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Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law*

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I. Introduction

The European construction in its widest sense, whether referring to the integration of the European Union (EU) or the development of the European Convention on Human Rights (ECHR) system, has given rise to interesting processes, namely a process of Europeanization and a process of constitutionalization. Europeanization is an encompassing concept used in political science where the literature on European integration increasingly employs the notion to assess the European sources of domestic politics.[2] It generally refers to a process taking place at, or affecting, the national level whereby domestic adaptation and changes are required by European integration including, in its broadest sense, the legal aspects of the changes.[4] Europeanization thus encompasses Europeanization of law.[6] Europeanization should not be limited to the EU context as 'Europeanization is more than just EU-ization'[7] and can refer to the impact of other institutions or systems which are highly intertwined with the EU in terms of organization and even identity, such as the Council of Europe in the area of human rights. Europeanization also embraces the parallel influence of ECHR law.

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2 See M Green Cowles, J Caporaso and T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Ithaca New York, Cornell University Press, 2001); K Featherstone and C M Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003); and P Graziano and M P Vink (eds), *Europeanization – New Research Agendas* (Basingstoke, Macmillan, 2008).

4 The process can also be defined as taking place at European level as the emergence and the development of distinct structures of governance 'that is of political, legal and social institutions associated with political problem-solving that formalize interactions among the actors, and of policy networks specializing in the creation of authoritative European rules'. See T Risse et al, 'Europeanization and Domestic Change: Introduction' in M Green Cowles, J Caporaso and T Risse, *Transforming Europe: Europeanization and Domestic Change* (Ithaca New York, Cornell University Press, 2001) at 1. See also the typology by J P Olsen, 'The Many Faces of Europeanization' (2002) 40 *Journal of Common Market Studies* 921–52.

6 F Snyder, *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford, Hart, 2000).

7 P Graziano and M P Vink (eds), *Europeanization – New Research Agendas* (Basingstoke, Macmillan, 2008).

In the second place, legal scholarship is also increasingly referring to a process of constitutionalization in relation to the two European Treaty systems. Constitutionalization of the EU means the 'step-by-step transformation of the EC/EU into a political system which rests on a constitutional basis', in brief the 'emergence of European constitutional law within the European legal order'.[9] In relation to the Strasbourg system, constitutionalization pertains to the claim that the European Court of Human Rights (ECtHR) is a constitutional court, or 'quasi-constitutional', in the sense of being 'the final authoritative judicial tribunal for a specific constitutional system designed to ensure that the exercise of public power throughout Europe is constitution-compliant, the constitution in this case being the ECHR'.[11] In other words, the primary purpose of the (Convention) judicial process is not to benefit individual applicants ('individual justice'), but aims at enabling the ECtHR to address the most serious defects with Convention compliance in Member States, that is to exercise 'constitutional justice'.[13]

Europeanization and constitutionalization have profoundly affected national legal systems and often generated real tensions with domestic approaches, especially when fundamental rights are concerned. The example of the French legal system represents an interesting illustration of the tensions in this context for two reasons. First, the overall position of France vis-à-vis both European systems (EU and ECHR) is one of the most contradictory. As a founding member of the European Communities and instigator of major reforms (e.g. in part, the elaboration of the Treaty establishing a Constitution for Europe), France has also been responsible for its most resounding failures (*e.g.* the negative 29 May 2005 referendum on the very same Treaty which halted the European construction for some time)[14] and holds one of the worst records in terms of implementation of EC directives.[15] As for the Strasbourg system, France, '*patrie des droits de l'homme'* (homeland of human rights), has one of the worst records before the ECtHR. Despite a late ratification of the Convention in 1974, France quickly became a regular litigant before the ECtHR and was found in violation of certain core rights of the ECHR (Articles 2, 3 and 4) on several occasions, particularly in the past decade or so.[17] Although

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9 A Peters, 'The Constitutionalisation of the European Union – Without the Constitutional Treaty' in S Puntscher and W Wessels (eds), *The Making of a European Constitution* – Dynamics and Limits of the Convention Experience (Wiesbaden, VS Verlag, 2006). See also J H H Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor? and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999).

11 S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, Cambridge University Press, 2006) at 190. See also J-F Flauss, 'La Cour européenne des droits de l'homme est-elle une cour constitutionnelle?' (1999) *Revue française de droit constitutionnel* 711; E A Alkema, 'The European Convention as a Constitution and its Courts as a Constitutional Court' in P Mahoney, F Matscher, H Petzold and L Wildhaber (eds), *Protecting Human Rights: The European Perspective – Studies in Memory of Rolv Ryssdall* (Cologne, Carl Heymanns, 2000) at 41.

13 S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, Cambridge University Press, 2006) at 59.

14 M-L Paris, 'The Implications of the "No" vote in France: Making the Most of a Wasted Opportunity' in F Laursen, *The Rise and Fall of the Constitutional Treaty* (Leiden, Martinus Nijhoff/Brill, 2008) at 497–523.

15 C Enfert, 'La France et la transposition des directives' (2005) 41 *Revue trimestrielle de droit européen* 671–86.

17 France was the second largest provider of cases after Italy, reaching a total number of registered cases of 643 by 1998, barely over 12 years after the first ruling against France. A peak was reached in 2006 with a total of 92 judgments on the merits. It seems that there is now a decline in the number of petitions brought to Strasbourg – which has yet to be confirmed. See E Lambert Abdelgawad and A Weber, 'The Reception Process in France and Germany' in A Stone Sweet and H Keller (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008) 107–64, at 121–3, 125.

there are no obvious answers to these paradoxes, the lower participation rate of France in the European legal systems is attributable, to a large extent, to 'the lack of an individual constitutional complaints procedure, plus certain flaws in the attitude of the French courts to legally enforceable rights',[19] and a general 'lack of fit' between the domestic political structure and the European system.[21] However, the influence of European norms over the domestic legal system is now well rooted and accepted. Over the last 25 years, France has been undergoing a new legal and political revolution, moving away from a purely domestic concept of the rule of law to a new approach which accepts the prevailing influence of European law, particularly in the field of human rights. Accompanied by ups and downs, progress and resistance, the general trend has clearly been in favour of an ever closer European legal integration.[23]

Secondly, in the case of France, the process of Europeanization does not suffice to give a full picture of the changes that have affected the domestic legal order and the protection of fundamental rights in particular. A process of constitutionalization of French law at domestic level – paradoxically more recent than its Europeanization – has had the effect of impregnating the different areas of law with constitutional norms of reference developed by the French Constitutional Council (*Conseil Constitutionnel*) This process has transformed not only the original arrangements of French constitutional review but also the traditional approach regarding the protection of rights and freedoms. As domestic constitutional review appeared more sophisticated and the role of the *Conseil Constitutionnel* more settled, the time has come for reconciliation of the French 'constitutional *acquis'* with European norms. This is also crucial at a moment when, regarding the EU legal order in particular, pressure has increased on national courts and especially on 'those ultimately responsible for the relevant national (constitutional) provisions to ensure that there is a certain harmony between the European and national levels' and an 'interconnection' between the EU legal system and national legal systems.[27] In this context, recent challenging developments came about when the *Conseil Constitutionnel* defined the relationship between French constitutional norms and EC law in a series of important decisions rendered in 2004 and 2006. This is also a significant transitional time for the French constitutional order, and the whole French judicial system indeed, after the recent introduction of a constitutional provision on the exception of unconstitutionality. New Article 61-1 of the 1958 Constitution allows an issue of constitutionality on the conformity of a promulgated statutory provision with the rights and freedoms guaranteed by the Constitution to be referred to the *Conseil constitutionnel* [29]. This 'judicial big bang'[30], which introduces the novelty of a posteriori constitutional

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19 S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, Cambridge University Press, 2006) at 133, talking about the ECHR system.

21 L Conant, 'Europeanization and the Courts: Variable Patterns of Adaptation among National Judiciaries' in M Green Cowles, J Caporaso and T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Ithaca New York, Cornell University Press, 2001) 97–115, at 113.

23 J-P Costa, 'The Influence of the European Convention on Human Rights on Domestic Legal Systems: The French Experience' (2004) 11(2) *Irish Journal of European Law* 350–61, at 361.

Conseil Constitutionnel Conseil Constitutionnel[25] Although the *Conseil Constitutionnel* not strictly speaking a constitutional court (see below).

27 S Prechal, 'National Courts in EU Judicial Structures' (2006) *Yearbook of European Law* 429–50, at 450.

29 See Article 61-1 of the 1958 Constitution introduced by the constitutional amendment on the modernization of the institutions of the 5th Republic (*Loi constitutionnelle n°2008-724 du 23 juillet 2008 de modernisation des institutions de la Vème République*), discussed below.

30 D Rousseau, 'La question préjudicielle de constitutionnalité: un big bang juridictionnel' (2009) *Revue du droit public* 631.

review in French law, will have a profound impact on the scope of constitutional review as well as on the role of the *Conseil Constitutionnel* as a constitutional court arguably reinforcing the process of constitutionalization at national level.

It is argued that the relative maturity reached by both processes of Europeanization and constitutionalization at national level has prompted recent judicial and legislative developments seeking to reconcile the influence of European and constitutional norms within the French legal order. The analysis of the most obvious transformations of the French legal system under the influence of European and constitutional norms will adopt a tripartite approach, first, examining the Europeanization of French law, then the constitutionalization of French law and, finally, focussing on the relationship between national and European norms as recently clarified in French constitutional law.

II. Europeanization of French Law

In his case study about France, Ladrech defined Europeanization as 'an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making'.[32] In this analysis, Europeanization refers to the mutations of French law attributable to European integration whereby domestic legal norms and structures adapt to sources of European law, namely EC law and ECHR law.

Although the reception mechanisms of EC law and the law of the ECHR are different, their impact on French law is manifest and ongoing. An exhaustive study of the transformations of French law caused by this dual influence would go beyond the scope of this article. Rather, an overview of the multifaceted impact of European law will be given supported by relevant examples, starting with the influence of EC law[33].

A. French Law and EC Law

Different instruments and principles are at play in the relationship between French law and EC law. The legally binding force of EC secondary legislation[34] and European Court of Justice (ECJ) decisions,[36] as well as the principles of primacy,[38] direct effect,[40] effectiveness[41] and even subsidiarity[42] have, directly or indirectly, contributed to the penetration of EC norms into the national legal order. Directives in particular are instruments of acculturation and show how the national

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32 R Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' (1994) 32 (1) *Journal of Common Market Studies* 69–88, at 69.

33 Analyzed before the entry into force of the Lisbon Treaty on 1 December 2009, the changes in French law are limited to the influence of EC law, and not EU law. However, a necessary formal update is made in relation to references to EC law and EU law provisions with the indication of the new numbering under the Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon.

34 Article 249 EC (new Articles 288-291 TFEU).

36 Articles 220–45 EC (new Articles 251-281 TFEU).

38 Case 6/64 *Costa v ENEL* [1964] ECR 1141.

40 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

41 Article 10 EC (replaced, in substance, by Article 4 (3) TEU). See also, for example, Case 14/83 *Von Colson* [1984] ECR 1891; Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651; and Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097.

42 Article 5 EC (replaced, in substance, by Article 5 TEU).

legislator assimilates or 'domesticates', through the transposition process, the substance of EC law. The whole process of the preliminary ruling procedure under Article 234 EC (new Article 267 TFEU), involving the decision to refer by the national court, and the application by the national court of EC law as interpreted by the ECJ, is a good indicator of the intensity of Europeanization of the national legal system. The effects of EC law on French law can be observed in both the public law and private law spheres. The public/private law divide, although called into question by the very influence of EC law, still reflects the approach taken by most studies in the area and will frame the discussion that follows.

(i) Public Law

The EC legal system has generated a political and legal (and even social) context favourable to the progressive transformation of the mechanisms and concepts of French public law. By the mid-1990s, Europeanization of administrative law was widely acknowledged.[44] The forms of influence have been diverse and can be analysed from different angles. The French administrative model, successively marked by 'colbertism',[46] centralism, interventionism and the welfare State, features a powerful public sector as well as a highly hierarchical and structured civil service centred on the notion of public service (*service public*) and prerogatives of the State (*puissance publique*).

The liberal market-oriented approach taken by the EC institutions towards the administration has greatly shaken this model, calling into question its organization as well as its basic legal principles and concepts.[48] The liberalization process has meant less centralization and State control, as well as the creation of independent agencies. Most reforms in the area have been prompted by EC law, though not without a strong input by the French government, which has pushed forward a re-conceptualization of the notion of public service at European level and engaged in reflection on the notion at national level. From the mid-1980s, the action of the European Commission under Article 86 EC (new Article 106 TFEU) on competition law applicable to public undertakings sought to liberalize the public service sector and dismantle public monopolies in Europe in order to achieve the objectives of the common market. By the mid-1990s, all of them (transport, energy and communications) were affected to some extent in France.[50] However, the same decade witnessed a progressive recognition

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44 E Schmidt-Assmann, 'Les influences réciproques entre les droits administratifs nationaux et le droit administratif européen' (1996) *Actualité juridique – Droit administratif* (Special Issue) 146–55. See the development of administrative law at European level in J Schwarze, *European Administrative Law* (London, Sweet & Maxwell, Revised First Edition, 2006); and J-B Auby and J Dutheil de la Rochère (eds), *Droit administratif européen* (Brussels, Bruylant, 2007).

46 Colbertism has its origins in the set of economic practices enforced in the late 17th century under Jean-Baptiste Colbert, then Minister for Finance. This policy, later theorized as a specifically French mercantilist doctrine, was based on a strong State interventionism aimed at enriching the State finances by encouraging accumulation of goods, economic protectionism and control of the overseas means of production by the French central authorities.

48 The process of liberalization is not solely due to the action by the European Commission and Council. The neoliberal wave of the late 1970s accompanied by technological progress drove several Member States to open their monopolies to competition – particularly telecommunications – even before specific rules of EC law were introduced.

50 J-M Belorgey, 'Service public et droit communautaire' (1996) *Actualité juridique – Droit administratif* (Special Issue) 35–8. For an account of scholar references on this issue, see P Cassia, 'Service public français et droit communautaire' (4 July 2002) *Les Petites Affiches* 4–23. For a general reflection on the public service and Europe, see G Savary, *L'Europe va-t-elle démanteler les services publics?* (La Tour-d'Aigues, Éditions de l'Aube, 2005).

of the central role played by the public services regarding the economic and social cohesion of the EU under the pressure of national governments, especially successive French governments.[52] As a result, a more general definition of public service emerged in the form of the notion of 'universal service' which could arguably be interpreted as an attempt to generalize, at European level, the traditional approach to public services.

Article 16 EC (new Article 14 TFEU) acknowledges the place occupied by services of general economic interest in the shared values of the EU as well as their role in promoting social and territorial cohesion. Even if their proposal to include in the Treaty a Charter on Public Services has not been taken up, French authorities are still active on this matter and the National Assembly even proposed a framework directive aimed at setting out the general principles applying to services of general economic interest which will govern future sectoral directives.[54] At domestic level, a general discussion on the concept of services of general economic interest, as enshrined in the Treaty, has led to a reflection on various other notions of public law – such as 'monopoly', 'public undertaking' and 'public service obligations'. Paradoxically, but not surprisingly, a reconsideration of the approach towards the very notion of competition (at the heart of the EU approach to liberalization) has followed according to which competition should not be regarded as a goal in itself but rather be turned into an instrument aimed at improving the functioning of the services of general economic interest.[56]

In relation to implementation of EC norms, particular problems arose in the case of directives transposition, often because of differing conceptual approaches between the EC authorities and French government. One example is to be found in the area of public procurement where directives on public procurement and public works refer to concepts which have no exact equivalent in French administrative contract law.[58]

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52 It is also due to the case law of the ECJ which had accepted exceptions to the application of competition rules when general interest obligations were at stake (see Case C-320/91 *Corbeau* [1993] ECR I-2533 and Case C-393/92 *Municipality of Almelo* [1994] ECR I-1477).

54 See Information Report of the French National Assembly Delegation for the EU, *Le service public en France et en Europe*, N°3141, 14 June 2001, accessed at <http://www.assemblee-nationale.fr/europe/rap-info/i3141.pdf>. Websites mentioned in the article were last accessed on 20 August 2010.

56 Ibid, at 12. The issue of the notion of public service was revived on the occasion of the ratification of the Constitutional Treaty and Lisbon Treaty, at both European and national level around the issues of general public interest and competition. See, for example, L Dubouis, 'Le service public et le Traité établissant une Constitution pour l'Europe' in P Bon et al (eds), *Renouveau du droit constitutionnel – Mélanges en l'honneur de Louis Favoreu* (Paris, Dalloz, 2007) at 1219–30. No more reference is made to the free and 'undistorted' competition in the Lisbon Treaty. Article 3 (1) (b) TFEU on the areas where the EU has exclusive competence, refers to the establishment of the competition rules necessary for the functioning of the internal market. Also, Protocol No 26 on Services of General Interest attached to the Treaty recognizes that the shared values of the EU in respect of services of general economic interest include, in particular, 'the essential role of the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of users'.

