; cons. const., March 18, 2009, no. 2009-578 DC, consider. 5.*

[50] *cons. const., July 10 1985, n° 85-191 DC, Law containing various economic and financial provisions , considering. 5: "that the criticized text submits to an annual taxation regime the proceeds of securities which will only be paid by the issuer at the end of the operation; that this text is susceptible to at least two interpretations, one favoring the simplicity of the basis rules by fixing equal annuities, the other favoring the adaptation of the base to economic reality by fixing progressive annuities taking compound interest into account; that the choice between these two interpretations is all the more uncertain as arguments in favor of one and the other can be found in the preparatory work; that, consequently, article 14-III, not having fixed the rules concerning the base of the tax, is not in conformity with article 34 of the Constitution".*

[51] *cons. const., 16 dec. 1999, no. 99-421 DC, Codification by ordinances , considering. 13.*

[52] *See Cons. const., 28 Apr. 2005, n° 2005-514 DC, Law relating to the creation of the French international register , recital. 14 then, for the current formulation no longer referring to a "principle of clarity of the law", Cons. Const., July 27 2006, n° 2006-540 DC, Law on copyright and related rights in the information society , recital. 9.*

[53] *cons. const., 29 dec. 2013, n° 2013-685 DC, Finance Law for 2014 , considering. 130.*

exceptional in nature, when it was collected two years ago and when it is open to the legislator to take non-retroactive measures to remedy the said consequences [54].

When this substantive condition is met, case law also adds four additional requirements of constitutionality [55]: respect for court decisions that have become final; respect for the principle of non-retroactivity of harsher penalties and sanctions; non-unconstitutional character of the validated or modified act; strict definition of the scope of validation or modification.

Secondly, more recently, the Constitutional Council derived from the guarantee of rights a protection of the "legitimate expectations" which the law may have given rise to in taxpayers, which constitutes the counterpart of the protection of "legitimate expectation" by the European Court of Human Rights. Thus, in 2013, it ruled that taxpayers who have respected the retention period of six or eight years for their life insurance contract, beyond which redemptions are subject to a favorable tax regime, “could legitimately expect the application of a special tax regime linked to compliance with this legal term” [56]. He then considers that in this case, the objective pursued by the legislator, "exclusively financial", "does not constitute an objective of general interest sufficient to justify that the proceeds of life insurance contracts acquired or recognized during the legal period necessary to benefit from the special tax regime for these products are subject to a modification of the rates of social security contributions applicable to them”.

3 CONTROL OF COMPLIANCE WITH CONSTITUTIONAL RULES BY THE TAX LEGISLATOR

3.1 WAYS OF ACCESS TO THE CONSTITUTIONAL COURT

If we set aside certain specific procedures (examination of the “laws of the country” of New Caledonia, procedure of “legislative downgrading”, etc.), the French Constitution organizes three procedures allowing a judge to examine the constitutionality of the rules tax. First, the Constitutional Council is competent to examine the conformity of tax laws with the Constitution and can be seized both directly during the adoption of the law, and a posteriori on the occasion of a *dispute*. Then, the rare regulatory texts adopted in tax matters are subject to the control of the administrative judge.

3.1.1 *A priori* control by the Constitutional Council

Article 61 of the Constitution confers on the President of the Republic, the Prime Minister, the presidents of the parliamentary assemblies and, since the constitutional revision of October 29, 1974, sixty deputies or sixty senators, the faculty to refer to the Constitutional Council the laws before their promulgation; the latter then has, in principle, one month to make a decision.

This referral is therefore not systematic: the review of tax laws before their entry into force only occurs if one of these authorities so decides. It should however be noted that in practice, the parliamentary oppositions have almost constantly challenged the initial finance law (law setting the budget for the year) before the Constitutional Council since 1973 (with the notable exception of the finance laws for 1989, for 1993, for 2007, 2008 and for 2009).

