

The Constitutionalization of Law: General Considerations Based on the French Example

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I. INTRODUCTION

The challenges posed by the study of the constitutionalization of law are substantial. They are due to the conceptual differences surrounding the uses of the term, the tools used to make diagnoses, and the difficulty of comprehending fully the scope, contexts, aspects, and ramifications of that phenomenon.

First of all, it should be noted that there are many different uses of the word “constitutionalization,” which break away from normativism. In some recent practices, the concept of constitutionalization—following the concept of Constitution—is not even (or not anymore) the prerogative of the State. It is also increasingly used, not only to analyze the evolving processes of “constitutionalization” of European Union or International Law, or to support the analyses of transnational or global constitutionalism, but more broadly to point out the creative and constitutive forces of non-state societal orders.¹ This is the case with the self-constitutionalization of private systems, aside from penalty mechanisms organized by state law,² illustrated by the corporate codes of

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1. See G. Teubner, “Self-Constitutionalizing TNCs? On the Linkage of ‘Private’ and ‘Public’ Corporate Codes of Conduct,” *Indiana Journal of Global Legal Studies*: Vol. 18: Iss. 2 (2011), Article 2.

2. See A. Fischer-Lescano and G. Teubner, “Collisions de régimes: la recherche vaine de l’unité juridique face à la fragmentation du droit global,” *Revue Internationale du Droit Economique* (2013), vol. 187.

multinationals whose functions, structures, and institutions have been compared—not without strong criticisms—to real constitutions.³

Thus, the constitutionalization process finds itself at the center of social constitutionalism theory,⁴ after having more or less fed general sociological theories. According to this approach, the phenomenon of constitutionalization is moving towards different societal sectors that produce constitutional norms, away from the political constitutions of States. Thus, self-constitutionalization would come from a circular translation process in which different “learning pressures,” to use Teubner’s terminology, are involved. A sort of *spontaneous constitutionalization*, one might say, is taking place, which may be observed, in its most innovative form, as a project to link historical and empirical analyses of constitutional phenomena with normative perspectives.

The process doesn’t appear to be unconnected with *common law*. It is well known that, in the British tradition, beyond the recent adoption of constitutional texts and the institution of an independent Supreme Court, there continues to be distrust of systems for the protection of fundamental rights ascertained by written texts,⁵ whereas constitutionalization, in a context of multiplication of sources, is a profoundly cultural thing and a perpetual process. It is the process of forming constitutional rules whose power derives from their cultural and social dimension.

It is recognized that the phenomenon of constitutionalization, as claimed by the sociological method, is not confined to the field of the formal Constitution. Also recognized is the need to take into account the progress in the understanding of sociological analyses of constitutionalization processes. All of this illustrates how constitutionalization summarizes in one word the aspiration to *become law*. However, the problem does not vanish in the management of a “plurality of self-regulation programs,”⁶ since the constitutionalization processes refer to hetero-limitative analyses, within a legal system, highlighted by jurists who wonder, one way or another, about the role of constitutional provisions *in* and *on* the law.

3. G. Teubner, “Self-Constitutionalizing TNCs? On the Linkage of ‘Private’ and ‘Public’ Corporate Codes of Conduct,” *op. cit.*

4. For a recent general analysis, read J. de Munck, “Le défi du constitutionnalisme sociétal,” in *Les visages de l’Etat*, Liber amicorum Yves Lejeune, Bruylant, (2017), 293.

5. A. Antoine, *Droit constitutionnel britannique*, LGDJ, coll. Systèmes (2016), 23, 51.

6. According to G. Teubner’s terminology in “La question constitutionnelle au-delà de l’Etat-Nation. Pour une approche sociologique du phénomène constitutionnel,” *Revue de droit public* (RDP), (2017), no. 6, 1603.

To be honest, jurists do not have a fine typology or an exhaustive categorization of the different constitutionalizations or situations that claim the name.⁷ Such an undertaking is made all the more delicate by the fact that it suffers from the profound transformation that affects the relationship between legal norms and that it depends, in substance, on a theory of sources, and therefore on a theory of law.

However, usually, it is not uncommon for the word “constitutionalization” to be used in a legal context to refer to distinct phenomena. Sometimes the creation of a constitutional rule, sometimes the rise of a previously non-constitutional rule to a constitutional level, sometimes the codification of rules with a constitutional nature or scope, sometimes the affirmation of a freedom by the constitutional judge or the creation of a protective case-law regime. Constitutionalization refers in whole or in part to a tree-like phenomenon: constitutional norms sometimes or at the same time better-established, more numerous, more dense and/or more diffuse norms within the reference system of legal actors.