58 For an account of criticisms towards the European approach, see H Courivaud, 'La concession de service public "à la française"' (2004) *Revue internationale de droit économique* 395–434.

The main aspects of EC law influence on French public law are twofold. First, there has been a transformation of the relationship between the courts and the executive with a strengthening of the role of the former in this area.[60] French administrative courts have intervened more willingly from the beginning of the 1990s, drawing on the supremacy and direct effect of EC law after the *Nicolo* Decision in which the *Conseil d'Etat*, the supreme administrative court, famously accepted the primacy of EC law over a conflicting subsequent French statute.[62] The *Conseil d'Etat* was ready to cooperate with the ECJ and encouraged lower administrative courts in their application of EC norms and their use of the preliminary procedure in particular.[64] The insistence of EC institutions, especially the ECJ, on the efficiency of judicial protection of the rights of the individuals has led to a different perception of their judicial function by domestic courts. Whereas the traditional approach was to strive to reach a compromise between the public general interest and the rights of the individuals, the courts now have the *administrés* and their rights as the central focus.[66] Secondly, the transformations of French administrative law have led to a critical reflection on the reconciliation of the public law regime with the imperatives of the law of the market to best serve the interests of public service users – in other words, a reflection on the concept of 'administration' and the definition of administrative law.[68]

In addition to substantive changes, a greater awareness towards EC law led to institutional improvements in the involvement of domestic authorities. The *Conseil d'Etat* was granted a role in the EC decision-making process at domestic level with the possibility to intervene in the procedure laid down in Article 88-4 of the 1958 Constitution on the scrutiny of EC proposals by the national Parliament.[70] The provision requests the French government to lay before the National Assembly and the Senate drafts or proposals of acts of the EC and the EU containing provisions which are of legislative nature as soon as they have been transmitted to the Council of the EU.[72] The role of the

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60 J-C Bonichot, 'Le droit communautaire et le droit administratif français' (1996) *Actualité juridique – Droit administratif* (Special Issue) 15–19, at 18.

62 CE Ass 20 October 1989 (*Nicolo*) [1990] 1 CMLR 173. See J Dutheil de la Rochère, 'The Attitude of French Courts towards ECJ Case Law' in D O'Keeffe and A Bavasso, *Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* (The Hague, Kluwer Law International, 2000) at 417–31.

64 CE 1 June 1994 (*Letierce*) Recueil Lebon 1994 278–80.

66 J-C Bonichot, 'Le droit communautaire et le droit administratif français' (1996) *Actualité juridique – Droit administratif* (special issue) 15–19, at 18–19.

68 L Dubouis, 'Le droit communautaire a-t-il un impact sur la définition du droit administratif?' (1996) *Actualité juridique – Droit administratif* (Special Issue) 102–8, at 108.

70 Article 88-4 of the Constitution is part of a set of Articles (Articles 88-1 – 88-5) introduced by the constitutional amendment of 25 June 1992 on the occasion of the ratification of the Maastricht Treaty. They constitute Title XV of the Constitution dedicated to the membership of France to the EC and the EU. A new Title XV (Articles 88-1 – 88-7) on the European Union now replaces the former provisions since the entry into force of the Lisbon Treaty on 1 December 2009 (see below *Revisions of the 1958 Constitution*).

72 The rest of the provision reads as follows: 'It may also lay before them other drafts of or proposals for acts or any instrument issuing from a European Union institution. In the manner laid down by the rules of procedure of each House, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or instruments referred to in the preceding paragraph.' The procedure resembles the institution of the Select Committees in both Houses of the British Parliament (the European Scrutiny Select Committee of the House of Commons and the EU Select Committee of the House of Lords).

Conseil d'Etat, acting in its advisory capacity to the government, is significant in this regard. It determines, first, what constitutes such 'drafts or proposals' of EC acts, and, secondly, which ones are of 'statutory nature'. While the procedure certainly allows the national Parliament to be better informed of EC legislative activity and control the action of the French government with the possibility of adopting resolutions on these EC proposals, it also allows the supreme administrative court to formulate observations on the content of such proposals thus contributing indirectly to the formation of EC laws. Acting like a 'definition check-point' on the nature of the proposals in between the executive and legislative powers, it illustrates how EC law has become a common feature of the French administrative legal order, including in its institutional arrangements. It must be noted, however, that since the constitutional revision of 1999 (in the context of the Treaty of Amsterdam ratification) and a 2005 *circulaire* of the Prime Minister, the determination of the 'legislative nature' of EC proposals has somehow lost its relevance since the range of texts that can be forwarded by the government to the Parliament has been greatly extended to cover almost all texts received from the Council, and not just those of legislative nature.

To conclude, being a law of deregulation and dismantlement, especially in the area of public law, EC law has appeared as a factor of renewal of the French approach to administrative action.[74] Beyond the substantive transformations of domestic law, a modernization of its concepts and mechanisms has offered new perspectives to academic debate in this area.

(ii) Private Law

Turning to the private law sphere, the growing importance of the EU has recently focused on private law.[76] In France, as in other Member States, EC law was first regarded as a specific area of law pertaining to a large extent to the public sphere. The first signs of the impact of EC legislation on private law were in very specific areas like competition law and intellectual property law, where intense litigation involving EC and national private law matters developed.[78] Because of the instrumental view of the ECJ towards private law – meaning that private law must serve the common market – the influence on domestic legal systems has led to harmonization in the area. The first two directives which affected the heart of traditional French private law (but this is not different from other Member States) date from the mid-1980s, namely Council Directive 85/374/EEC on liability for defective products[79] and Council Directive 85/577/EEC on consumer protection in respect of contracts negotiated away from business premises.[81]

Other directives in the 1990s provoked further reforms and changes such as, for instance, Council Directive 93/13/EEC on unfair terms in consumer contracts.[85] Consumer law is indeed another good

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74 J-C Bonichot, 'Le droit communautaire et le droit administratif français' (1996) *Actualité juridique – Droit administratif* (Special Issue) 15–19, at 18. For a recent account, see *Rapport public du Conseil d'Etat 2007 – L'administration française et l'Union européenne. Quelles influences? Quelles stratégies?*, accessed at <http://www.conseil-etat.fr/ce/rapport2007/rap07.pdf>.

76 R Michaels and N Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *Am J Comp Law* 843–90, at 861.

78 E Putman, 'L'incidence du droit communautaire en droit privé français' (1997) *Revue de la recherche juridique – Droit prospectif* 434–48.

79 OJ 1985 L 210, p 29.

81 OJ 1985 L 372, p 31.

83 For an overview of EC directives in this area, see P-C Müller-Graff, 'EC Directives as a Means of Private Law Unification' in A Hartkamp et al, *Towards a European Civil Code* (Kluwer, 2004) at 90–100.

85 OJ 1993 L 95, p 29.

example of an area of private law which has been deeply influenced by EC law[86]. A majority of French scholars considered at the time that French legislation (as laid down in the *Scrivener* statute No 78-23 of 10 January 1978) was satisfactory with regard to the standard of consumer protection against abusive clauses and even higher than the one proposed in the Directive. It was nevertheless acknowledged that the EC instrument (transposed by statute No 95-96 of 1 February 1995) brought about some changes to consumer law like the notion of 'significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer', which appeared more favourable towards the consumer than the concepts used under the previous domestic legislation referring to the arguably more stringent criteria of 'abuse' and 'excessive advantage'.

In some other instances, the EC legal order has impacted on French private law via more pervasive ways such as in the context of EC litigation before domestic courts, where the invocation of EC provisions by French litigants and their legal representatives, although relatively recent, has been gradually established. The impact is also due to the action of the legislator in its approach to EC law. One example relates to the controversy surrounding the prohibition of Sunday trading which started in the late 1980s after the ECJ decided that national legislation which imposed 'Sunday rest' was actually not contrary to the free movement of goods. Because such laws were not intended to regulate the flow of goods and because they affected the sale of both domestic and imported products, they did not appear to be excessive in relation to the aim pursued, namely reflecting certain particular national and regional socio-cultural choices.[88] The French authorities then addressed the difficulties encountered at national level by enacting a set of rules in this area which probably would have never been adopted without the impulse of the ECJ case law.[90]

Despite a slow start, the effect of EC law on French private law has been real and deep. However, it still faces tension. The tension is between the volume of EC norms and the constant pressure to harmonize private law at EU level, on the one hand,[92] and the failure of France to transpose a majority of EC directives including those affecting private law,[94] on the other. This creates a discrepancy where academic debate in the area has been strongly revived by developments taken place at EU level,[96] but where reticence is clearly perceptible at national political level.

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86 For an overview of EC directives in this area, see P-C Müller-Graff, 'EC Directives as a Means of Private Law Unification' in A Hartkamp et al (eds), *Towards a European Civil Code* (The Hague, Kluwer Law International, 2004) at 90–100.

88 Case C-312/89 *Conforama* [1991] ECR I-997.

90 The 'Sunday rest' controversy is in fact an ongoing problem in France, as well as in other Member States and at European level. French social legislation provides for a principle of free trade opening on Sundays which has to be reconciled with the principle of 'Sunday rest' of employees as laid down in Articles L 221-2, L 221-4, and L 221-5 of the Employment Code (*Code du travail*) – which itself allows for many exceptions.

92 See the calls for the elaboration of a codification of European private law by the European Parliament (EP resolution of 26 May 1989, OJ C 158, p 400), reiterated since on several occasions, and at the Tampere special meeting of the Council of the EU on 15–16 October 1999 on the creation of an area of freedom, security and justice in the EU.

94 C Enfert, 'La France et la transposition des directives' (2005) *Revue trimestrielle de droit européen* 671–86.

96 The *Lando* Commission and the Study Group on a European Civil Code, which are private initiatives dealing with private law codification projects, constitute specific forms of international cooperation between academic institutions and could be regarded as the relevant signs of the Europeanization of legal science (R Zimmermann, 'Le droit comparé et l'européanisation du droit privé' (2007) *Revue trimestrielle de droit civil* 451–83, at 456).

B. French Law and ECHR Law

France was a latecomer in the Strasbourg system and only ratified the ECHR on 3 May 1974, nearly a quarter of century after its signature.[98] The situation is quite paradoxical as France was committed early on to the establishment of the Convention.[100] It accepted the right of individual petition in 1981[101] and the first judgment in an application against France was delivered by the ECtHR in 1986.[103] The scope of the implementation of the ECHR has been quite paradoxical: according to the monist approach to international law, its provisions can be directly invoked by citizens, although some of its strength is lost in case of conflict with a national provision. France is a monist State and the implementation of the ECHR in its legal order did not require – like in the UK, Ireland or Sweden, as the last three original signatories to have incorporated the Convention in their domestic legal order[104] – any national measure of incorporation. Also, the highest French courts, namely the *Conseil d'Etat* and the *Cour de Cassation*, held from the very beginning that the ECHR as a whole was 'self-executing' and could therefore be directly invoked by individuals before domestic courts.

The rank of the ECHR in the hierarchy of norms is determined by Article 55 of the 1958 Constitution, according to which 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. The ECHR has thus supra-legislative status. The position traditionally taken by *Conseil d'Etat* and the *Cour de Cassation* was that, in case of a conflict between a treaty and a national statute, the most recent text was to be applied, thereby implying that international treaties only had primacy over previous legislation. The two supreme courts eventually abandoned this position, in 1975, for the *Cour de Cassation*,[106] and notoriously later, in 1989, for the *Conseil d'Etat*[107] when they accepted to review the conformity of a statute with an international treaty as invited to do so following

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98 Decree 74-360 of 3 May 1974 publishing the ECHR, JORF 4 May 1974, p 4750.

100 Two eminent French scholars, René Cassin and Pierre-Henri Teitgen, who eventually became the first two French judges of the ECtHR, were among the instigators and drafters of the ECHR in the late 1940s. Several political and institutional reasons explain the delay in ratification. First, during the Algerian War (1954–1962), political leaders were not too keen on accepting international agreements, the provisions of which could have led to judgments against France finding breaches against the Convention. Secondly, even after 1962, the French Presidents, as '*souverainistes*', were generally not much in favour of a supranational court with jurisdiction to redress wrongs committed by a national legal system. See E Lambert Abdelgawad and A Weber, 'The Reception Process in France and Germany' in A Stone Sweet and H Keller (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008) 107–64, at 108.

101 Decree 81-917 of 9 October 1981, JORF 14 October 1981, p 2873.

103 ECtHR *Bozano v France* 18 December 1986 Series A 111. At the time, the right on individual petition and acceptance of the compulsory jurisdiction of the ECtHR were not automatic and depended on a declaration of recognition by the respondent State.

104 Sweden enacted the Act on the European Convention on Human Rights in 1994, the United Kingdom the Human Rights Act in 1998 (HRA 1998), and Ireland the European Convention on Human Rights Act in 2003 (ECHR Act 2003).

106 Cass Ch Mixte 24 May 1975 (*Société des Cafés Jacques Vabre*) [1975] 2 CMLR 336.

107 CE Ass 20 October 1989 (*Nicolo*) [1990] 1 CMLR 173.

the *Conseil Constitutionnel*'s 1975 ruling.[109] Both the administrative and judicial courts not only have the power, but also, in principle, the constitutional duty, in case of a conflict of laws, to set aside the national norm in favour of the international provision. However, both courts made it clear in later cases that Article 55 does not give international treaties a position of precedence over the Constitution or other provisions of constitutional nature.[111] Since this change in the case law, the number of references made to the ECHR in domestic litigation has substantially increased, especially within the administrative courts.[113]

The record of France before the ECtHR is far from exemplary. For instance, in 2006 alone, France was found in violation of rights guaranteed by the ECHR on 92 occasions.[115] While a number of adverse rulings have been the focus of media attention, the most spectacular case is probably the *Selmouni* case, making France one of the few countries to have been found in breach of Article 3 of the ECHR for torture violation.[117] However embarrassing that record is, what is to be analysed in the

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Conseil Constitutionnel Conseil Constitutionnel[109] CC Decision 74-54 DC of 15 January 1975 (*Loi relative à l'interruption volontaire de grossesse*), discussed below.

111 See CE Ass 30 October 1998 (*Sarran, Levacher et autres*); CE 3 December 2001 (*Syndicat national de l'industrie pharmaceutique SNIP*); and Cass Ass Plen 2 June 2000 (*Fraisse*).

113 For example, in 2001, a provision of the ECHR is invoked in more than 2,000 cases dealt with by the *Conseil d'Etat* (representing almost 40% of the all the cases dealt with by the court), compared with 38 references in 1989, the year of the *Nicolo* case. See O Dutheillet de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité' in J-C Bonichot et al (eds), *Mélanges en l'honneur de Daniel Labetoulle – Juger l'administration, administrer la justice* (Paris, Dalloz, 2007) 315–27, at 320. Cf E Saillant, 'Sur la prétendue rivalité de systèmes complémentaires' (2004) *Revue du droit public* 1497–1546, citing at 1545 *La France face aux exigences de la Convention européenne des droits de l'homme, Etudes* (Paris, La Documentation Française, 2001) on the reluctance of the *Cour de Cassation* and *Conseil d'Etat*, and counsels before them, to invoke the ECHR.

115 See above, E Lambert Abdelgawad and A Weber, 'The Reception Process in France and Germany' in A Stone Sweet and H Keller (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008) 107-164, at 121–3, 125.

117 ECtHR *Selmouni v France* (Grand Chamber) 28 July 1999 ECHR 1999-V (concerning the ill-treatment of the applicant while in police custody and the length of subsequent proceedings which he joined as *partie civile*). Other recent examples include *LR v France* 27 June 2002 Application No 33395/96 (delay in reviewing the decision to release a person from a mental institution); *Mouisel v France* 21 May 2003 ECHR 2002-IX (refusal to release from jail a prisoner suffering from terminal illness); *Maurice v France* 6 October 2005 ECHR 2005-IX (condemnation of the retroactive effect of statute No 2002-303 of 4 March 2002, so-called 'anti-Perruche statute' after the name of a controversial case by the *Cour de Cassation* concerning the claim for damages for the birth of a disabled child); and *E B v France* 23 January 2008 Application No 43546/02 (refusal by the French authorities of an application for adoption by a homosexual).

following developments are the various manifestations of changes brought about by membership of the ECHR system. France, under the influence of the Strasbourg case law, has had to make profound changes to its legislation, regulations and practice affecting almost all areas of law.[119] There is a two-level approach to this question commanded by the different means of influence of the ECHR: first, the general impact of the ECHR, as interpreted by the ECtHR, in domestic litigation when directly invoked in judicial proceedings or used in the legislative process; secondly, the specific impact of the ECtHR's rulings against France. What follows is not a systematic study of compliance of the French legal system with the ECHR. Rather an overview of the effectiveness of the ECHR and its case law will show, through relevant examples, to what extent domestic officials (legislators, administrators and judges) have enforced Convention rights.