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[54] *cons. const., 18 dec. 1998, no. 98-404 DC, Social Security Financing Act for 1999 , consider. 6 and 7.*

[55] *Cf. , for a complete statement of these conditions, commentary to the notebooks on Cons. const., 29 dec. 1999, no. 99-425 DC, Amending Finance Law for 1999 , p. 2.*

[56] *cons. const., 19 dec. 2013, n° 2013-682 DC, Social Security Financing Act for 2014 , considering. 17.*

However, it should not be inferred from this practice that all of the provisions adopted by Parliament in tax matters would be subject to an a priori constitutional review : in addition to any ordinary law (i.e. other than a law of Finances) is likely to contain tax provisions, the Constitutional Council rarely takes up objections on its own initiative during the examination of finance laws – which the shortness of the time at its disposal suffices to explain.

The control of the conformity with the Constitution is in principle limited by article 61 of the Constitution to the examination of the laws before their promulgation. However, returning to its previous case law [57], the Constitutional Council has ruled since 1985, in application of its so-called "New Caledonian" case law, that the constitutionality of a law already promulgated can be usefully challenged when examining provisions legislative "which modify it, supplement it or affect its field" [58]. For example, during the examination of the finance law for 2013 which raised the maximum tax rate of the income tax scale, the Constitutional Council ruled that this increase had the effect, by its combination with the the application of the maximum rate of a contribution on "top pensions" provided for by the Social Security Code, not amended by the law referred, to modify the scope of the maximum rate of this tax with regard to the contributory faculties of taxpayers and that , consequently, the law referred should be regarded as affecting the scope of application of the provisions of the Social Security Code governing this contribution [59]. Considering the overall rate of taxation of "top hat pensions" to be confiscatory, he then censored the maximum rate of the contribution provided for by the Social Security Code.

3.1.2 The priority question of constitutionality

According to article 61-1 of the Constitution: "When, during a proceeding pending before a court, it is argued that a legislative provision infringes the rights and freedoms that the Constitution guarantees, the The Constitutional Council may be seized of this question on referral from the Council of State or the Court of Cassation, which decides within a specified period". The constitutional revision of July 23, 2008 which created this provision thus enabled any litigant to contest the conformity of the law with constitutional rights and freedoms (excluding their conformity with purely procedural rules). Its terms of application were specified by an organic law of December 10, 2009.

The invocation of priority questions of constitutionality is very frequent in tax matters; this procedure has led to about thirty censures of the tax law since its entry into force in 2010.

The QPC makes it possible to challenge any legislative provision that is or has been applicable. The fact that the contested law has been repealed or amended, removing its unconstitutionality, does not prevent the success of the QPC: the taxpayer retains the possibility of contesting the past unconstitutionality of a tax law which has been applied to him.

In addition to the text of the legislative provision, it is also the interpretation retained by the courts that the QPC procedure allows litigants to challenge. It is indeed a question of controlling the constitutionality of the legal rule as it is actually applied by the courts: this is the so-called doctrine of "living law". The Constitutional Council thus judges, since a decision of October 6, 2010, "that by asking a priority question of constitutionality, any litigant has the right to contest the constitutionality of the effective scope that a consistent jurisprudential

[57] *See Cons. Const., July 27 1978, n° 78-96 DC, Law supplementing law n° 74-696 of 7 August 1974 relating to radio broadcasting and television , consider. 4.*

[58] *cons. const., 25 Jan. 1985, no. 85-187 DC, State of emergency in New Caledonia (to the report by André Ségalat), consider. 10.*

[59] *cons. const., 29 dec. 2012, n° 2012-662 DC, Finance Law for 2013 , considering. 20 and 21. See also, regarding social contributions, Cons. const., 13 dec. 2012, n° 2012-659 DC, Amending Finance Law for 2013 , considering. 14 and 15.*

interpretation confers on this provision" [60]. A decision of November 15, 2019 illustrates these principles in tax matters: while the law requires obtaining ministerial approval for the benefit of a derogatory tax regime applicable to partial contributions of assets, the Council of State, drawing the consequences of the European "mergers" directive, considers that the requirement of an authorization is not applicable to the allocations of securities carried out by foreign companies established in an EU Member State. The QPC procedure enabled the taxpayer to challenge the constitutionality of the resulting difference in treatment between foreign companies, depending on whether these companies were established in an EU Member State or a third country, even though this difference stems not from the text of the law, but from its jurisprudential interpretation [61].