Constitutionalization works essentially in two ways: either directly to raise the legal value of some rules that are considered more important than others, thus forcing the legislator as well as the government to follow them, or indirectly to guide the interpretation of the law in the light of constitutional requirements. Thus, the rise of sub-constitutional norms to the Constitution is a reverse process in which sub-constitutional law determines the scope of the Constitution. In that respect, constitutionalization is fundamentally a system of interpretation because it gives the means to see all the law in a constitutional way.

But one must be cautious in front of this wealth of meanings. Caution is necessary even more so when it comes to offering an assessment on the 60th anniversary of the French Constitution. Needless to say, such an undertaking is part of a more general question regarding the transformations that have occurred in the field of contemporary constitutional law, particularly the subsequent changes to the development of fundamental rights and freedoms and to the position of constitutional justice in the system of law sources.

Various attitudes can be adopted by the observer.

7. For a typology in German, see M. Jestaedt, “Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts. Eine deutsche Perspektive,” in J. Masing and O. Jouanjan (eds.), *Verfassungsgerichtsbarkeit. Grundlagen, innerstaatliche Stellung, überstaatliche Einbindung*, Tübingen, Mohr Siebeck, (2011), 39.

One of them is to analyze the genesis of the concept of constitutionalization, its introduction in France through the work of Dean Louis Favoreu, and the history of the concept of constitutionalization in much the same way one would go back through the construction of legal thought. In doing so, some authors seek to explain the contemporary torments of the constitutional field resulting from the poorly executed implementation of fundamental law.⁸ We can be assured of the soundness of this reconstruction (probably more or less self-fulfilling) by taking into account its performative capacity.

From a comparative and teleological angle, it would be possible to shed light on the differences in the *projects* conveyed by constitutionalization. This analysis would probably stand out in the systems in which the Constitution is a powerful source of imagination within a population that claims ownership of it and in which citizens identify themselves with it more intensely, particularly when the Constitution has asserted itself as the “creation of citizens,” as in the United States, or when it embodies the end of a totalitarian period in certain European and South American countries. This would also stand out in systems in which constitutionalization is thought of not directly to enhance the Constitution or to regulate the legislator, but to supervise the judge. This is noteworthy, for example, in Brazil, where the movement for constitutionalization was promoted by the government to contain the judiciary . . . even if it meant reinforcing, as a (counter-)collateral effect, the power of standardization vested in the Supreme Federal Court.

Another approach would be to concentrate the study on the structure of rights, their historical and normative characteristics. In France, for example, while the main sources for most “branches” are the law and the regulatory power, some branches, like social law, include also professional sources. The general rules must then be combined with special rules, that is to say rules that apply only in specific situations and to specific categories of people. In a different manner, the constitutionalization of public finance law cannot be examined precisely without first understanding that the claims fall under a “constitutional law of exception,” the vision of which varies from time to time and from place to

8. In that sense, see Th. Hochmann, “Les droits fondamentaux, le grenouille française et le boeuf allemand (II) : Louis Favoreu et la constitutionnalisation du droit,” in Ph. Cossalter and C. Witz (eds.), *60 ans d'influences juridiques réciproques franco-allemandes*, ed. Société de législation comparée, coll. Droit comparé et européen, (2016), 183.

place.⁹ Just as it could be specified on another level that procedural law is a privileged object of constitutionalization since procedure is often the condition for the implementation of other rights, be they material or substantial.

All this proves, in all respects, that there are indeed *multiple* constitutionalizations.

While the French Constitution celebrated its 60th anniversary on October 4, 2018, and in July, the 10th anniversary of the constitutional amendment which introduced, in July 2008, an *a posteriori* constitutional review called the “Priority Preliminary Ruling on the Issue of Constitutionality” (QPC),¹⁰ French constitutionalists are wondering about the present state and future of their discipline. We will not venture here into a sociological study of knowledge, and we will not claim to exhaust the analysis of each branch of ordinary law in order to list its constitutional sources and to create a patchwork capable of identifying all of its manifestations. Our remarks will focus on how this plural reality, known as “constitutionalization,” has been conveyed and realized in the application of constitutional law, and how we understand it today. Analyzing the mutations at work in France seems to offer a broader perspective on the concept of constitutionalization.

II. FROM CONDITIONING TO PERMEATION

II.A.

The topic of the constitutionalization of branches of law is a recent topic in France. Put back into the major movements of constitutional discipline, it has only recently developed within the framework of constitutional law.

Before that, the question of the relationship between constitutional law and (other) branches of law remained either very general or very detailed. More uncommon was the question of the dependence and subordination of these branches of law to the Constitution, or more simply the question of the constitutional influence on these branches.