(i) General Impact

By the 1990s, the ECHR had become a familiar instrument to both French litigants (and their counsels) and courts as the ECHR and its case law were a common feature invoked in domestic legal proceedings and decisions. An example of this receptivity is provided by the 2000 *Kudla* case against Poland in which the ECtHR found that the lack of an effective domestic remedy, enabling the applicant to complain about length of proceedings exceeding the reasonable time required by Article 6 of the ECHR, constituted a violation of Article 13.[121] France, which was not legally bound to take account of this ruling,[123] reacted positively in as much as the highest courts modified their case law in order to offer an appropriate domestic remedy to victims of an excessive length of proceedings.[125]

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119 J-P Costa, 'The Influence of the European Convention on Human Rights on Domestic Legal Systems: The French Experience' (2004) 11(2) *Irish Journal of European Law* 350–61, at 351. Several studies can be referred to in this regard. For general studies on private law, see, for example, J-P Marguénaud, *CEDH et droit privé – L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur le droit privé français* (Paris, La Documentation française, 2001); and F Sudre et al (eds), *Les Grands arrêts de la Cour européenne des droits de l'homme* (Paris, PUF, 2003). For more specific analyses, see, for example, I Daugareilh, 'La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la protection sociale' (2001) *Revue trimestrielle de droit européen* 123–37 on social law; and F Vasseur-Lambry, *La famille et la Convention européenne des droits de l'homme* (Paris, L'Harmattan, 2000) on family law. See also <http://www.credho.org/cedh/> (in French) for studies on human rights law (and humanitarian law) concerning France.

121 ECtHR *Kudla v Poland* (Grand Chamber) 26 October 2000 ECHR 2000-XI.

123 Under Article 46 (1) of the ECHR, the binding force of the ECtHR's judgments does not apply *erga omnes* as '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case *to which they are parties*' (emphasis added).

125 J-P Costa, 'The Influence of the European Convention on Human Rights on Domestic Legal Systems: The French Experience' (2004) 11(2) *Irish Journal of European Law* 350–61, at 354. See esp. CE Ass 28 June 2002 (*Magiera*) Application No 239575 which was accompanied by a Decree of 28 July 2005 (Article R 311-1 Code of Administrative Justice) giving competence to the *Conseil d'Etat* on State liability claims for excessive length of proceedings before an administrative court.

The *Cour de Cassation* recognized quite early the authority of the interpretation (*autorité de la chose interprétée*) given by the ECtHR in cases not involving France, although references to the ECHR and its case law by the French judicial courts are generally not easy to trace in this regard.[127] In administrative law, the impact of the ECHR as a judicial source of law for the *Conseil d'Etat* contributed in the 1990s to significant improvements in the protection of individual rights. The evolution in this area has been twofold with, first, a more intense judicial review of administrative action[128] and, secondly, a better protection of substantive rights.[130] References to the ECHR case law have been mostly indirect though, through the conclusions of the *Commissaire du gouvernement*, who has generally been more inclined to expressly refer to the ECHR and its case law than the court itself.[132]

In 1990, the supreme administrative court expressly recognized the supra-legislative value of the ECHR[133] and recently clarified the consequences attached to State liability in case of a violation of an international convention by a national statute in a landmark decision of its highest formation.[135] Until then, the *Conseil d'Etat* would only recognize that the State was liable in case of an illegal administrative act – and not because of an Act adopted by Parliament. The particular nature of the statute at stake in the *Gardedieu* case of 2007[73] might explain the new attitude adopted by the administrative judge. Mr Alain A brought proceedings before a social security court (*Tribunal des affaires de sécurité sociale*) claiming to be discharged of the payment of social contributions to his dental surgeons' pension authority since the decree requesting such payment had been declared illegal by the *Conseil d'Etat*. However, the levy of the contributions was later 'validated' by a domestic statute (*loi de validation*), which legality could not then be challenged before the administrative court which is not the judge of the *loi*. Yet, the *Conseil d'Etat* is the natural court when it comes to decide on the liability of the State and the claimant rightfully turned to the supreme administrative court claiming compensation for the damage caused by the effects of this later statute which had him pay the social contributions contrary to Article 6 (1) of the ECHR on the right to a fair trial. The supreme administrative court ruled that the validating statute was not based on any general imperative interest and was therefore contrary to Article 6 (1) of the ECHR.

On a practical level, Mr. A received reparation amounting to the reimbursement of the contributions he had to pay under the *loi de validation*, even though the claimant was claiming for a more substantial amount corresponding to full compensation of the damage suffered. In relation to the legal principle developed in the case, it is the first time that the *Conseil d'Etat* recognized the liability of the State for damages caused *directly* by the adoption of a statute contrary to international agreements entered into

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127 Cass 1ère Civ 10 January 1984 (*Renneman*: express reference to Article 6 (1) ECHR as interpreted in *Le Compte and others v Belgium* (Plenary) 23 June 1981 Series A-43). Cf Cass Ass Plen 11 December 1992 (*Marc Y*) on transsexualism which operates a change in the case law but does not make anywhere reference to the adverse ruling against France in the area.

128 See CE 28 July 1995 (*Association Alexandre*: publications for children) Application No 159172 and CE 9 July 1997 (*Association EKIN*: publications from abroad) Application No 151064.

130 See CE Ass 19 April 1991 (*Belgacem*: deportation of foreigners) Applications No 107470 and No 117680; CE 3 July 1998 (*Bitouzet*: property rights) Application No 158592.

132 See, for example, CE Ass 17 February 1995 (*Marie et Hardouin*: reference to *Engel v Netherlands* (Plenary) 18 June 1976 Series A 22, and *Campbell and Fell* v *UK* 28 June *1984* Series A 80 by *Commissaire du gouvernement* Frydman) Recueil Lebon 1995 82–85.

133 CE Ass 21 December 1990 (*Confédération nationale des associations familiales catholiques*: commercialisation of the abortive pill) Application No 105743.

135 CE Ass 8 February 2007 (*Gardedieu*) Application No 279522. Another landmark decision was rendered on the same day in the *Arcelor* case in relation to EC law (discussed below).

by France. This position goes a step further than holding the State liable for damages caused by administrative acts, whether general[136] or particular,[138] implementing national statutes. It now seems that the 'mediation' of an administrative act is no longer necessary to invoke State liability before the administrative judge. The *Conseil d'Etat* had recognized its competence to set aside a statute contrary to an international treaty[139] but would have not, until then, regarded the State as having committed any wrong. This has now changed and the administrative judge can challenge not only the executive function in case of illegal administrative acts but also the legislator on the basis of State liability in case of statutes contrary to international treaties. This case has been analysed as significantly contributing to the reinforcement of the obligation put on all public authorities to abide by the international agreements entered into by France, the ECHR in particular. It certainly makes the protection of ECHR rights more effective in the context of domestic legal proceedings.

Compliance with the ECHR, as interpreted by the ECtHR, has generally enabled the judiciary to increase its power *vis-à-vis* the other authorities, legislative and executive, in that they have been able to protect rights through their review of conventionality (conformity of a statute with the ECHR). In this way, the ECHR has acted as a source of 'legal evasion' towards the domestic courts and their review has arguably been operating as 'a functional substitute for rights protection under the Constitution'.[141]

It is not only the French judiciary which has come to embrace the consequences attached to European law, but also the French legislator who has, on some occasions, referred to the ECHR when drafting new pieces of legislation. The best example is the elaboration of the 'new' criminal code (*Nouveau code pénal*) which entered into force in 1994.[143] Its *travaux préparatoires* contains direct references to the interpretative authority of the ECtHR's case law, with express mentions of the *Dudgeon v United Kingdom*[144] and *Moustaquim v Belgium* cases[145] concerning respectively the definition of sexual offences and the prohibition to re-enter the national territory in case of a deportation order. However, it has been observed that references to the ECHR and interpretative authority of the ECtHR's rulings are neither systematic nor deliberate in Parliamentary oral and written reports.[147]

(ii) Specific Response to ECtHR's Rulings against France

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136 CE Ass 28 February 1992 (*Société Arizona Tobacco Products*) Application No 87753.

138 CE Ass 30 October 1996 (*Société Jacques Dangeville*) Application No 141043.

139 CE Ass 20 October 1989 (*Nicolo*) [1990] 1 CMLR 173.

141 E Lambert Abdelgawad and A Weber, 'The Reception Process in France and Germany' in A Stone Sweet and H Keller (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford, Oxford University Press, 2008) 107–64, at 116–17, 129.

143 Different statutes in 1992 (*Lois n°92-683, 92-684, 92-685, 92-685*) and 1993 (*Loi n°93-913*) were enacted before the Code entered into force on 1 March 1994.

144 ECtHR *Dudgeon v United Kingdom* (Plenary) 22 October 1981 Series A 45 (violation of Article 8 of the ECHR for unjustified interference with the applicant's right to respect for his private life due to the existence of criminal legislation prohibiting homosexual acts between consenting adults).

145 ECtHR *Moustaquim v Belgium* 18 February 1991 Series A 193 (violation of the right to respect family life under Article 8 in case of a deportation order).

147 J-P Marguénaud, 'La Convention européenne des droits de l'homme et le droit français: approche par le droit privé' in J Andriantsimbazovina et al (eds), *Etudes en l'honneur de J-C Gautron – Les dynamiques du droit européen en début de siècle* (Paris, Pédone, 2004) 155, at 168.

If adverse rulings against another State have rarely prompted legislative reforms,[149] the French authorities, whether legislative, executive or judicial, have overall taken into account decisions against France. Several areas of French law have been modified by the legislator as a direct result of this, with, most of the time, a change in the attitude of the courts anticipating the legislative reform or accompanying it.[151] The best instance is probably the exemplary attitude of French authorities (not only the legislator but also the courts) in improving the safeguards concerning regulation on phone-tapping: the modifying legislation (statute No 91-646 of 10 July 1991) was enacted about a year after the ECtHR's rulings of 24 April 1990[152] in *Kruslin* and *Huvig* and the explanatory report clearly states that its origin lies in the European case law.[154] Another example deals with the sensitive issue of the deportation of aliens. In view of several ECtHR's cases,[156] French immigration law was modified to prohibit the deportation of a non-French national to a country where he or she would be exposed to treatments contrary to Article 3 of the ECHR.[158] This legislative change was later complemented in relation to Article 8 of the ECHR by the decisions of the administrative courts. Within the scope of their judicial review function, they now carry out a complete review of proportionality which can lead to setting aside deportation orders if the measure is regarded as disproportionate from the point of view of the private or family life of the alien residents.[160]

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149 See, however, one exception following the ECtHR's case in *Burghartz v Switzerland* 22 February 1994 Series A 280-B, after which statute No 2002-304 of 4 March 2002 established equalitarian rules regarding the attribution of the family name.

151 The scope of the ECtHR's rulings is limited to declaratory effect and does not entail the power to strike down national conflicting legislation or judicial decisions (see Article 46 of the ECHR).

152 ECtHR *Krüslin v France* 24 April 1990 Series A 176-A; and *Huvig v France* 24 April 1990 Series A 176-B. In its *Lambert* case of 24 August 1998, the ECtHR stated that the 1991 French legislation (*Loi n°91-646 du 10 juillet 1991 relative au secret des correspondances émises par la voie des télécommunications*) was in conformity with the European requirements (see ECtHR *Lambert v France* 24 August 1998 ECHR 1998-V).

154 R Errera, 'Les origines de la loi française du 10 juillet 1991 sur les écoutes téléphoniques' (2003) 55 *Revue trimestielle des droits de l'homme* 851.

156 For example, ECtHR *Soering v United Kingdom* (Plenary) Series A 161; *Chahal v United Kingdom* (Grand Chamber) ECHR 1996-V.

158 *Loi n°93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*.

160 See, in particular, ECtHR *Beldjoudi v France* 26 March 1992 Series A 234-A, at pt 55. More recently and on a procedural point, immigration legislation was rapidly amended in November 2007 (*Loi n°2007-1631 du 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile*) to introduce a suspensive remedy in case of rejection of an asylum claim following the *Gebremedhin* case (ECtHR *Gebremedhin v France* 26 July 2007, Application No 25389/05, on a violation of Article 13 of the ECHR on the right to an effective remedy for absence of suspensory effect of the remedy in French asylum proceedings).

In another area, the *Mazurek* case brought about the long-anticipated change to the law of successions with the suppression of discrimination towards children born of adultery.[162] In question was a provision of the French Civil Code which provided that children born out of wedlock and whose father or mother, at the time of their conception, was bound by a marriage of which legitimate children were born, should receive only half of the share to which they would have been entitled if they had been legitimate children of the deceased parent. The ECtHR decided that the national provision was in breach of Article 1 of Protocol No 1 on property rights, taken in conjunction with Article 14 of the ECHR on prohibition of discrimination. The formal abrogation of the provision of the Civil Code was preceded by several domestic rulings which put the domestic provision aside in favour of the ECHR provisions as interpreted in the *Mazurek* case.[164] A last example concerns a change in the area of criminal law when the French legislator introduced in 2000 a mechanism allowing for the revision of a criminal judicial decision after an adverse ruling of the ECtHR.[166]

The French courts have also taken into account adverse rulings and their implications for the French legal system, with sometimes a surprising enthusiasm – for example, anticipating the ECtHR's case law in the case of the *Conseil d'Etat*,[168] or going further than what was required by the European court, in the case of the *Cour de Cassation*.[170] One example of an area which has been particularly affected by the rulings of the ECtHR is the area of administrative law and organization. The supreme administrative judge has progressively integrated the requirements of Article 6 of the ECHR on the right to a fair trial as interpreted by the ECtHR to include the determination of an applicant's civil rights and obligations, or of a criminal charge against him or her. Concerning the scope of the provision, accepting the extensive interpretation of 'civil rights and obligations' and 'criminal charge' given by the ECtHR, the *Conseil d'Etat* extended its control to professional bodies and disciplinary proceedings.[172] More generally, 'public law' disputes (with a few exceptions, such as individuals' obligations vis-à-vis

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162 ECtHR *Mazurek v France* 1 February 2000 ECHR 2000-II; and statute No. 2001-1135 of 3 December 2001 (*Loi n°2001-1135 du 3 décembre 2001 relative aux droits du conjoint survivant et des enfants adultérins et modernisant diverses dispositions du droit successoral*).

164 Another affected area was the law of property which was modified in the wake of the ECtHR's ruling in the *Chassagnou* case (ECtHR *Chassagnou v France* (Grand Chamber) 29 April 1999 ECHR 1999-III).

166 Articles 626-1 – 626-7 of the Procedural Criminal Code (*Code de procédure pénale*).

168 CE Ass 19 April 1991 (*Belgacem*) Applications No 107470 and No 117680;and CE 26 July 1991 (*Hadad*) Applications No 123690, No 123507and No 123905 anticipating on the *Beldjoudi* case (see above) and accepting to review the legality of the deportation order of an alien under Article 8 of the ECHR.

170 Cass Ass Plen 11 December 1992 (*Marc X*). The French judge accepts a much more flexible approach than the European judge (ECtHR *B v France* (Plenary) 25 March 1992 Series A 232-C) concerning the modification of his or her civil status (*état civil*) by a transsexual.