In terms of procedure, the QPC must be raised during a concrete dispute, by a separate memorandum. A double filter is then organized: when the QPC is raised in first instance or on appeal, the lower court must rule on the transmission of the question to the Council of State or the Court of Cassation. It must proceed to this transmission, "without delay", when three cumulative conditions are met: the contested provision is applicable to the dispute; it has not already been declared constitutional in the grounds and operative part of a decision of the Constitutional Council, unless circumstances change; the question "is not devoid of seriousness". When the question is transmitted [62], it is up to the Council of State or the Court of Cassation to decide within three months on its referral to the Constitutional Council. They proceed to this referral if, in addition to the first two conditions set out above, the question "is new or presents a serious nature".

3.1.3 Control of regulatory acts by the administrative judge

The inventory of existing procedures in matters of constitutional litigation would be incomplete without mentioning the control by the administrative judge of administrative acts taken in tax matters. Indeed, in addition to its QPC filter functions raised which it shares with the judicial judge (and in addition to its advisory functions which may lead it to rule on questions of constitutionality), it is solely competent to examine not [63]only the legality of these acts, but also their conformity with constitutional principles, unless the law constitutes a "screen", that is to say that the disputed rule results directly from the law.

Moreover, it is historically the decisions rendered by the Council of State on the acts taken by the overseas State authorities[64] or by the local authorities[65] in the field of local taxes which, even before the creation of the Constitutional Council in 1958, drew the first contours

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[60] *cons. const., Oct. 6, 2010, No. 2010-39 QPC, Ms. Isabelle D. and Isabelle B. , consider · 2. Cf. , a few days later in tax matters, Cons. const., Oct. 14, 2010, No. 2010-52 QPC, C [ie] agricole de la Crau , consider. 4.*

[61] *cons. const., Nov. 15, 2019, No. 2019-813 QPC, M. Calogero G .; in this case, the grievance was rejected on the merits. See also, for another example, Cass. com., Oct. 19, 2017, No. 17-15.023, regarding the challenge to the consistent case law rule that so-called lead holding companies are eligible for exemption from wealth tax on professional assets.*

[62] *The court seised must then in principle stay the proceedings until the end of the QPC proceedings.*

[63] *This is the case both when examining bills and draft decrees, whether they are stand-alone or law enforcement decrees.*

[64] *CE, May 5, 1922, No. 58355, Fontan , p. 386, which dismisses the challenge, under the "principle of fiscal equality", of the creation by the administrator of Hanoi of a tax on vehicles. – CE, 7 [th] ss-sect., Nov. 23, 1936, No. 25962, Sieurs Abdoulhoussen et a. : Rec. EC 1936, p. 1015, concluded. Chasserat, validating with regard to the principles of equality before taxes and freedom of trade and industry a decree providing for different treatment in terms of license between French and foreigners residing in Madagascar. – EC, sect., Feb. 4 1944, no. 62929, Sieur Guiyesse: Rec. EC 1944, p. 45, concluded. Chenot, validating with regard to the principle of equality before tax an order of the Governor General of the AOF which subjected, in terms of consumption tax, certain goods (in this case sea biscuits and candles) to a higher taxation when they are manufactured in AOF than when they are imported in AOF (and also validating the differences in the methods of recovery depending on whether the goods are produced in an industrial establishment or "come from village or family manufacture"). Cf. also CE, 7 [th] and 9 [th] ss-sect., 10 Nov. 1976, No. 98659 reviewing with regard to the principle of equality a deliberation of the Chamber of Deputies of the French territory of the Afars and the Issas which instituted a general solidarity tax on income and profits.*

[65] *CE, June 29, 1955, No. 4220, City of Montreuil-sous-Bois: Rec. EC 1955, p. 663, annulling for disregard of the principle of equality before public charges a municipal deliberation which instituted discrimination among those liable for the license.*

of the framework for tax law by the general principles of law with constitutional value, particularly with regard to the principle of equality before tax.