172 See CE Ass 14 February 1996 (*Maubleu*: disciplinary proceedings before the Bar Council) Application No 132369 and CE Ass 3 December 1999 (*Didier*: disciplinary proceedings before the Financial Markets Council) Application No 207434. See also ECtHR *Diennet v France* 26 September 1995 Series A 325-A (violation of Article 6 (1) in proceedings dealing with the professional misconduct of a doctor for absence of public hearing before the local council and the disciplinary section of the national medical association).

the State or procedures for the expulsion of aliens) are now considered by the ECtHR to fall within the ambit of Article 6 (1) of the ECHR and the French case law has taken this into account.[174]

In relation to the content of Article 6 of the ECHR, the most controversial area has been the calling into question of the *Commissaire du gouvernement*'s function within the judicial section of the *Conseil d'Etat* in the *Kress* case.[176] The *Commissaire du gouvernement* is a *sui generis* institution peculiar to the organization of administrative court proceedings in France.[178] He or she is a fully independent member of the *Conseil d'Etat*,[180] who neither represents the court nor the parties to the proceedings, but acts as a 'legal adviser' to the court. His or her task is threefold: first, he or she will attend – without voting and, generally, without speaking – the sitting at which the case is prepared for trial and will receive a copy of the draft judgment adopted by the section of the jurisdiction; secondly, he or she will present his or her submissions at the hearing which represent his or her own impartial assessment of the facts of the case and the applicable rules of law, together with his or her opinion as to whether the manner in which the case submitted ought to be decided; thirdly, it is customary for him or her to attend the deliberations after the public hearing, although he or she has no vote and, as a general rule, only intervenes orally to answer specific questions that are put to him or her.[182] The ECtHR did not call into question the existence and institutional status of the *Commissaire* nor his or her general independence and impartiality. However, it took the view that some aspects of his or her intervention during the trial of a case and especially his or her participation in the private deliberations of the court when he or she had already given submissions in open court, constituted a violation of Article 6 (1) of the ECHR. More specifically, the ECtHR, weighting the presence of the *Commissaire du gouvernement* at the deliberations against the higher interest of the litigant, who must have a guarantee that the *Commissaire* will not be able to influence the outcome of the deliberations, decided that such guarantee was not afforded under the current French system.[184]

The ECtHR's case law was confirmed in the later case of *Martinie v France* of 2006.[186] After the enactment of several Decrees attempting to satisfy the European requirements (one of them on a

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174 For further examples, see J-P Costa, 'The Influence of the European Convention on Human Rights on Domestic Legal Systems: The French Experience' (2004) 11(2) *Irish Journal of European Law* 350–61, at 355–6.

176 ECtHR *Kress v France* (Grand Chamber) 7 June 2001 ECHR 2001-VI.

178 *Kress*, at pt 69.

180 There are also *Commissaires du gouvernement* in the other administrative courts, of first instance and appeal, and at the Jurisdiction Disputes Court (*Kress*, at pt 52).

182 See *Kress*, at pts 43–52. Two further points are worth of note: first, the *Commissaire du gouvernement* plays a traditionally very important role in the creation of administrative case law and most of the major judicial innovations have come about as a result of celebrated submissions by the *Commissaire* (*Kress*, at pt 41); second, the function of Advocate General at the ECJ was closely modelled on the institution of the *Commissaire du gouvernement*, with the difference that only the judges who sat at the hearing may take part in the deliberations – to the exclusion therefore of the Advocate General (*Kress*, at pt 52).

184 *Kress*, at pt 85.

186 ECtHR *Martinie v France* (Grand Chamber) 12 April 2006 ECHR 2006-VI. In fact, the compliance process had been a little more complex. After the *Kress* case, a first Decree was enacted in 2005 incorporating a new procedure within French administrative courts according to which the *Commissaire* could 'be present at deliberations . . . but not participate in them'. However, the dissociation made by the French government between 'presence' and 'participation' did not convince the ECtHR, especially with regard to its case law on the 'doctrine of appearances' referring to the concerns a litigant might have as to the impartiality of a court. In short, it specified that the terms used in the *Kress* case ('presence', 'assistance', 'assists', 'attends') were synonyms and decided that the mere presence of the *Commissaire* at the deliberations of the *Conseil d'Etat*, was a violation of Article 6 (1) of the ECHR (*Martinie*, at pt 53-55).

proposal of the *Conseil d'Etat* itself), the influence came to full circle when the *Commissaire du gouvernement* was replaced by the establishment of the *Rapporteur public* by a Decree entered into force in February 2009.[188] The symbolically significant change of name aims at making the institution less ambiguous for potential litigants. Significantly, participation of the parties in the proceedings is increased by allowing them to be communicated, at their request, the conclusions of the public *Rapporteur* before the hearing, and submitting oral observations after his or her oral report. This particular example of the transformation of one of the main institutional features of French administrative courts is to be placed in the context of a more general trend about the growing influence of the ECtHR's case law on procedural law which has affected the organization of other European supreme courts.[190]

Of course, there has been some hesitation and resistance on the part of the supreme courts. Both have at times tried to strictly limit the authority of the ECtHR's rulings to the case and parties before them and declared that an adverse European ruling had no direct impact on the decisions of domestic courts.[192] They also refused to be bound by the interpretation given by the ECtHR on some occasions.[194] However, the attitude of France has been positive overall and, more often than not, public authorities and courts do abide by the ECtHR's judgments under the watchful supervision of the Committee of Ministers of the Council of Europe.

III. Constitutionalization of French Law

The process of constitutionalization of national law (as opposed to constitutionalization processes at play at European level) refers to a complex legal phenomenon which affects the whole normative order. It consists of the interaction between constitutional norms and infra-constitutional norms and has the effect of broadening and enriching the former.[196] The necessary premises for the process to take place are the existence of a fundamental law, which structures the legal order and is supreme over other domestic norms, and of a constitutional court which ensures its primacy.[198] Although constitutional law was regarded as an area of minor importance and its status as a law discipline was

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188 Decree 2009-14 of 7 January 2009 on the public *rapporteur* and hearings proceedings before the administrative courts, JORF 8 January 2009, p 479.

190 J-M Sauvé, 'L'influence de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales sur l'organisation et le fonctionnement des cours suprêmes' (*exposé introductif*), *Colloque organisé par la Société de législation comparée*, 7 March 2008, Conseil d'Etat.

192 Cass Crim 4 May 1994 (*Saïdi*) and CE 24 November 1997 (*Ministre de l'Economie et des Finances c/Société Amibu*) Application No 171929.

194 Compare *Cour de Cassation*'s decision (Cass Crim 19 January 1994 *Guérin*) with the *Poitrimol* case (ECtHR *Poitrimol v France* 23 November 1993 Series A 277-A) on procedural law.

196 E Simina Tanasescu, 'Constitutionalisation ou codification du droit européen?' in P Bon et al (eds), *Renouveau du droit constitutionnel – Mélanges en l'honneur de Louis Favoreu* (Paris, Dalloz, 2007) 1411–20, at 1412.

198 Ibid, at 1413.

even doubtful some thirty years ago,[200] the constitutionalization of French law is now widely acknowledged. It first started with the introduction of constitutional review of statutes and the development of 'constitutional justice' by the *Conseil Constitutionnel*. The features of constitutional review under French law will be considered before turning to the various aspects explaining the constitutionalization process.

A. Constitutional Review the French Way

France was reluctant to introduce a judicial review mechanism for various reasons relating to the doctrine of separation of powers, the notion that parliamentary legislation constitutes the authentic expression of the general will and, generally, an aversion to 'government by judges' which dates back to the *Ancien Régime*.[202]

The 1958 Constitution did provide for a non-judicial *Conseil Constitutionnel* whose constitutional review has been tightly restricted to the review of statutes,[204] after their adoption, but before promulgation, upon referral by politicians.[206] A statute, once it has entered into force, is immune to review by any court under French law. However, to counter the promulgation and application of an unconstitutional provision in a statute which would not have been referred to it, the *Conseil Constitutionnel* has decided that the constitutionality of such a statute could be reviewed when a later

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200 D Rousseau, 'Le nouvel horizon du droit constitutionnel' in P Bon et al (eds), *Renouveau du droit constitutionnel – Mélanges en l'honneur de Louis Favoreu* (Paris, Dalloz, 2007) at 887–93.

202 The *Ancien Régime* refers to the political and social system in force in France before being swept away by the 1789 Revolution.

Conseil Constitutionnel Conseil Constitutionnel[204] In addition to review of ordinary statutes, the *Conseil Constitutionnel* also reviews, under Article 61 (1) of the 1958 Constitution, institutional statutes (*lois organiques*) before promulgation, legislative proposals made under Article 11 before their submission to referendum and parliamentary assemblies rules of procedures before their entry into force.

Conseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil Constitutionnel[206] Article 61 (2) of the 1958 Constitution reads: 'To the same end [that is, to allow the Constitutional Council to rule on their conformity with the Constitution], Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.' This is not the only judicial role of the *Conseil Constitutionnel* which can also control the constitutionality of international agreements (Article 54), the respect of the division of competences between the legislative and executive powers (Articles 37 (2) and 41 of the 1958 Constitution) and, since the 2008 constitutional revision, the respect of Article 39 on the right of the government to make legislative proposals. It has also competence as an electoral court regarding parliamentary and presidential elections, as well as referendum proceedings. Apart from its judicial role, it acts as a formal constitutional authority and gives opinions (for example, on the fulfilment of the Article 16 conditions on emergency powers) and decisions (for example, on the incapacity of the President under Article 7) accordingly.

statute amending, complementing or dealing with the same area of law as the first statute was itself referred to and reviewed by the *Conseil*.[208] In other words, the preventive nature of constitutional review is no longer absolute and the implementation of an unconstitutional provision not referred for a priori constitutionality review cannot be necessarily regarded as definitive anymore.[210]

Yet, the French arrangement is exceptional in Europe. The *Conseil Constitutionnel* is the only European constitutional court[211] whose jurisdiction has been limited to abstract review in that it does not receive referrals of constitutional questions from other courts (concrete review), and individuals may not appeal to it directly via constitutional complaints.[213] The *Conseil Constitutionnel*'s powers of constitutional review have been envisaged as a device for the maintenance of the limits imposed on Parliament's legislative competence and *not as a mechanism for the protection of the liberties of the citizen, against legislative limitation*.[215] This form of constitutional review has often been criticized precisely for its main features – the political character of its referral mechanism, as well as the preventive and abstract nature of the review operated by the *Conseil Constitutionnel*. In the meantime, however, constitutional review under French law has proved to be much more effective than the bare mechanism looks at first sight. Far from hampering the development of the *Conseil Constitutionnel*'s case law, the influence of constitutional law over other areas of law and on the protection of fundamental rights and freedoms in particular has been significant.

B. The Process of Constitutionalization

Constitutionalization of domestic law presupposes the existence of a Constitution and a constitutional court entrusted with the task of ensuring the primacy of the '*Grundnorm*'. Although the first condition raises no question, the second was less obvious under French law. The *Conseil Constitutionnel* appeared as a relatively inconspicuous institution reflecting the very special arrangement of constitutional review put in place in the late 1950s. However, it has managed not only to transform itself into a body that, at least in some respects, resembles a constitutional court, but also to transform the Constitution itself from an instrument primarily concerned with the institutional structure of

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Conseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil Constitutionnel[208] CC Decision 85-187 DC of 25 January 1985 (*Loi relative à l'état d'urgence en Nouvelle Calédonie et dépendances*). See also CC Decision 99-410 DC of 15 March 1999 (*Loi organique relative à la Nouvelle-Calédonie*). Decisions of the *Conseil Constitutionnel* (CC Decisions) are available at <http://www.conseil-constitutionnel.fr>. Some are translated into English. For a list, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/case-law.25743.html#institutions>.

210 See J-P Camby, 'Une loi promulguée frappée d'inconstitutionnalité?' (1999) *Revue du droit public* 653–60.

211 The denomination of the *Conseil Constitutionnel* as a constitutional court can be contested as it is not strictly speaking a court, neither by its composition of *members*, and not judges, nor by several procedural features such as its non-contradictory procedure. However, the *Conseil Constitutionnel* has come to resemble a constitutional court largely because of the development of its role (see below).

213 See A Stone Sweet, 'The Politics of Constitutional Review in France and Europe' (2007) I•CON 69–92. According to the author, the '*Conseil* is the most politically exposed, and the least juridically rooted, of Kelsenian courts'. But see the new a posteriori constitutional review originating from the last constitutional revision of 23 July 2008 discussed below.

215 J E Beardsley, 'The Constitutional Council and Constitutional Liberties in France' (1972) 20 *Am J Comp Law* 431–52, at 431 (emphasis added).

government to one that also provides substantial protection of fundamental rights.[217] Some very specific developments have triggered these transformations: first, the case law of the *Conseil Constitutionnel*, which has boldly interpreted constitutional norms, most remarkably in the seminal Decision of 1971 on freedom of association; secondly, a technical reform which took place in 1974 and allowed for a wider range of persons to refer to the *Conseil Constitutionnel*; thirdly, the influence of scholarship, most notably by Louis Favoreu, which has contributed to giving constitutionalization its doctrinal framework.

(i) The 1971 Decision of the *Conseil Constitutionnel*

The constitutionalization process was triggered by the landmark decision of the *Conseil Constitutionnel* of 16 July 1971 in which it declared the challenged statute to be incompatible with the Constitution and 'notably . . . its preamble'. It identified freedom of association as one of the 'fundamental principles recognized by the laws of the Republic'.[219] As the first decision of the *Conseil* that struck down[220] a provision of a statute for breach of fundamental rights, it had important repercussions for the protection of rights and freedoms in France. It gave domestic law its constitutional framework and put the literature on human rights, which previously had no legal standing, in the legally binding sphere and discourse. In other words, the Decision had the effect of 'incorporating a charter of human rights into the French Constitution'[221] making it one of the most legally and politically significant decisions of the *Conseil Constitutionnel*.

Technically, it widened the body of constitutional norms of reference, or *bloc de constitutionnalité* (according to Favoreu's expression). From then on, it was not just against the Constitution[222] that the *Conseil Constitutionnel* could test the constitutionality of a statute, but also against a whole range of interconnected texts and principles comprising: the Preamble to the 1958 Constitution, which constitutional value was recognized by the *Conseil* in 1970;[224] the 1789 Declaration of the Rights of Man and of the Citizen referred to in the Preamble of the 1958 Constitution, as confirmed and completed by the Preamble to the 1946 Constitution, also referred to in the Preamble to the 1958 Constitution; the fundamental principles of laws recognized by the laws of the Republic (*principes fondamentaux reconnus par les lois de la République*) referred to, but not enumerated, in the

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217 C Saunders, 'The interesting times of Louis Favoreu' (2007) *I•CON* 1–16.

Conseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil Constitutionnel[219] CC Decision 71-44 DC of 16 July 1971 (*Liberté d'association*). For comments on the case, see L Favoreu and L Philip, *Les Grandes décisions du Conseil constitutionnel* (Paris, Dalloz, 1999) at 252–71, and J E Beardsley, 'The Constitutional Council and Constitutional Liberties in France' (1972) 20 *Am J Comp Law* 431–52.

220 Technically, the unconstitutional statute or statutory provisions are not annulled, as they have not come into existence yet, but 'censored'. Note: Decisions of the *Conseil Constitutionnel* on conformity are identifiable by the DC abbreviation (*décision de conformité*) mentioned in the reference of the decision.

221 A Stone Sweet, 'The Politics of Constitutional Review in France and Europe' (2007) I•CON 69–92, at 68. See also the earlier seminal work by the same author, *The Birth of Judicial Politics in France – The Constitutional Council in Comparative Perspective* (Oxford, Oxford University Press, 1992).

222 References have been made, for example, to Article 1 ('France shall be an indivisible, secular, democratic and social Republic'), Article 3 ('Suffrage . . . shall always be universal, equal and secret'), Article 4 ('Political parties and groups . . . shall be formed and carry on their activities freely'), Article 64 on the independence of the Judicial Authority, Article 66 on the prohibition of arbitrary detention and Article 72 on the free exercise of their activities by the Territorial Communities.

Conseil Constitutionnel Conseil Constitutionnel[224] CC Decision 70-39 DC of 19 June 1970 (*Traité de Luxembourg portant modification de certaines dispositions budgétaires des Traités instituant les Communautés européennes*).

Preamble to the 1946 Constitution;[226] and the principles of law particularly necessary to our times (*principes particulièrement nécessaires à notre temps*), which refer to a certain number of political, economic and social principles generally formulated in the Preamble to the 1946 Constitution.[228] This set was further broadened to encompass non-textually based general principles of law (*principes généraux du droit*),[230] as well as objectives of constitutional value which, unlike principles, allow the legislator some leeway to limit fundamental rights and reconcile them with one another. General principles of international law[231] and the 2004 Charter on the Environment referred to in the Preamble to the 1958 Constitution[232] are the most recent norms and texts to have been integrated in the *bloc de constitutionnalité*.

A corollary of the 'judicial' constitutionalization of fundamental rights, as diverse as due process of law, the principle of individual liability for damage caused, individual freedom, respect for private life, freedom of opinion and religion, is the repercussions it has had on the way judicial and administrative courts decide on issues dealing with such rights. Thus, despite the abstract character of French constitutional review, the decisions of the *Conseil Constitutionnel* have had a wider resonance in other fields of national law.[234] On a more technical level, this is also due to the techniques of review used by the *Conseil Constitutionnel* and most notably the use of '*réserve d'interprétation*'. In theory, the *Conseil* is bound by a binary choice – to declare the statute in conformity with constitutional norms of reference or not.[236] In practice, and like its counterparts in other European juridictions, the *Conseil Constitutionnel* can uphold the constitutionality of a statute while accompanying its decision with interpretative reservations.[238] The referred provision will be regarded as constitutional if it is interpreted in the way expressly indicated in the decision, or if it is implemented, generally through the enactment of secondary legislation, as indicated by the *Conseil*. These reserves have judicial authority and bind

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Conseil Constitutionnel Conseil Constitutionnel[226] These principles are the result of a jurisprudential construction by the *Conseil Constitutionnel* drawing on principles developed by the *Conseil d'Etat*. Examples include freedom of association, right to education, academic freedom etc.

228 Examples of such principles include the right to strike, trade-union rights, right to health, right to claim asylum and the protection of human dignity.

Conseil Constitutionnel Conseil Constitutionnel[230] See, for example, CC Decision 79-105 DC of 25 July 1979 on the conciliation of the right to industrial action with the principle of continuity of the public service (*Continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*).

231 See CC Decision 98-408 DC of 22 January 1999 on the status of the International Criminal Court (*Traité portant statut de la Cour pénale internationale*).

232 *Loi constitutionnelle n°2005-205 du 1er mars 2005 relative à la Charte de l'environnement*.

234 See examples in the case law of the *Cour de Cassation* and *Conseil d'Etat* in N Molfessis, 'L'irrigation du droit par les décisions du Conseil constitutionnel' (2003) 105 *Pouvoirs* 89–101, at 93–4.

236 It is in fact more complex than that depending on whether the whole statute is declared unconstitutional (*inconstitutionnalité totale*) or only certain provisions of the statute (*inconstitutionnalité partielle*).

238 The technique first appeared in CC Decision 80-127 DC of 20 January 1981 (*Sécurité et liberté*) and was later confirmed on several occasions, recently in CC Decision 99-419 DC of 9 November 1999 (*Loi relative au Pacte civil de solidarité*) and Decision 2001-454 DC of 17 January 2002 (*Loi relative à la Corse).*

the supreme courts (*Cour de Cassation* and *Conseil d'Etat*) when applying the concerned statute to the case before them.[240]

(ii) The 1974 Constitutional Revision

The development of constitutionalization of domestic law owes also much to the constitutional revision of 29 October 1974 which allowed for 60 Deputies or 60 Senators to refer a statute to the *Conseil Constitutionnel*.[242] This proved to be a critical change as national representatives in Parliament, and members of the opposition in particular, have had the opportunity to refer the most important statutes to the *Conseil Constitutionnel*. The decisions which followed have affected many areas of law,[244] some of which have been more prone to constitutional challenge than others, such as criminal law and social law, forming the main bulk of the recent constitutional case law.[246] When called upon to decide on the constitutionality of statutes in these different areas of law, the *Conseil Constitutionnel* necessarily ends up defining, clarifying and interpreting constitutional principles founding these different disciplines and rendering decisions which, as having *autorité de la chose jugée*, bind all public authorities, including courts, under Article 62 of the Constitution.[248] This has had the effect of ensuring consistency of the case law in the different internal legal orders; judicial courts as well as

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240 For an example, see CE Ass 11 March 1994 (*SA La Cinq*). Application No 115052.

242 *Loi constitutionnelle n°74-904 du 29 octobre 1974 portant révision de l'article 61 de la Constitution*. The same reform was put in place concerning referral of international agreements (see below *Loi constitutionnelle n°92-554 du 25 juin 1992 ajoutant à la Constitution un titre: 'Des Communautés européennes et de l'Union européenne'*).

Conseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil Constitutionnel[244] In quantitative terms, the number of challenges dramatically increased, from 9 in the 15 years of existence of the *Conseil Constitutionnel* before access was widened, to 328 between 1974 and 1998. Today, and international agreements excluded, 24 Acts of Parliament (*lois ordinaires*) and Institutional Acts (*lois organiques*) were referred to the *Conseil Constitutionnel* in 2003, 17 in 2004 and 18 in 2005. Almost 50% of statutes are now being referred to the *Conseil Constitutionnel*.

246 For example, statute of 13 June 1998 on the 35 hours (*Loi n°98-461 d'orientation et d'incitation relative à la réduction du temps de travail),* statute of 17 January 2002 on social modernization (*Loi n°2002-73 de modernisation sociale*), statute of 17 January 2003 on wages, working hours and employment (*Loi n°2003-47 relative aux salaires, au temps de travail et au développement de l'emploi*).

248 Article 62 of the 1958 Constitution reads: 'A provision declared unconstitutional on the basis of Article 61 shall be neither promulgated nor implemented. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.' Nota: this provision was amended to take into account the effects of a review pursuant to new Article 61-1 on the a posteriori constitutional review (see below).

administrative courts refer to, and take into account, the case law of the *Conseil Constitutionnel*.[250] Also significant of the influence of the *Conseil* on the overall political process is the fact that Parliament has come to internalize issues of constitutionality in the course of the legislative decision-making process. It is now indeed quite common for bills to be amended during parliamentary debates to take into account their constitutional dimension and avoid the risk of sanction by the *Conseil Constitutionnel*. Traditionally associated with the quality of legal texts, it is the Senate which tends to specialize in detecting and dealing with issues of constitutionality of bills submitted to it.[252]

(iii) Scholarship and Constitutionalization

Although the process of constitutionalization is now well established, it was clearly encouraged in the early days of the *Conseil Constitutionnel* by the work of constitutionalists, most prominently by Louis Favoreu's scholarship.[254] He was the first to describe – and justify – 'a gradual constitutionalization of the legal disciplines and a growing relativization of the distinction between public and private law'.[256] It was his very prescriptive conception of the *Conseil Constitutionnel* which enabled him to build and refine his argument. He was instrumental in securing the legitimacy of the *Conseil* within the French tradition as well as with reference to the emergent European tradition of judicial review. For Favoreu, the *Conseil Constitutionnel* is not a political institution, nor a third branch of government. It is in effect a 'judicialized' decision-making body independent of the political process, in other words, a court applying constitutional norms that are legal in nature and generate a coherent jurisprudence.[258] Accordingly, the different areas of law not only have constitutional bases but also tend to transform

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Conseil Constitutionnel Conseil Constitutionnel[250] For the *Cour de Cassation*, see, for example, decisions Cass Soc 9 November 1982 and Cass Crim 25 April 1985; for the *Conseil d'Etat*, see, for example, decisions CE 1 July 1983 (*Syndicat unifié de la radio et de la télévision*) Applications Nos 20838, 21663, 21890 and CE 20 December 1985 (*SA des Etablissements Outters*) Application No 31927. However, the authority of the decisions of the *Conseil Constitutionnel* is limited in that they do not represent a formal source of law.

Conseil Constitutionnel Conseil Constitutionnel[252] For example, see CC Decision 2006-535 DC of 30 March 2006 (*Loi pour l'égalité des chances*).

Conseil Constitutionnel Conseil Constitutionnel[254] Louis Favoreu (1936–2004). Some achievements that contributed to spread his work include the publication of *Les Grandes décisions du Conseil constitutionnel* in 1975, the creation of the French Association of Constitutionalists (*Association française des constitutionnalistes*) in 1980, the creation of the International Directory of Constitutional Justice in 1985, the creation of the French Review of Constitutional Law (*Revue française de droit constitutionnel*) in 1990 and the publication of a textbook on constitutional law in 1998 (*Droit constitutionnel*, in its twelve edition in 2009) which redefined the curriculum of law students.

256 L Favoreu, *La Politique saisie par le Droit* (Paris, Economica, 1988).

258 C Saunders, 'The interesting times of Louis Favoreu' (2007) I•CON 1–16, at 9 (the 2007 issue of the *International Journal of Constitutional Law* is dedicated to Professor Favoreu and is entitled 'In Honor of the Late Louis Favoreu: France's Exceptionalism in Constitutional Review').

themselves under the influence of constitutional norms with the Constitution becoming the common matrix to the disciplines of private, public, criminal, international and European law.[260]

Even though Favoreu's views have represented a welcome orthodoxy of contemporary French legal and political thought on constitutional law, their influence should not be overestimated as they have been quite controversial, especially regarding the nature and role of the *Conseil Constitutionnel*. Other scholars have not necessarily agreed with the idea of 'the changing nature of constitutional law' and have considered it as one scholarly interpretation among others.[262] These criticisms have not necessarily challenged the process of constitutionalization itself, but rather tended to underline the necessary conditions for the *Conseil Constitutionnel* to become a fully fledged court of law.[264] However, other analyses appear more critical and, despite the large consensus acknowledging constitutionalization, it is has been argued that the French legal order is not adapted to nor prepared for it and that it is developing without coherence and logic. The French legal system is structured in different orders in which different judicial organs are meant to apply norms in a uniform and consistent way. Yet, constitutional, judicial and administrative courts apply constitutional norms differently through their own developed case law. Further evolution of the French legal system is then required in order to allow for its adaptation to this 'new' source of law.[266] This ties in with another paradoxical malfunction of the French legal system which, due to its inability, until recently, to review a posteriori the conformity of statutes with the Constitution, has seen French judicial and administrative courts applying less domestic constitutional norms than principles and rights derived from European sources of law – as contained in the ECHR or derived by the ECJ (given the fact that almost every substantive constitutional norm has roughly an equivalent at European level). In other words, one could say that French ordinary courts use their own Constitution *indirectly* through the means of European norms and principles,[267] thus underpinning the centrality of the interaction between the two processes of Europeanization and constitutionalization.

IV. Europeanization and Constitutionalization – Time for Clarification and (Re)conciliation in French Constitutional Law

The 1958 Constitution of the 5th Republic, which was adopted after the 1950 ECHR and the 1957 European Communities Treaties, does not expressly lay down the primacy of the Constitution over international agreements. However, such primacy is implied by the interpretation of its Articles 54 and

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260 L Favoreu, 'Le droit constitutionnel, droit de la Constitution et constitution du droit' (1990) *Revue française de droit constitutionnel* 71–89, at 86.

Conseil Constitutionnel Conseil Constitutionnel[262] See, in particular, D Rousseau, 'The *Conseil Constitutionnel* confronted with comparative law and the theory of constitutional justice (or Louis Favoreu's untenable paradoxes)' (2007) I•CON 28–43.

264 Ibid, at 31.

266 N Molfessis, 'L'irrigation du droit par les décisions du Conseil constitutionnel' (2003) 105 *Pouvoirs* 89–101, at 100–1.

267 N Molfessis and D de Béchillon, 'Propos introductifs' in N Molfessis: 'Sur les rapports entre le Conseil Constitutionnel et les diverses branches du droit' (2003–4) 16 *Cahiers du Conseil Constitutionnel*. The *Cahiers du Conseil Constitutionnel* are accessible at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/documentation-publications/cahiers-du-conseil/les-cahiers-du-conseil-constitutionnel.5069.html>.

55.[269] In terms of hierarchy of norms, the three-tier relationship between international agreements, the Constitution and Acts of Parliament is as follows: international agreements or treaties prevail over Acts of Parliament under certain conditions, namely ratification, publication and reciprocity (Article 55); they can only be ratified or approved, and hence implemented in the domestic legal order, if they are not contrary to the Constitution or, if contrary, after an amendment to the Constitution (Article 54).[271]

The *Conseil Constitutionnel* has had a central role in interpreting and applying the provisions of the Constitution concerning international law, which have often included EC law and ECHR law. It primarily intervenes when international norms enter the domestic legal order by reviewing the conformity of these norms to the Constitution as well as ensuring that correct procedures on adoption of international conventions were followed. Since the constitutional revision of 25 June 1992, 60 Members of the National Assembly or 60 Senators can also refer to the *Conseil Constitutionnel* the text of an international agreement.[273] This revision has made constitutional review of international agreements more rigorous. The *Conseil Constitutionnel* has also a role in the application of international law in domestic law. While it ensures primacy of the Constitution over international law as a preventive measure, judicial and administrative courts ensure primacy of international law over national statutes. There is therefore a real complementarity between the *Conseil Constitutionnel* and the national courts in taking into account international law.[275]

However, both European sources, namely ECHR law and more particularly EU law, have had a very distinct influence on the *Conseil Constitutionnel*'s case law which has shaped the relationship between French constitutional law and European law.

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269 Article 54 reads: 'If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking may be given only after amending the Constitution.' According to Article 55, '[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. See C Maugüé (*Commissaire du gouvernement*), 'Conclusions sur Conseil d'Etat, Assemblée, 30 octobre 1998 MM. Sarran, Levacher et autres' (1998) *Revue française de droit administratif* 1081.

271 Others argue that Article 54 does not automatically imply the superiority of the Constitution over treaties, as it concerns only the ratification stage of the treaty. There is no reason to believe that once ratified, the treaty remains inferior to the Constitution and, in particular, that the Constitution power can act in breach of a provision of the ratified treaty (commented in C Richards, '*Sarran et Levacher*: Ranking Legal Norms in the French Republic' (2000) *European Law Review* 192–9, at 197).

273 *Loi constitutionnelle n°92-554 du 25 juin 1992 ajoutant à la Constitution un titre: 'Des Communautés européennes et de l'Union européenne'*. Before 1992, the referral by Members of Parliament was limited to the Act of Parliament authorizing the ratification and not to the text of the treaty itself.

Conseil Constitutionnel Conseil Constitutionnel[275] C Maugüé, 'Le Conseil constitutionnel et le droit supranational' (2003) 105 *Pouvoirs* 53–71, at 70.

A. The ECHR and French Constitutional Law

Clarification concerning the relationship between domestic law and the ECHR was given by the *Conseil Constitutionnel* in its Decision of 15 January 1975.[277] By limiting its review to constitutional matters and refusing to review the conformity of statutes with international treaties and agreements, the *Conseil Constitutionnel* left a whole area open to the national courts. They have since engaged in the elaboration of their own form of review in ensuring that legislation in cases pending before them is not contrary to the rights guaranteed by the ECHR. The existence of these two parallel forms of review –review of constitutionality (conformity with the Constitution) by the *Conseil Constitutionnel* and review of 'conventionality' (conformity with the ECHR) by judicial and administrative courts – has questioned the very core of the French legal order and the relationship between the different supreme courts in the context of fundamental rights protection. The IVG Decision, which is discussed below, may thus be regarded as one of the most important – if not the most important – landmark case of the *Conseil Constitutionnel* in terms of the legal consequences attached to constitutional review.[279] The recent reform on the exception of unconstitutionality represents other potential interesting challenges in the area.

(i) The 1975 Decision of the *Conseil Constitutionnel*

Although the ECHR is not specifically mentioned in the operative part of the 1975 Decision – which refers generally to treaties and international agreements (thereby also making the Decision a significant ruling with regards to the relationship between EC Treaties and domestic legislation) – the legal issue raised by the 60 Members of the National Assembly involved the right to life provided under Article 2 of the ECHR. Called upon to decide on the conformity with the Constitution of French abortion legislation, the *Conseil Constitutionnel* ruled that it could not review the compatibility of the statute with the provisions of a treaty, referred to as the *contrôle de conventionnalité* (review of conventionality)in the case of the ECHR. It could only review the conformity of statutes with provisions of the Constitution (*contrôle de constitutionnalité* or review of constitutionality). To come to this conclusion, the *Conseil Constitutionnel* insisted on the different nature of the two types of review: first, constitutional review decisions made under Article 61 of the Constitution are unconditional and final, prohibiting the promulgation or implementation of an unconstitutional statute according to Article 62; and secondly, decisions about the prevalence of treaties over statutes, governed by Article 55, are both relative and contingent, being restricted to the ambit of the treaty and subject to reciprocity. Taking the view that a statute that was inconsistent with a treaty was not necessarily unconstitutional, the *Conseil Constitutionnel* concluded that it was not its task, under Article 61, to uphold the rule of the superiority of treaties contained in Article 55 and to declare incompatible with the Constitution any domestic statute law which would prove to be contrary to international treaty obligations.[281] In addition to legal arguments, the *Conseil Constitutionnel* had also practical reasons to so decide. It would have been very difficult indeed to review, within the tight one month time-limit under Article 61 (3) of the

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Conseil Constitutionnel Conseil Constitutionnel[277] CC Decision 74-54 DC of 15 January 1975 (*Loi relative à l'interruption volontaire de grossesse, or loi IVG*) on the Voluntary Interruption of Pregnancy.

[279] See *Procureur Général* Touffait in Cass Ch Mixte 24 May 1975 (*Société des Cafés Jacques Vabre*) [1975] 2 CMLR 336.

Conseil Constitutionnel Conseil Constitutionnel[281] CC Decision 74-54 DC of 15 January 1975, at pts 2–7. On the substance of the case, the provisions of the Voluntary Interruption of Pregnancy Act were found to be constitutional and not at variance with the texts which the 1958 Constitution referred to in its preamble, nor with any Article of the Constitution. The Act respected the freedom of persons who resort to or take part in a termination of pregnancy, whether for reasons of distress or on therapeutic grounds, as well as the right to life and the protection of the child's health (see pts 8–11).