The administrative judge may be led in two ways to examine the constitutionality of administrative acts in tax matters. It can first be seized of direct appeals for abuse of power directed against regulatory acts, whether they are taken for the application of tax law or whether they fall within the autonomous field of regulation. He may also have to rule on an exception of illegality, targeting a regulatory text that has been applied to the taxpayer, raised during a tax dispute before the tax judge [66]. The taxpayer can thus argue, for example, that the tax was levied on the basis of regulatory provisions which encroach on the exclusive competence which the legislator holds under Article 34 of the Constitution in tax matters and are vitiated by incompetence [67]. When it comes to a dispute brought before the judicial judge (in matters of registration fees or wealth tax, for example), the latter must make a reference for a preliminary ruling to the administrative judge to assess the validity of the the disputed administrative act [68].

For example, the Conseil d'État annulled for abuse of power a decree which, to define the perimeter of an urban free zone benefiting from tax exemptions, only included in this perimeter only part of the businesses in a district, having the effect of inducing, within this homogeneous district, between companies that carry out identical activities within the same catchment area, discrimination unrelated to the objectives of the law [69]: the breach of equality in question did not result from the law, but from the exercise by the regulatory power of the margin of appreciation which the legislator entrusted to it.

3.2 THE AUTHORITY OF THE DECISIONS OF THE CONSTITUTIONAL COUNCIL

The question of the authority of the decisions of the Constitutional Council vis-à-vis the legislator and the tax administration is not settled with great precision by the French constitutional text, which has given rise to ongoing debates. still.

The Constitution (art. 62, last paragraph) limits itself to providing that: “The decisions of the Constitutional Council are not subject to any appeal. They are binding on public authorities and all administrative and jurisdictional authorities”. The principle according to which the decisions of the Constitutional Council are binding on public authorities and courts raises several questions to which it is up to case law to provide an answer. Is the authority of the matter decided by the Council limited to cases involving the legislative provisions on which it has ruled? On the contrary, does it extend to any dispute raising questions of constitutionality analogous to those which it has decided in its decisions, even though it may not have ruled on the legislative provisions in question? In other words, is the authority attached, according to the letter of the Constitution, to the "decisions" of the Council confined to their operative part (declaring a given legislative provision conforming to the Constitution or not), or does it extend it to their motives and to the interpretation of the Constitution which they enshrine?

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[66] *See e.g. CE, 10 th and 9 th ss-sect., Oct. 16, 2009, No. 305986, President of the Government of New Caledonia , concl. J. Burguburu, concerning a tax deliberation of the territorial assembly of New Caledonia.*

[67] *CE, 8th and 3rd ch ., Jan. 26, 2021, No. 439582, SELAS Biomnis , concl. R. Victor, granting the taxpayer's request because of the incompetence tainting the provisions of Appendix III to the CGI which were opposed to him*

[68] *Cf. for example, CE, 1 st and 6 th ch., 19 July. 2017, No. 407191, URSSAF Champagne-Ardenne , concl. C. Touboul, regarding the assessment of the validity of a decree fixing the rate of the contribution for housing allowance.*

[69] *CE, 9 th and 8 th ss-sect., 19 May 1999, n° 185765, concl. J. Courtial.*

3.2.1 The authority of the device of the decisions

The Constitutional Council affirmed, as early as 1962, that its decisions are vested with the absolute authority of res judicata: they must be respected by all, independently of the parties to the initial dispute (assuming moreover that one can always identify parties in the cases brought before him) [70]. This absolute authority distinguishes the decisions of the Constitutional Council from judgments not to refer priority questions of constitutionality delivered by the Court of Cassation and the Council of State in the exercise of their role of "filter": these judgments are only endorsed of the relative authority of res judicata, invoked only between the same parties [71].

If it is not subordinated to an identity of parties, the authority of the thing decided by the Constitutional Council supposes on the other hand that the object – the legislative provision in question – is the same as in the decision which it rendered. The Constitutional Council initially seemed to retain a strict conception of this condition of identity of object: in a decision of July 20, 1988 ruling on an amnesty law, it thus held that "the authority of res judicata attached to the decision of the Constitutional Council [revoked in this case] is limited to the declaration of unconstitutionality relating to certain provisions of the law which was then submitted to it; that it cannot usefully be invoked against another law designed, moreover, in different terms;»[72]. However, the following year, in an important decision of July 8, 1989, it relaxed the assessment of this condition by judging that "if the authority attached to a decision of the Constitutional Council declaring unconstitutional the provisions of a law cannot in principle be usefully invoked against another law framed in distinct terms, this is not the case when the provisions of that law, although drafted in a different form, have, in substance, a similar object to that of legislative provisions declared contrary to the Constitution" [73]. In this case, he censured an article of a new amnesty law for disregarding the authority of his censure decision taken the previous year.