Constitution[283] the conformity of a statute with the whole body of international law, consisting of some 4,000 treaties binding France at the time.[285]

While the practical argument might still stand, the legal basis of the decision has been increasingly criticized by scholars.[287] First, the difference in nature between the two types of review has been rendered pointless. The 'contingent and relative' character of the review under Article 55 referring mainly to the reciprocity rule was quickly abandoned as not applying to human rights treaties.[289] Secondly, the fact that a statute which is inconsistent with a treaty is not necessarily unconstitutional has been considered objectionable since the supremacy of treaties over national statute laws is itself derived from an express *constitutional* provision (Article 55).

Overall, the 1975 Decision has been called into question because of its implications. The Decision entailed that international agreements and treaties were not part of the norms of reference (*bloc de constitutionnalité*) against which the *Conseil Constitutionnel* could review the conformity of legislation. As indicated in subsequent judgments, it was the task of the various organs of the State to ensure the application of international conventions within the framework of their respective competences.[291] It was therefore up to the domestic courts to ensure that the primacy of treaties was respected. The way judicial and administrative courts took advantage of the area left open by the IVG Decision is well acknowledged. It is acutely illustrated in the context of the implementation of the ECHR whereby both supreme courts, the *Cour de Cassation* for the judicial legal order and the *Conseil d'Etat* for the administrative legal order, have developed a sophisticated review in cases where a claimant claims before them that the application of legislation to his or her case is incompatible with Convention rights and have, on many occasions, set aside national statutes as being incompatible with the ECHR.[293] Contrary to constitutional review – which is a preventive and abstract review – conventionality review is posterior and concrete.

The 1975 IVG Decision is still good law and the *Conseil Constitutionnel* has reaffirmed its position on several occasions until recently.[295] However, the fact that it does not include the ECHR as an

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283 This period is reduced to 8 days in cases of urgency at the request of the government.

285 In the context of EC law, it would also prove impractical to refer a preliminary question to the ECJ in such a short period of time.

287 See *Références doctrinales* under the Decision available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1975/74-54-dc/references-doctrinales.13567.html> and G Carcassonne, 'Faut-il maintenir la jurisprudence issue de la décision n°74-54 DC du 15 janvier 1975?' (1999) 7 *Les Cahiers du Conseil constitutionnel*. Cf. B Genevois (conseiller d'Etat), 'Faut-il maintenir la jurisprudence issue de la décision n°74-54 DC du 15 janvier 1975?', ibid.

Conseil Constitutionnel Conseil Constitutionnel[289] See CC Decision 98-408 DC of 22 January 1999 on the International Criminal Court, and Decisions 92-308 DC of 9 April 1992 and 98-400 of 20 May 1998 on the EC Treaties.

Conseil Constitutionnel Conseil Constitutionnel[291] For example, CC Decision 86-216 DC of 3 September 1986 (*Loi relative aux conditions d'entrée et de séjour des étrangers en France*) pt 6.

293 See above on French Law and the ECHR.

295 See decisions spanning from 1977 (Decision 77-83 DC of 20 July 1977 *Loi modifiant l'article 4 de la loi de finances rectificative pour 1961*, pt 6) to 2006 (Decision 2006-535 DC of 30 March 2006 *Loi pour l'égalité des chances*, pts 27–28). Nota: The *Conseil Constitutionnel* recently reaffirmed its position in a decision after the entry into force of the new exception of unconstitutionality (CC Decision 2010-605 DC of 12 May 2010 (*Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*) pt 16).

operative tool when exercising its constitutional review, does not mean that the *Conseil Constitutionnel* has totally neglected or ignored it. Some decisions have arguably demonstrated its willingness to take into consideration international agreements as *a factor* which may allow the legislator to derogate from a constitutional principle.[297] It has been more inclined over the years to use the ECHR in particular, as interpreted by the ECtHR, as an aid to the interpretation of rights and freedoms protected at domestic level. The process can be described as follows: when called upon to decide on the constitutionality of a statute, the *Conseil Constitutionnel* will strive to find, in the *bloc de constitutionnalité*, a principle or objective of constitutional value which is the closest equivalent of a principle interpreted by the ECtHR, and will then give a European meaning to the domestic principle, as far as possible. For example, in its Decision of 28 July 1989, the *Conseil Constitutionnel* interpreted the principle of due process of law as developed in the ECtHR's case law.[299] In recent years, it has come to refer to the ECHR itself and, recently, to its case law within the legal bases (*visas*) of its decision.[301] This is typical of a growing interaction between constitutional and European norms in the guarantee of fundamental rights, prompted by an indirect dialogue between the *Conseil Constitutionnel* and the ECtHR which arguably represent two complementary, and not rival, systems of rights protection.[303]

Conseil Constitutionnel Conseil Constitutionnel[297] CC Decision 98-399 DC of 5 May 1998 (*Loi relative à l'entrée en vigueur et au séjour des étrangers en France et au droit d'asile*) at pt 20 where the *Conseil* acknowledged the close link and similarity of the judicial protection offered by constitutional principles and an international agreement on the matter of recognizing the refugee status: 'However, there is a close link between applications for refugee status based on Article 1 of the Geneva Convention and those based on the fourth paragraph of the Preamble to the Constitution of 1946; although made on different legal bases, they demand careful scrutiny of the same factual situations and, by virtue of the second paragraph of section 29 of the Act referred, seek the benefit of the same protection; in the interests both of applicants and of the sound administration of justice, it was legitimate for the legislature to unify the procedures in such a way as to introduce a single investigation and rapid decisions subject to review and annulment by the Council of State; section 29 of the Act referred is accordingly contrary to no principle or rules of constitutional status'.

Conseil Constitutionnel Conseil Constitutionnel[299] CC Decision 89-260 DC of 28 July 1989 (*Loi relative à la sécurité et à la transparence du marché financier*) at pt 44: '*Considérant que le principe du respect des droits de la défense constitue un des principes fondamentaux reconnus par les lois de la République . . . qu'il implique, notamment en matière pénale, l'existence d'une procédure juste et équitable garantissant l'équilibre des droits des parties*.'

Conseil Constitutionnel Conseil Constitutionnel[301] For example, CC Decision 2004-505 DC of 19 November 2004 (*Traité établissant une Constitution pour l'Europe*) in which the *Conseil* expressly mentions a decision of the ECtHR in its *visas*: 'Having regard to case No 4774/98 of the European Convention of Human Rights (*Leyla Sahin v Turkey*) dated 29 June 2004' (see also below).

[303] E Saillant, 'Sur la prétendue rivalité de systèmes complémentaires' (2004) *Revue du droit public* 1497–1546.

(ii) The New Exception of Unconstitutionality

Criticisms of the 1975 IVG Decision have come from different angles. First, the Decision has led to the development of different types of control exercised by different courts in different legal orders, thus generating a certain legal 'disorder'. Secondly, each framework of review (compatibility with the Constitution or compatibility with the Convention) has its flaws. In its constitutional review, the *Conseil Constitutionnel* is immune from a potential contradictory interpretation of an international provision by the domestic courts, or even supranational courts. Secondly, the fact that ordinary courts are not entitled to review the conformity of norms with the Constitution deprives citizens of vindicating their constitutional rights in court. Some have argued that the two types of review are in fact similar in their scope and effects, mainly because the rights contained in the ECHR encompass most (social rights excepted maybe) of the constitutional rights contained in the *bloc de constitutionnalité*.[305]

Against this background, it is interesting to observe how the new exception of unconstitutionality, introduced by the constitutional revision of 23 July 2008,[307] fits in the system(s). A new provision of the Constitution provides for the long-awaited[308] remedy of concrete review allowing French courts to refer an issue of constitutionality to the *Conseil Constitutionnel*. According to Article 61-1 (1), '[i]f, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'Etat* or the *Cour de Cassation* to the Constitutional Council, within a determined period'. Legislation found to be unconstitutional after examination by the *Conseil Constitutionnel* will be declared void and without effect for the future – as opposed to, in the current review of conventionality, the incompatibility of a statute with an international convention where the statute is only set aside (see above 1975 Decision).[310]

While the introduction of the a posteriori form of constitutional review has been warmly welcomed by politicians, commentators and citizens alike, the technical aspects of its implementation have caused some concern and were partly dealt with in the Institutional Act referred to Article 61-1 (2)[312] Different

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305 O Dutheillet de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité' in J-C Bonichot et al (eds), *Mélanges en l'honneur de Daniel Labetoulle – Juger l'administration, administrer la justice* (Paris, Dalloz, 2007) at 315–27.

307 *Loi constitutionnelle n°2008-724 du 23 juillet 2008 de modernisation des institutions de la Vème République*.

308 The debate as to whether allow concrete review open to the citizens started in the late 1980s with a proposal by Robert Badinter, President of the *Conseil Constitutionnel* at the time. It was adopted as a constitutional amendment by the National Assembly on 26 April 1990 but eventually opposed by the Senate. Another proposal was made by the Vedel Commission on Constitutional Revision in 1993 to no avail.

310 The French exception of unconstitutionality creates an hybrid system of concrete constitutional review which does not resemble the US model (also in force in Greece, Japan and Norway, for example) where an ordinary judge can deal with the issue of constitutionality and declare an unconstitutional statutory provision inapplicable, nor the European model (in force in Austria, Germany, Italy and Spain, for example) where the issue is referred to the constitutional court which will strike down the unconstitutional provision.

312 Article 61-1 (2) reads: 'An Institutional Act shall determine the conditions for the application of the present article'. The Institutional Act was enacted on 10 December 2009 (*Loi organique No. 2009-1523 du 10 décembre 2009, relative à l'application de l'article 61-1 de la Constitution*). The new procedure entered into force on 1 March 2010.

issues have been raised, which can be grouped into three categories. The first type of issue pertains to the meaning of the criteria set out in Article 61-1 of the Constitution, such as 'statutory provision', 'proceedings in progress before a court of law' and 'rights and freedoms guaranteed by the Constitution'. Concerning this last expression, it is important to understand that the concrete review put in place is limited to statute laws conflicting with constitutional rights and freedoms. These are to be understood broadly encompassing not only rights and freedoms found in the Constitution itself but also in the whole *bloc de constitutionnalité* as interpreted by the *Conseil Constitutionnel*. The question is posed as to whether a right protected under the general principles of EC law could indirectly be invoked in the context of the question of constitutionality procedure.[314]

The second type of issue deals with important procedural questions. A few observations will be made in this regard. The issue of constitutionality could be raised either before a court of first instance or, for the first time, before a court of appeal or the supreme courts, *Conseil d'Etat* or *Cour de Cassation*, on an appeal from a lower court. Proceedings before the referring 'court of law' are suspended while the issue is being answered by the *Conseil Constitutionnel*. A lot of attention was paid during parliamentary discussions to the issue of admissibility criteria of the referred question, as well as to the time-limit within which a referring court is bound to act. The Institutional Act provides for a double-filter mechanism whereby the first court before which the issue is raised will proceed to examine prima facie if it is 'serious'; if it decides to refer to its hierarchical court (the *Conseil d'Etat* in the case of the administrative courts of first instance and appeal and the *Cour de Cassation* in the case of civil and criminal courts of first instance and appeal), the supreme court concerned will then exercise a second scrutiny before deciding to refer to the *Conseil Constitutionnel*[316] In both instances, the order for reference must be motivated and take the form of a written, separate and reasoned memorandum (*mémoire écrit distinct et motivé*). Concerning the time-limit, the idea is that the issue of constitutionality should be decided within 6 months, granting an equivalent amount of time to the *Conseil d'Etat* or *Cour de Cassation* to decide to refer (3 months) and to the *Conseil Constitutionnel* to decide on the constitutionality (a further 3 months).[318]

Although the subject of the exception of unconstitutionality could be the object of a paper in itself,[320] the purpose of the following observations is to point to the main potentialities of the reform. The issue

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314 B Mathieu, 'La question de constitutionnalité, quelles lois? Quels droits fondamentaux?' in 'Une nouvelle compétence pour la Cour de cassation: la question préjudicielle de constitutionnalité' (25 June 2009), *Les Petites Affiches*, Special Issue No 126, 56, at 23.

316 The criteria of admissibility are as follows: the allegedly unconstitutional provision must be relevant to the proceedings; the provision must not already have been found constitutional by the *Conseil Constitutionnel*, unless the existence of new circumstances question the constitutionality of the provision; the issue of constitutionality must be 'serious'.

318 If the issue of constitutionality originates in a lower court (court of first instance or court of appeal), this court must refer the issue of constitutionality 'without delay' without any other precision, nor sanction.

320 The literature on the new reform is substantial and constitutes a whole new area of study for constitutionalists. For the dedicated page on the *Conseil Constitutionnel*'s website, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html>. For doctrinal references, see http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/QPC/doctrines_61_1.pdf.

of constitutionality implies a redefinition of the roles of domestic courts and the *Conseil Constitutionnel*, especially in the exercise of their respective reviews of statutory legislation. The orderly coexistence of the abstract constitutional review exercised by the *Conseil Constitutionnel*, on the one hand, and the concrete review of conventionality exercised by the judicial and administrative courts, on the other, will certainly be challenged by the coming into force of a third type of review involving both streams of courts. In this respect, one of the main concerns has been to determine which question (of constitutionality or conventionality) ought to be dealt with first where both questions happen to be simultaneously raised before a domestic court. It has indeed been anticipated that, in order to retain their control over the development of fundamental rights protection, domestic courts would be tempted to avoid a lengthy referral (thus reducing the exercise of the question of constitutionality to an 'empty shell') and rather look at rights and freedoms protected under the international agreements, the ECHR and general principles of EC law in particular.

It is significant in this regard that the *question préjudicielle de constitutionnalité* (literally preliminary reference on an issue of constitutionality) was renamed the *question* prioritaire *de constitutionnalité* or QPC[321] after the first scrutiny of the Institutional Act by the National Assembly. It is now clearly stated that the court before which an issue of compatibility of a statute with rights protected by the Constitution, on the one hand, and the ECHR, for example, on the other, shall decide *first* on the issue of constitutionality, that is on whether to refer the issue to the *Conseil Constitutionnel* or not.

Overall, the reform will have interesting repercussions at different levels. First, within the domestic system and in the judicial/administrative/constitutional courts relationship, it will allow national courts to 'practice' the Constitution which they could not do before. National courts will necessarily be led to interpret and apply constitutional principles, especially the supreme courts of both judicial orders (*Conseil d'Etat* and *Cour de Cassation*) which will have to decide on the 'serious' character of a issue of constitutionality – thus auguring interesting jurisprudential developments about the motivations accompanying the order for reference. Secondly, in the ECHR/national systems relationship, the *QPC* is likely to operate as a filter mechanism in cases filed by French litigants to the ECtHR, since legislation in force but potentially infringing a Convention right will be 'checked' beforehand at national level. In other words, it reconciles in a constitutional 'network' and enterprise of 'cooperation' the different types of review not only between the different levels of French courts, but also between the *Conseil Constitutionnel* and the ECtHR.[323] Thirdly, in the EU/national legal orders relationship, the practical combination of the different referral mechanisms involved will need to be tested. In the eventuality of a case involving a statute implementing a directive and in conflict with constitutional fundamental rights, it is likely to increase the scope of the *Conseil Constitutionnel*'s test of the conformity of a national statute with a directive. Concerning the position of domestic courts, although not being expressly dealt with in the Institutional Act, the question of simultaneity of referrals to both the *Conseil Constitutionnel* and the ECJ under Article 234 EC (new Article 267 TFEU), can cause problems in particular with respect to the principle of supremacy of EC law (if, for instance, the ECJ gives an interpretation of a fundamental right which contradicts the one given by the *Conseil Constitutionnel*). However, the obligation to refer an issue of constitutionality in priority seems absolute including towards conformity with EC law, and it is likely the case that French courts will get rid of the issue of constitutionality before making a preliminary reference to the ECJ. However, this issue, which could be regarded as technically difficult to solve, should be put in the perspective of the dialogue taking place between the European and domestic courts and their tendency to take into account each others' case law on a particular question[324].

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[321] The *QPC* is translated by Priority Preliminary Ruling on the Issue of Constitutionality.

Conseil Constitutionnel Conseil Constitutionnel[323] F Tulkens, 'Convention européenne des droits de l'homme et cours suprêmes', Visite au Conseil constitutionnel, 13 February 2009 available at <http://www.echr.coe.int/NR/rdonlyres/FB4215ED-A89A-436D-96E5-D49F7882F271/0/2009FrancoiseTulkensConseilconstitutionnel_final_.pdf>.

[324] Nota: The whole issue was addressed in a series of three decisions rendered in less than one month by the French highest courts (Cass QPC, 16 April 2010, *M. Abdeli et a.*, No. 10-40001 & 10-40002 (two decisions); CC Decision 2010-605 DC of 12 May 2010 (*Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*); and CE 14 May 2010 (*M. Senad B.)* Application No 312305). Already qualified as decisions of principle ('*grandes decisions*'), they reveal different perspectives on the relationship between the new constitutionality review and the existing conventionality review. Whereas the *Cour de Cassation* has chosen to refer to the ECJ the issue of the compatibility of the Institutional Act of 10 December 2009 implementing the *QPC* with the TFEU (esp. the priority feature of the procedure), the *Conseil Constitutionnel*, followed by the *Conseil d'Etat*, reasserted the distinction between both reviews which should not, functionally nor conceptually, clash.

Lastly, the new role given to the *Conseil Constitutionnel* as well as the new procedural rules involved, such as the requirement of a contradictory and public procedure when dealing with a ruling on an issue of constitutionality , are likely to change further the institution and achieve its 'jurisdictional' transformation into a genuine constitutional court.[326]).

B. EC Law and French Constitutional Law

With regard to the relationship between French constitutional law and the EU legal order, the influence has obviously been more explicit corresponding to the advancing level of integration of the EU. It has transformed not only the 1958 Constitution itself due to French membership of the EC and EU, but also the approach of the *Conseil Constitutionnel* towards EC law.

(i) Revisions of the 1958 Constitution due to EC/EU Membership

An important aspect of the evolution of French law lies in the revisions of the Constitution necessitated by the adaptation of the domestic legal order to primary EC law. Fundamental French texts are no longer immune from the effects of the European construction. An important step was the 25 June 1992 constitutional amendment needed to ratify the Maastricht Treaty.[328] It introduced Articles 88-1–88-3 on *the European Communities and the European Union* providing for the Republic's participation in the EC and EU and transferring the exercise of sovereign powers in particular areas. Following a general trend encountered in other Member States towards a constitutionalization of Europe,[330] this amendment to the 1958 Constitution is said to have 'constitutionalized' the membership of France to the EU legal order. Other important revisions occurred in the following years, the last two on the occasion of the ratification of the Treaty establishing a Constitution for Europe and of the Lisbon Treaty. The review of compatibility of the EC and EU Treaties with the Constitution under Article 54 of the Constitution has generated an important body of case law after each Treaty amendment, namely Maastricht, Amsterdam, Schengen and Rome (on the International Criminal Court). In its two most recent decisions – one in 2004 in relation to the Constitutional Treaty[331] and one in 2007 in relation to the Lisbon Treaty[332] – the *Conseil Constitutionnel* decided that a prior revision of the Constitution was necessary before ratification because of unconstitutional provisions in the respective Treaties. In both decisions, emphasis was put on the specific nature of the EC legal order: reminding that, under Article 88-1 of the Constitution, the 'Republic shall participate in the European Communities and the European Union constituted by States which have freely chosen, by virtue of the Treaties which established them, to exercise some of their powers in common', the *Conseil* concluded that the constituent power thereby acknowledged the 'existence of a Community legal order integrated to the domestic legal order and distinct from the international legal order'.[334]

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326 J Roux, 'De la décision de renvoi à la décision du Conseil constitutionnel' in 'Une nouvelle compétence pour la Cour de cassation: la question préjudicielle de constitutionnalité' (25 June 2009), *Les Petites Affiches*, Special Issue No 126, 56, at 42–52.

328 *Loi constitutionnelle n°92-554 du 25 juin 1992 ajoutant à la Constitution un titre: 'Des Communautés européennes et de l'Union européenne'*.

330 M Claes, 'Constitutionalizing Europe at Its Source: The "European" Clauses in the National Constitutions – Evolution and Typology' (2005) *Yearbook of European Law* 81–125, at 125.

331 CC Decision 2004-505 DC of 19 November 2004 (*Traité établissant une Constitution pour l'Europe*), commented in G Carcassonne, '*Conseil Constitutionnel* on the European Constitutional Treaty. Decision of 19 November 2004, 2004-505 DC' (2005) *European Constitutional Law Review* 293–301.

332 CC Decision 2007-560 DC of 20 December 2007 (*Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*).

334 See pt 11 of the 2004 Decision and pt 7 of the 2007 Decision.

In the 2004 Decision on the Constitutional Treaty,[336] several groups of provisions were examined by the *Conseil Constitutionnel*. No revision was deemed necessary with regard to the principle of supremacy of EU law and the incorporation of the Charter of Fundamental Rights into the Treaty. As expressed for the first time in primary legislation (Article I-6 of the Constitutional Treaty), the scope of the principle of supremacy was analysed in relation to Article I-5 (1) of the Constitutional Treaty concerning national constitutional autonomy. The *Conseil Constitutionnel* concluded that the effect of the principle could not be regarded as changed by the Constitutional Treaty if read in conjunction with the principle of respect for the identity of the Member States inherent to their political and constitutional structures.[338] As for the Charter, incorporated as Part II of the Constitutional Treaty, neither its provisions not its effect on the exercise of national sovereignty called for a revision of the Constitution.[340] However, two kinds of provisions were found to be unconstitutional: first, those on the policies and functioning of the EU, and secondly, provisions on new prerogatives afforded to national Parliaments by the EU. Holding that the first category of provisions as potentially jeopardizing 'the essential conditions for the exercise of national sovereignty', the *Conseil Constitutionnel* was only pursuing its previous case law on the amendments to the 1958 Constitution made consequent upon the Maastricht and Amsterdam Treaties.[342] The second category of provisions necessitated a revision in order to allow for the exercise of new competences given to the French Parliament, especially its power to oppose a 'simplified revision' of the Treaty under Article IV-444, and its power to ensure compliance with the principle of subsidiarity under Protocols Nos 1 and 2.[344]

The 2007 Decision obviously bears similar points to the 2004 Decision as many provisions of the Constitutional Treaty are to be found in the Lisbon Treaty. On the issue of fundamental rights of the EU, no revision was necessitated by the legal effect (same as the Treaties) afforded to the Charter of Fundamental Rights under Article 6 (1) of the TEU (in line with the 2004 Decision), nor by the possibility of accession of the EU to the ECHR under Article 6 (2) of the TEU in so far as, according to Article 218 (8) of the TFEU, the decision on accession will come into force only after approval by the Member States in accordance with their respective constitutional requirements.[346] However, following a close parallelism with the 2004 Decision, the *Conseil Constitutionnel* held that a twofold revision was necessary in relation, first, to the competences and functioning of the EU and, secondly, to the new prerogatives conferred to national Parliaments. The transfer of additional competences to the EU has indeed the effect of encroaching on the fundamental conditions of the exercising of national

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Conseil Constitutionnel Conseil Constitutionnel[336] CC Decision 2004-505 DC of 19 November 2004 (*Traité établissant une Constitution pour l'Europe*).

338 See pt 13 of the 2004 Decision.

340 See pt 22 of the 2004 Decision.

Conseil Constitutionnel Conseil Constitutionnel[342] See CC Decision 92-308 DC of 9 April 1992 (*Traité sur l'Union européenne*) and Decision 97-394 DC of 31 December 1997 (*Traité d'Amsterdam*). The 2004 Decision cites examples in four situations where such revision is necessary, namely transfers of competence in new fields, new ways of exercising competences already transferred, passage to qualified majority in application of all future decisions and simplified revision procedures of Articles IV-444 and IV-445 (see pts 23–36 of the 2004 Decision).

344 See pts 37–41 of the 2004 Decision.

346 See pts 12 and 13 of the 2007 Decision. The accession will require a statutory authorization by the French Parliament under Article 53 of the 1958 Constitution.

sovereignty in areas, or in a manner, other than those provided for by the Treaties referred to in Article 88-2 of the 1958 Constitution ('transfer of powers' provision),[348] as well as the new competences vested in national Parliaments.[350]

The last constitutional revisions were the occasion to amend the whole Title XV of the 1958 Constitution to take into account the adoption of the Lisbon Treaty, signed on 13 December 2007. New Articles 88-1, 88-2, 88-4, 88-5, 88-6 and 88-7 came into effect upon the coming into force of the new Treaty amending the Treaty on European Union (TEU) and the Treaty establishing the European Community, renamed the Treaty on the Functioning of the European Union (TFEU)[352] These legally and symbolically significant revisions are part of the Europeanization process of French constitutional law. The other transformative influence due to European integration has been the elaboration of a substantive case law by the *Conseil Constitutionnel* on issues involving EC law.

(ii) Case Law of the *Conseil Constitutionnel* concerning EC law

The *Conseil Constitutionnel* has had to decide on many occasions on important points of principle concerning the relationship between EC law and the French legal order. The overall constitutional case law presents an 'integrated view of the problem' (of the relationship between the French legal order and EC law)[353] and can be analysed as being at the crossroads of the processes of Europeanization and constitutionalization. It is to be placed in the context of the '*dialogue des juges'* (dialogue between the judges) showing how the French constitutional 'court' interacts with the ECJ as well as with national ordinary courts, the supreme administrative court in particular. The general trend of the French constitutional case law has been towards a more explicit acceptance of EC law in the national legal order, as regards EC primary legislation, general principles and, more recently and notoriously, secondary legislation.

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348 Like in the 2004 Decision, the 2007 Decision indicates several situations. Concerning the transfer of competence in new areas, the *Conseil* mentions Article 75 TFEU (on the prevention of and fight against terrorism), Article 77 TFEU (on the control on persons at internal borders), Article 79 TFEU (on the prevention of and fight against human trafficking), Article 81 TFEU (on judicial cooperation in civil matters), Articles 82 and 83 (on judicial cooperation in criminal matters) and Article 86 (on the establishment of the office of the European Public Prosecutor). Reference is also made to new manners of exercising competences already transferred, mainly the substitution of qualified majority voting to unanimity voting (See pts 14–27 of the 2007 Decision).

350 Particular concerns were expressed in relation to the right of the French Parliament to oppose a revision of the Treaties according to the simplified revision procedure under Article 48 of the TEU, as well as its control of the respect of the principle of subsidiarity. Lastly, its right to oppose the decision of the Council to substitute the ordinary legislative procedure to the unanimity vote causes concern, especially in relation to certain aspects of family law which have cross-border ramifications (see pts 28–32 of the 2007 Decision).

352 See *Loi constitutionnelle n°2008-103 du 4 février 2008 modifiant le titre XV de la Constitution and Loi constitutionnelle n°2008-724 du 23 juillet 2008 de modernisation des institutions de la Vème République*.

353 O Pollicino, 'The *Conseil d'Etat* and the relationship between French internal after *Arcelor*: Has something really changed?' (2008) 45 CML Rev 1519–40, at 1521.

In relation to *primary* legislation, the *Conseil Constitutionnel* did not engage in reviewing the constitutionality of EC treaties. In a 1970 Decision, it ruled that the ECSC and EEC Treaties, once introduced in the national legal order, could not be the object of an examination of constitutionality, as they were protected by a sort of 'constitutional immunity'.[355] This was to be followed by the famous 1975 IVG Decision in which the *Conseil Constittuionnel* declined its competence to review the constitutionality of statutes laws with a treaty (though not the EC treaties in this case).[357] A perceptible change came about on the occasion of the Maastricht Treaty Decision in 1992 when the *Conseil Constitutionnel* recognized the *sui generis* nature of the EC legal order, thus acknowledging the impact of EC law on the domestic legal system.[359]

In later decisions, the *Conseil Constitutionnel* used EC law as a source of inspiration and appeared to 'domesticate' certain principles directly stemming from EC law such as, for example, the principle of clarity of the law or the constitutional objective of intelligibility of the rule of law. Although based on national constitutional principles or rules, they were clearly inspired by the principles of legitimate expectations and legal certainty.[361] In a further step, it explicitly referred to the *general principles* of EC law in its 2004 Decision on bioethics when stating that the freedom of expression was guaranteed not only by national constitutional law (Article 11 of the 1789 Declaration of the Rights of Man and Citizen) but also by a general principle of EC law based on Article 10 of the ECHR.[363]

The most challenging developments have come about in relation to EC *secondary* legislation. Through a consistent and well-designed jurisprudential construction formed in a series of decisions in 2004 and 2006, the *Conseil Constitutionnel* clarified the status of secondary EC law in the French hierarchy of norms in cases involving statutory implementation of EC directives. The first pivotal decision came up on 10 June 2004 when the *Conseil Constitutionnel* had to decide on the constitutionality of a statute implementing an EC directive on e-commerce.[365] Its reasoning was as follows. First, it declared that

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Conseil Constitutionnel Conseil Constitutionnel[355] CC Decision 70-39 of 19 June 1970 (*Traité de Luxembourg portant modification de certaines dispositions budgétaires des Traités instituant les Communautés européennes*).

[357] See above on the ECHR.

Conseil Constitutionnel Conseil Constitutionnel[359] CC Decision 92-308 DC of 9 April 1992 (*Traité sur l'Union européenne*). Reference is made to the possibility for France 'to enter into, subject to reciprocity, international agreements for participation in the establishment or development of a permanent international organization, enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States' (pt 13).

*Conseil Constitutionnel Conseil Constitutionnel*Conseil Constitutionnel Conseil Constitutionnel[361] See, for example, CC Decision 99-421 DC of 12 December 1999 (*Loi d'habilitation par ordonnance*) and Decision 2001-455 DC of 12 January 2002 (*Loi de modernisation sociale*), cited in C Maugüé, 'Le Conseil constitutionnel et le droit supranational' (2003) 105 *Pouvoirs* 53–71, at 70.

Conseil Constitutionnel Conseil Constitutionnel[363] CC Decision 2004-498 DC of 29 July 2004 (*Loi relative à la bioéthique*), at pt 6.

*Conseil Constitutionnel Conseil Constitutionnel*Conseil Constitutionnel Conseil Constitutionnel[365] CC Decision 2004-496 DC of 10 June 2004 (*Loi pour la confiance dans l'économie numérique*), commented in J Dutheil de la Rochère, 'Conseil Constitutionnel (French Constitutional Court) Decision No. 2004-496 of 10 June 2004' (2005) 42 CML Rev 859–69; C Richards, 'The Supremacy of Community Law before the French Constitutional Court' (2006) *European Law Review* 499–517. Other decisions followed in the summer of 2004: Decision 2004-497 DC of 1 July 2004 (*Loi relative aux communications électroniques et aux services de communication audiovisuelle*); Decision 2004-498 DC of 29 July 2004 (*Loi relative à la bioéthique*); Decision 2004-499 DC of 29 July 2004 (*Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel et modifiant la loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*).

the transposition of an EC directive in French law was a 'constitutional duty' (*exigence constitutionnelle*). Secondly, it reminded that, according to Article 88-1 of the Constitution, the Member States have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common.[367] It followed that it was only for the ECJ, as the occasion may arise by way of preliminary procedure, to test the compatibility of the directive against both the competences defined by the Treaties and the fundamental rights guaranteed by Article 6 TEU. However, the *Conseil Constitutionnel* noted that ruling on the constitutionality of a statute which was the exact transposition of a directive amounted to rule on the directive itself. This the *Conseil Constitutionnel* could not do.[369] Henceforth, it refused to test the statute against the Constitution in this case.

The legal and institutional scope of the decision cannot be underestimated. It marked the start of a 'jurisprudential revolution' that changed the *Conseil Constitutionnel*'s approach to EC law. A few key observations will be made reviewing the main points stemming from the abundant literature attached to the decision.[371] At first glance, the decision seems paradoxical. On one hand, there is the significant change of legal basis, from Article 55 of the Constitution which, phrased in general terms, does not recognize EC law's specificity as compared with classical international law,[373] to Article 88-1. The *Conseil* declares itself competent to ascertain any possible violation of Article 88-1 by national legislation transposing a directive in the case where such legislation is 'manifestly incompatible with

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[367] Article 88-1 reads: 'The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties that established them to exercise some of their powers in common.'

Conseil Constitutionnel Conseil Constitutionnel[369] This would contradict the ECJ's case law which states that national rules, even of a constitutional nature, cannot override EC law (ECJ Case 11/70 *Internationale Handellsgesellschaft* [1970] ECR 1125). Besides, the *Conseil Constitutionnel* has no competence to review secondary EC law directly as Article 54 of the 1958 Constitution only allows for the review of 'international agreements' that need (national) approval or ratification.