The reception of this extension by the judicial and administrative jurisdictions was not immediate. Thus, the Court of Cassation ruled in 2001 that the "decisions [of the Constitutional Council] are binding on the public authorities and the administrative and judicial authorities only with regard to the text submitted for examination of the Council" [74]. In recent times, however, the courts have taken greater account of constitutional case law which extends the authority of res judicata to similar provisions. Thus, in a decision of January 16, 2015 [75], the Council of State ruled that the declaration of unconstitutionality of the provisions of the Cinema and Moving Image Code relating to the basis for a tax on publishers of television services television was to be regarded as applying to the articles of the General Tax Code previously applicable, from which these provisions had been transferred. On the other hand, the judges did not go so far as to extend the scope of the declaration of unconstitutionality to the provisions which were the subject of a substantial modification: thus, while the Constitutional Council had censured a provision of the General Code of taxes excluding the application of the "mother-daughter" tax system to securities without voting rights, the Council of State decided to send it a QPC relating to the same provision in its subsequent wording, since the legislator had modified to restrict its scope [76]. The

[70] *cons. const., 16 Jan. 1962, n° 62-18 L.*

[71] *CE, 7 th and 2 nd ss-sect., March 21, 2011, n° 345216, Synd. of Senate Officials , Concl. N. Boulouis.*

[72] *cons. const., July 20 1988, n° 88-244 DC, Amnesty Law , consider. 18.*

[73] *cons. Const., July 8 1989, n° 89-258 DC, Amnesty Law , consider. 13.*

[74] *Cas. ass. Plen., Oct. 10, 2001, Breisacher .*

[75] *CE, 9th and 10th ss -sect., Jan. 16, 2015, No. 386031, Sté Métropole Télévision , concl. MY. Nicolas de Barmon.*

[76] *EC, 9th and 10th c ., May 18, 2016, no. 397316, Sté Natixis , concl. E. Bokdam-Tognetti.*

Constitutional Council did not deny this analysis and examined the question, censuring these new provisions for the same substantive reason as that retained by its previous censure [77].

With the introduction of the QPC, this extensive conception of the authority of res judicata posed a problem, however, with regard to declarations of unconstitutionality: if it made it possible to speed up the trial for the applicant who challenges another version of a law already censured, by dismissing the contested legislative provision without there being any need to refer to the Constitutional Council again, it deprived the judge, on the other hand, of the possibility of modulating the effects over time of the censorship concerning this other version (see below). below). Only the Constitutional Council has the power, when it pronounces a declaration of unconstitutionality, to adjust its effects over time, either by postponing censorship, or on the contrary by applying it retroactively to situations already established. This concern led the Constitutional Council, by a decision of April 30, 2020, to review its case law by restricting the authority of its declarations of unconstitutionality. He henceforth judges that the authority of the censors is limited to the version of the law which has been censored: "The authority of the decisions (…) prevents the Council from being seized of a priority question of constitutionality relating to the same version of a provision declared unconstitutional, unless circumstances change" [78]. Thus, the previous or later versions of the censored law, even if they are strictly identical in their wording and their object, may be the subject of a QPC: it will be up to the Constitutional Council alone to pronounce their declaration of unconstitutionality, and to determine its effects over time.

3.2.2 The authority of the reasons for the decision

As early as 1962, the Constitutional Council judged "that the authority [of its] decisions (…) attaches not only to their operative part but also to the reasons which are the necessary support and constitute their very foundation" [79].

The administrative and judicial courts, initially reluctant to consider themselves bound by the reasoning given by the Constitutional Council, have gradually accepted to rely on the reasons for its decisions when the same legislative provision is at issue in the dispute brought before them. In particular, by a decision of December 20, 1985, the Council of State, seized of a dispute relating to the collection of water royalties, explicitly based itself on the decision of the Constitutional Council of June 23, 1982 which qualifies as taxes of all kinds, to then deduce that their dispute falls, by default, within the administrative jurisdiction [80].