Conseil Constitutionnel Conseil ConstitutionnelConseil Constitutionnel Conseil Constitutionnel[371] There are numerous articles on this Decision most of which can be found on the website of the *Conseil Constitutionnel* under *Références doctrinales* at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-496-dc-du-10-juin-2004.901.html>. For references, see A Levade, 'La constitutionnalité des lois de transposition entre conformité et compatibilité' in P Bon et al (eds), *Renouveau du droit constitutionnel – Mélanges en l'honneur de Louis Favoreu* (Paris, Dalloz, 2007) 1291–1306; C Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) *European Constitutional Law Review* 436–62; and X Groussot, 'Supr[i]macy *à la Française*: Another French Exception?' (2008) *Yearbook of European Law* 89–120.

Conseil Constitutionnel Conseil Constitutionnel[373] Compare CC Decision 70-39 DC of 19 June 1970 (*Traité de Luxembourg portant modification de certaines dispositions budgétaires des Traités instituant les Communautés européennes*) with Decision 92-308 DC of 9 April 1992 (*Traité sur l'Union européenne*).

the directive being transposed'.[375] This is an acceptance of the primacy and specificity of EC law which does not alter, nevertheless, the place of the Constitution at the top of the hierarchy of norms:[377] the duty to implement EC law and its primacy are only effective by virtue of the constituent power's will which introduced the EU legal order into the domestic legal order via Article 88-1. On the other hand, however, the decision also seems to represent a relinquishment of its competence by the *Conseil Constitutionnel*. It declares its intention to renounce its constitutional review in the case of implementing statutes which, without any margin of discretion, 'are limited to drawing from the directive the necessary consequences resulting from its unconditional and explicit provisions' (which is likely to be the case given that most French laws have now an EC origin).

It is in fact a logical and reasoned decision the implications of which have been far-reaching for the national courts, the *Conseil d'Etat* in particular. It is a logical decision. Had the *Conseil Constitutionnel* struck down the statute transposing the directive, it would have run the risk to be contradicted by a court drawing, in a later case before it, all the consequences of the direct effect of the directive in question which would prevail over French law. It is also a reasoned decision because the *Conseil Constitutionnel* has set some limits on the restriction of its competence. The first one concerns the object of review: the statute must be the *exact* transposition of a directive, without any amendment made by the national legislator. In the 2004 Decision, the national statute implemented the unconditionally and precisely phrased provisions of a directive. The second limitation concerns the reservations to the refusal to review. The *Conseil Constitutionnel* will recover its competence to review a statute transposing a directive in case of an 'express contrary constitutional provision' meaning that the only constitutional norms that can be opposed to the transposition of a directive are norms specific to the French constitutional order. In other words, the EC directive, which enjoys constitutional immunity, will stand as a 'screen' between the statute and the Constitution only in so far as there is no 'explicitly contrary constitutional provision' at stake (*réserve de constitutionnalité*). In this sense, the *Conseil* limits its review to alleged breaches of those constitutional principles which have no equivalent in the EC legal system.

The concept of *réserve de constitutionnalité* was replaced by the concept of 'French constitutional identity' (*identité constitutionnelle de la France*) in a later stream of decisions in 2006.[379] The notion includes de facto very few principles and examples generally given are the principle that the State is secular (*principe de laïcité*) and the principle of equal access to public jobs. As a consequence, it significantly reduces the areas of a potential conflict between a constitutional norm and a national norm exactly implementing a directive. In a later 2006 Decision, the *Conseil Constitutionnel* struck down for the first time in this context a statute for unconstitutionality as some of its provisions were contrary to the objectives set out in the directive that it was purported to transpose.[381] In brief, the primacy of the EC legal order, including over constitutional norms, is fully recognized in the French

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[375] See pt 20 of the 2004 Decision.

Conseil Constitutionnel Conseil Constitutionnel[377] C Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) *European Constitutional Law Review* 436–62, at 459–62.

Conseil Constitutionnel Conseil Constitutionnel[379] CC Decision 2006-540 DC of 27 July 2006 (*Loi relative au droit d'auteur et aux droits voisins dans la société de l'information dite loi DADVSI"*), pt 19. Other decisions in 2006 include: Decision 2006-535 DC of 30 March 2006 (*Loi pour l'égalité des chances*) and Decision 2006-543 DC of 30 November 2006 (*Loi relative au secteur de l'énergie*).

[381] This decision to sanction a statute represents a progression compared with the 27 July 2006 Decision in which the *Conseil* only formulated reserves of interpretation in order for the statute not to contradict the objectives set out in the directive.

legal order, although based on a domestic constitutional provision (Article 88-1) and except in the case of an explicitly contrary constitutional norm (*identité constitutionnelle de la France*).

The implications of these cases are important in many respects: first, in relation to the type of review exercised by the *Conseil*; secondly, in relation to the influence it has had on other courts. First, the confrontation of national norms and EC norms in the framework of constitutional review has forced the *Conseil Constitutionnel* to adapt and 'deconstruct' its review when verifying the constitutionality of a transposing statute. Different steps can be distinguished in this regard.[383] First, the *Conseil Constitutionnel* will determine if the national provisions reviewed are aimed at transposing a directive; this preliminary check arguably creates two streams of constitutional review – one concerned with EC law and the transposition of directives specifically, and the other, which is the normal constitutional review not involving EC law. The following question will be to determine if the provisions aimed at implementing the directive are contrary to French constitutional identity; if this is the case, the legislator is relieved of its domestic constitutional obligation to transpose. Thirdly, the *Conseil* will aim at determining if the reviewed provisions fully draw the consequences of the precise and unconditional provisions of the directive; if this is the case, internal constitutional review reaches its limits and the provisions cannot be contested as there is a constitutional duty to transpose. Lastly, the *Conseil* will determine if the reviewed provisions are manifestly incompatible with the directive; if this is the case, the national provisions are deemed to be contrary to Article 88-1. This certainly represents a refinement of the review operated by the *Conseil Constitutionnel* in its acceptance of EC law. However, it still reflects the typically French a priori judicial review which, in the particular case, allows the *Conseil* to prevent the entry into force of a national legislative norm (transposing statute) contrary to a secondary EC norm (directive).[385]

Secondly, in its *Arcelor* Decision of 2007,[387] the *Conseil d'Etat* had to solve the '*quadrature du cercle*' and reconcile the superiority of the Constitution and the primacy of EC law in its manifestation of the constitutional obligation to transpose a directive into national law. The reasons for reconsidering its position with regard the relationship between the European and French legal systems are twofold: first, from a legal and constitutional perspective, the highest administrative court regarded as sufficient reason the provisions of Article 62 of the Constitution according to which the decisions of the *Conseil Constitutionnel* binds all public authorities, including judicial authorities; secondly, the court was certainly driven by more political considerations stemming from this general movement of judicial dialogue observed between the national and European courts.[389] The facts of this important case are briefly stated here. Arcelor, the prominent European steel manufacturer, sought the annulment of a Decree of 19 August 2004 transposing, with no additions or modifications, Directive 2003/87/EC on

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383 See *Rapport public du Conseil d'Etat 2007 – L'administration française et l'Union européenne. Quelles influences? Quelles stratégies?*, accessed at <http://www.conseil-etat.fr/ce/rapport2007/rap07.pdf>.

Conseil Constitutionnel Conseil Constitutionnel[385] P Mazeaud, 'L'évolution de la jurisprudence du Conseil constitutionnel sur les lois de transposition des directives', cited in *Rapport public du Conseil d'Etat 2007 – L'administration française et l'Union européenne. Quelles influences? Quelles stratégies?*, accessed at <http://www.conseil-etat.fr/ce/rapport2007/rap07.pdf>.

387 CE Ass 8 February 2007 (*Société Arcelor Atlantique et Lorraine et autres*) Application No 287110.

389 O Pollicino, 'The *Conseil d'Etat* and the relationship between French internal after *Arcelor*: Has something really changed?' (2008) 45 *CML Rev* 1519–40, at 1530. Cf M-P Granger 'France is already back in Europe: The Europeanization of French Courts and the Influence of France in the EU' (2008) 14 *European Public Law* 335-375.

greenhouse gas emissions within the EU.[391] The main argument of the company was that the allowance trading system established by the Directive was discriminatory in that the categories of undertakings required to limit greenhouse gas emissions included the iron and steel industry sector but not other potential competitors, such as the plastic and aluminium sectors, also responsible for damaging gas emissions. The transposing administrative Act thus conflicted with the French constitutional principle of equality.[393]

As invited by *Commissaire du gouvernement* Guyomar, the *Conseil d'Etat* court set out the conceptual framework of its Decision drawing on the constitutional case law. It embarked on a 'specific method' of review in this instance of conflicting legal orders and principles. The *Conseil d'Etat* first fully acknowledged the constitutional obligation to implement directives pursuant to Article 88-1 of the Constitution. It then logically sought to assess if the constitutional principles invoked by the claimant were also protected, both in nature and scope, by EC general principles as interpreted by the ECJ. The two branches of the test developed are as follows. First, if general principles of EC law guarantee, by their application, the effective respect of the constitutional principles, then the administrative court must scrutinize the national implementing measure in the light of these EC principles – which itself leads to two situations: (i) either there is no doubt that the implementing measure conforms with these principles and the alleged breach is discarded; or (ii) there is a doubt as to the validity of the EC statute which the challenged measure purports to transpose, and the administrative court must refer the question of validity to the ECJ. Secondly, in the instance where no equivalent principles to the constitutional principles invoked exist in EC law, the administrative court must directly examine the conformity of the implementing measure to the Constitution, in other words, recognize its competence to exercise constitutional review.

In the specific case at hand, the *Conseil d'Etat* concluded that the alleged constitutional rights (right to property, freedom to engage in trade and equality principle) were also protected to the same extent in the European legal system – and that in the case of the last one, it had to refer a preliminary question to the ECJ as it found 'serious difficulties' in assessing the compliance of the directive at issue with the EC general principle of equality. The ECJ eventually found no breach of the equality principle in its preliminary ruling.[395]

The litigation context in which this kind of review by the supreme administrative court can be exercised is only when the transposing directive is carried out exclusively at the executive level, without any action by the legislator, and only when there is no room for discretion in the transposition. Although it seriously limits the scope of the Decision, it has had larger resonance in the judicial discourse at national and European level. The 2007 Decision of the *Conseil d'Etat* and also the *Conseil Constitutionnel*'s case law of 2004 and 2006 have been analysed in the light of the 'judicial cooperation' or 'judicial dialogue'[396] taking place between national and European courts and are, as such, important facets of the Europeanization and constitutionalization processes at play in the French legal order. While there is no formal direct dialogue between the *Conseil Constitutionnel* and the ECJ, since the *Conseil* cannot refer a preliminary ruling to the ECJ, the *Conseil Constitutionnel* has been increasingly embracing the constitutional implications of EC law thereby echoing the case law of the ECJ. Nevertheless, on two key occasions, the *Conseil Constitutionnel* chose to limit the scope of its constitutional review and handed over its competence to the national judicial and administrative courts – first, in 1975 (IVG ruling) declaring itself incompetent to review the conformity of a domestic statute law with an international or EC treaty, it handed over to the national courts the task of ensuring

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391 OJ 2003 L 275, p 32.

393 Other principles invoked were the right to property and to freely engage in trade.

395 See Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier Ministre and Others* of 16 December 2008: Consideration of Directive of 13 October 2003 establishing a scheme for greenhouse gas emissions allowance trading within the Community . . . from the point of view of the principle of equal treatment has disclosed nothing to affect its validity . . . .

396 See, for example, Groussot at 113s (on Discursive Legal Pluralism) and Pollicino at 1532 (referring to 'cooperative constitutionalism').

observance of Article 55 of the Constitution on primacy of international law and setting aside French statutes which are incompatible with international treaties; secondly, in 2004 (e-commerce ruling), it handed over *part* of its constitutional review when it refused to review the constitutionality of a transposing statute of an EC directive, unless it conflicts with French constitutional identity – which has shrunk to very few principles indeed.

Paradoxically, this stance has not diminished the status and influence of the *Conseil Constitutionnel*, which has indirectly forced the supreme courts to take responsibility for framing, under its guidance, their own dialogue with the other courts, whether offering a 'pedagogical approach' to lower courts at national level or aiming at increased cooperation with European supranational courts – through the preliminary rulings procedure with the ECJ mainly, but also with increased references to the ECtHR's case law.

V. Conclusion

Through different techniques, vectors and paces, the impact of the EU legal order and ECHR system on French law has grown steadily, pervading all areas of law – public and private spheres alike, whether within the administrative or judicial court system. The parallel phenomenon of 'constitutionalization' at national level has also transformed substantive law as well as legal mechanisms – most notably the scope of constitutional review. Both processes have arguably contributed to renew many aspects of French law at different levels: the substance of law with improvements in administrative law and the protection of rights and freedoms in particular; the operation of law with changes in essential legal mechanisms or institutions (e.g. role of the *Commissaire du gouvernement* in administrative courts, scope of constitutional review); academic debate with reflections around foundational notions of French law (e.g. notions of 'administration', 'public service'); and, finally, the relationship between authorities, most notably the judiciary (e.g. cooperation between the legislator and supreme courts to take into account ECtHR's rulings, and dialogue between courts – *Cour de Cassation*, *Conseil d'Etat* and *Conseil Constitutionnel* – in the jurisprudential construction regarding EC norms). On this matter, both European systems have 'empowered' domestic courts, whether through their use of the Article 234 EC (new Article 267 TFEU) preliminary ruling procedure allowing them to refer outside of the national legal system, or via the review of conventionality of national provisions infringing ECHR rights making theirs the primary task of implementing the Convention at national level.[398]

The decisions of the *Conseil Constitutionnel* crystallize the dual effect of Europeanization and constitutionalization of French law. Through its 'European' case law, the *Conseil* has elaborated a tailor-made constitutional review in the case of EC law, more specifically in the case of transposing statutes. Not deterred by the unfortunate episode of the 2005 negative referendum and in spite of a tense political context, it pursued its creative jurisprudential construction to translate fully into an operative effective review the European requirements contained in the Constitution and gave its full scope to Article 88-1 on France's membership of the EC and EU. The *Conseil d'Etat*, which has never been too keen on the European construction, has followed the trend[399]. In both the *Arcelor* and *Gardedieu* decisions, the supreme administrative court, in its highest judicial formation (*Assemblée du contentieux*), drew significant consequences in relation to matters of legality of administrative acts and State liability – consequences imposed by the progressive integration of both the domestic legal order, headed by the Constitution, and the European legal order comprising EU/EC law, on the one hand, and ECHR law, on the other.

Nearly a year after the entry into force of the Lisbon Treaty, which provides for the accession of the EU to the ECHR under Article 6 (2) TEU, one can acknowledge the significant influence of European

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[398] Other factors that have prompted courts to engage in the European judicial process include outsourcing, efficiency, push on the part of the litigants, increasing levels of transnational trade and general political awareness. See SA Nyikos, 'Courts' in P Graziano and M P Vink (eds), *Europeanization – New Research Agendas* (Basingstoke, Macmillan, 2008) at 182–94.

[399] M-P Granger 'France is already back in Europe: The Europeanization of French Courts and the Influence of France in the EU' (2008) 14 *European Public Law* 335-375.

integration, whether due to the effect of EC norms or the reception of the ECHR, on French constitutional law. It is likely that the combined effect of Europeanization and constitutionalization (at national and European level) will lead to further developments, especially to the revival of the old debate on the incorporation of external norms in the *bloc de constitutionnalité*, at least for the whole of EC law, and why not also international norms regarding human rights?[401] The effective operation of the new exception of unconstitutionality (*question prioritaire de constitutionnalité*) will certainly represent the next interesting challenge to the French judicial and institutional order in this regard. The reform allows national courts to refer to the *Conseil Constitutionnel* an issue of compatibility of a statutory provision with the rights and freedoms guaranteed by the Constitution. To a certain extent, the new procedure illustrates the willingness of French authorities and courts to reach an advanced form of '*dialogue des juges*' between courts of first and second instance, the supreme courts (*Conseil d'Etat* and *Cour de Cassation*) and the *Conseil Constitutionnel*. It also raises concern, not only of a technical nature, but also of institutional nature, especially regarding the possible competition between courts, whether at national (e.g. temptation of the *Conseil Constitutionnel* to transform itself into a real supreme court) or European level (e.g. different referral mechanisms).

It also shows, to a certain extent, that France has been 'doing things' the other way round by, first, accepting the impact of Europeanization through the full effect of European norms, whether EC law or ECHR law, before engaging into a process of constitutionalization of its legal order by most recently seeking to refine the exercise of its constitutional review mechanism in the area of fundamental rights protection. In any case, the Europeanization and constitutionalization processes will continue to have a huge influence on French constitutional law, even if it means to further disturb the orderly architecture of the French judicial system.

Conseil Constitutionnel Conseil Constitutionnel[401] C Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*' (2007) *European Constitutional Law Review* 436–62, at 462.