The conception of the authority of the reasons for its decisions adopted by the Constitutional Council extends beyond the text on which it ruled: it considers the public authorities and courts bound by the reasoning it has adopted, including for the interpretation of other provisions. The Council of State and the Court of Cassation, however, did not agree to follow it so far [81]. For example, whereas the Constitutional Council had just affirmed by two decisions of 1984 and 1987 [82] the unconstitutionality of the tax advantages granted on the discretionary approval of the administration, the conditions for granting of which must always be framed by law, the Council of State, examining separate provisions providing for other tax

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[77] *cons. Const., July 8 2016, n° 2016-553 QPC, Natixis company . See also Cons. const., Jan. 14, 2016, n° 2015-513/514/526 QPC of Jan. 14, 2016, Mr. Alain D. et a ., cons. 10.*

[78] *cons. const., Apr. 30, 2020, No. 2020-836 QPC, Mr. Maxime O. , para. 6.*

[79] *cons. const., 16 Jan. 1962, n° 62-18 L, consider. 1.*

[80] *CE, ass., 20 Dec. 1985, no. 31927, SA És Outters , concl. Ph. Martin, to be compared with its previous decision CE, 3 rd and 5 th ss-sect., Nov. 21, 1973, No. 83046, Sté des papeteries de Gascogne , concl. G. Braibant, relating to these same "royalties".*

[81] *Cf. M. Guillaume, The authority of the decisions of the Constitutional Council: towards new balances? : New Cah. cons. const. Jan. 2011, No. 30.*

[82] *cons. const., 29 dec. 1984, n° 84-184 DC, Finance Law for 1985 , consider. 26. – Cons. const., 30 dec. 1987, n° 87-237 DC, Finance Law for 1988 , consider. 11.*

approval, could only find that it was purely discretionary [83]. Where the Constitutional Council itself had limited the Minister's margin of appreciation, subject to interpretation, the Council of State did not consider it possible to go that far in its role of interpreting the law.

3.3 THE TEMPORAL SCOPE OF THE CENSURES PRONOUNCED BY THE CONSTITUTIONAL COUNCIL

The question of the effects over time of the decisions of the Constitutional Council, and in particular of the censures that it pronounces when the law has already applied, is delicate. It requires in fact to reconcile two contradictory requirements: on the one hand, the restoration of constitutionality, which would imply in all rigor to make retroactively the violation of constitutional principles; on the other hand, the requirement of legal certainty, which prevents past situations from being called into question.

When the Constitutional Council censures a provision of a law as part of its *a priori control* , the question of the modulation over time of the effects of its decision does not in principle arise. By construction, censorship or reserve intervenes even before the promulgation of the law (thus the first paragraph of article 62 of the Constitution provides that "a provision declared unconstitutional on the basis of article 61 may be promulgated or implemented"), which therefore never produced any effects.

The question of the effects over time of pronounced censures arises in very different terms in the context of the QPC procedure. Here, the censored provision applied and produced effects, if necessary for several years. This question was settled by the constitutional revision of July 23, 2008, by laying down the principle, in the second paragraph of article 62 of the Constitution, according to which "a provision declared unconstitutional on the basis of article 61-1 is repealed from the publication of the decision of the Constitutional Council". This is the rule of immediate repealing effect: censorship does not in principle have retroactive effect – it remains, for reasons of legal certainty, without incidence on the effects that the censored law has produced in the past – but the censured provision can no longer, from the day after the publication of the decision, produce any effects in the future.

The constituent, however, combined this principle with two derogations which it is open to the Constitutional Council to handle by providing, on the one hand, that the censored provision is repealed as of the publication of the decision of the Constitutional Council "or of a later date fixed by this decision" and, on the other hand, that "the Constitutional Council determines the conditions and limits under which the effects that the provision has produced are likely to be called into question". The constitutional judge is thus authorized either to set aside the immediate nature of the repeal – by postponing the censure – or to give their decision a retroactive scope, and not purely abrogative, by postponing certain effects that the censored law has produced in the pass.

In practice, the Council very frequently uses these possibilities to modulate the effects over time of the QPC censures it issues in tax matters. Most often, it provides for immediate application of the censorship to "proceedings in progress" on the date of its decision (we then speak of "procedural" retroactivity), that is to say that taxpayers who have already contested their taxation may benefit from the declaration of unconstitutionality [84]. More rarely, it goes so far as to specify that the declaration of unconstitutionality of the tax law is "applicable to all cases not finally judged on [the] date [of its publication]", which means that all taxpayers can invoke censorship, even those who have not yet introduced any

[83] *CE, 8 th and 7 th ss-sect., 1 June 1988, n° 79550, SA Berto , concl. N. Chahid-Nouraï.*

[84] *See e.g. cons. const., Nov. 20, 2015, No. 2015-498 QPC, Sté SIACI Saint-Honoré SAS and a. , considering 9. – Cons. const., 11 dec. 2015, No. 2015-509 QPC, Mr. Christian B. , consider. 8.*

challenge (full retroactivity) [85]. He even recognizes the possibility of providing that his decision opens a new period of complaint for the benefit of the taxpayer: in this case, even foreclosed taxpayers can invoke the unconstitutionality found.

The exclusion of any retroactivity is infrequent: it is only when the retroactive disappearance of the censored tax law would entail "manifestly excessive" consequences that the Constitutional Council does not provide for any questioning of the effects produced in the past by the law. censored, which most often leads him to postpone his censorship. To date, it has decided nine times to defer the repeal of a tax provision which it has found to be unconstitutional [86]. As for the duration of the deferred repeal pronounced, it is generally about six months [87], except at the beginning of the finance law period (September or beginning of October) [88], during which it is in principle open to the legislator to take a rapid measure. coming to correct the unconstitutionality noted, which makes it possible to postpone the repeal only for a few months which separate the decision of the following January 1st.

The framing of tax reforms by constitutional law is, in France, an edifice that is constantly under construction. The introduction of the priority question of constitutionality in 2010, which allows all taxpayers to challenge the constitutionality of the tax law before a judge, has multiplied the opportunities offered to the constitutional judge to clarify his case law and the scope of rights and freedoms. In this context, the above statement must therefore be seen as a snapshot “at a moment t”: there is no doubt that the years to come will lead the constitutional judge to deepen and clarify the constitutional framework for taxation.

[85] *See e.g. cons. const. ' 15 Jan. 2015, n° 2014-436 QPC, Ms. Roxane S. , consider. 15. – Cons. const., Oct. 14, 2016, No. 2016-587 QPC, Épx F. , par. 9.*

[86] *cons. const., June 6, 2014, No. 2014-400 QPC, Sté Orange SA , para. 10. – Cons. const., 20 June 2014, n° 2014-404 QPC, Épx M. , consid. 13. – Cons. const., September 19, 2014, n° 2014-413 QPC, Sté PV-CP Distribution , consider. 8. – Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 16. – Cons. const., Sept. 30, 2016, No. 2016-571 QPC, Sté Layher SAS , para. 12. – Cons. const., Oct. 27, 2017, n° 2017-669 QPC, Sté EDI-TV , par. 10. – Cons. const., Sept. 21, 2018, No. 2018-733 QPC, Fairing means operating company , para. 13. - Cons. const., May 26, 2021, n° 2021-908 QPC, Sté KF3 Plus , para. 13.*

[87] *See Cons. const., 6 June 2014, n° 2014-400 QPC, Sté Orange SA , consider. 10. – Cons. const., 20 June 2014, n° 2014-404 QPC, Épx M. , consid. 13. – Cons. const., Oct. 27, 2017, n° 2017-669 QPC, Sté EDI-TV , par. 10 (up to eight months). - Cons. const., May 26, 2021, n° 2021-908 QPC, Sté KF3 Plus , para. 13.*

[88] *cons. const., September 19, 2014, n° 2014-413 QPC, Sté PV-CP Distribution , consider. 8. – Cons. const., September 19, 2014, n° 2014-417 QPC, Sté Red Bull On Premise et a. , considering 16. – Cons. const., Sept. 30, 2016, No. 2016-571 QPC, Sté Layher SAS , para. 12. – Cons. const., Sept. 21, 2018, No. 2018-733 QPC, Fairing means operating company , para. 13. – Cons. const., Oct. 12, 2018, No. 2018-739 QPC, Sté Dom Com Invest , para. 10.*