Let us be clear: the idea that the various divisions of the ordinary legal system find their basis, framework, or roots in the Constitution is well known and firmly rooted. In Europe, legal opinion uses a variety of metaphors to describe the phenomenon: constitutional law is the “trunk”

9. E. Oliva, “Les finances publiques vues par les constitutionnalistes,” RFFP, (2016), no. 133, 97.

10. The “QPC” was implemented on February 2010.

from which grow several “branches” of law (Santi Romano); it contains the “chapter headings” of all the branches (Pellegrino Rossi). A wide range of metaphors about springs and fountains have also been used.

Historically, public law scholars have paid particular attention to the phenomenon. It has fueled a famous controversy over the theory of constitutional bases of administrative law, developed by Dean Vedel in 1954, the merits of which were contested by Eisenmann. This theory actually originated at the end of the 19th century. It is both a legal and a political construction, which was used to legitimize the existence of an administrative law that derogated from ordinary law and an administrative court distinct from ordinary courts. Still today, the French public law jurists and the Conseil d’Etat remain very attached to the constitutional basis of administrative law and administrative justice, enshrined in the 1980s by the jurisprudence of the Constitutional Council. Constitutional law has always been vital to the understanding of administrative law, because, among other things, it was born out of the French revolutionary notion of separation of powers.

In fact, dependency on the Constitution is the most visible and immediate in areas of public law. Everyone knows that the form of the State and the system of government—in short, the “organizing Constitution”—determine and shape directly the relationship between public and administrative authorities, define the essential principles of the administrative structure and the general framework of administrative law. This has been the case historically, and it continues to be, particularly on the issue of local normative power. Everyone also knows that the founding principles of tax law are intimately interwoven with constitutionalism—and vice versa.

This does not mean, however, that the other branches are exempted from the phenomenon, on the contrary. It is not difficult to illustrate this assertion. We need only think of criminal law, as it gathers together all the legal rules organizing the State’s response to offenses. Its modern configuration is “the immediate continuation of the same set of ideas (the rationalism of the *Lumières*) from which the first constitutionalism was born,” according to José Manuel Cardoso Da Costa.¹¹ Basically, the more or less liberal or interventionist nature of the State, as defined by the Constitution, is reflected in the demarcation of behaviors likely to be subject to criminal sanction, as in the structure of the criminal procedure. It reflects, more generally, on what is customary to refer to as

11. Former president of the Portuguese Constitutional Court (1989-2003).

“constitutional trial law” or “constitutional procedural law.”¹² This control of criminal rules by constitutional norms is just as noticeable in France—particularly on the grounds of Articles 7, 8 and 9 of the 1789 Declaration—as in other European countries where the principles of criminal law are often written directly into the Constitution.

Private law, as a whole, is not immune from the process, as it is infused with the reconciliation of values and objectives restored and understood through the filter of constitutional principles. “Private property” presupposes a political and social system that guarantees it in the Constitution. So it is because the Constitution recognizes the right to property, to a greater or lesser extent, so that a private economic field will be admitted. The meaning and content of this right are directly linked to the evolution of the State and are reflected in the limitations or restrictions to which it may be subjected.

In short, there is a clear conditioning of the various branches of law, which is carried out directly by constitutional principles, or at least by the cultural and ideological conceptions underlying the Constitution or accepted by it. This corresponds to what can be called the primary dimension of constitutionalization. We could also speak of *generic conditioning*: constitutionalization occurs as all branches of law proceed from basic fundamental concepts (axiological, politico-cultural, or socio-economic) on which the organization of a political society is based and which become embedded in the Constitution.

II.B.

But this approach is obviously not enough anymore to cover the whole issue. The “constitutionalization” of law alludes to something much more intimate and diffuse, and in some respects more indistinct, which we can refer to as permeation—a word introduced by Dean Favoreu.

In its dynamic sense, constitutionalization refers to the diffusion of constitutional provisions in the legal system, which leads the general norms to be gradually regulated and modulated by them.¹³ It conveys the

12. F. Mélin-Soucramanien, “Le principe de la garantie des droits de la défense. Le point de vue du constitutionnaliste,” in *Droit constitutionnel et grands principes de droit pénal*, Actes & études, Cujas, (2013), 69.

13. This means, in the words of Dean Louis Favoreu, that “a field or a legal discipline is influenced by constitutional provisions and that, without being replaced by them, the rules governing the said discipline must now be applied and interpreted while taking into account constitutional requirements.” This results in a “progressive coloring of the legal order” through

goal of making the constitutional principles effective and the fulfillment of this requirement, and it defines accordingly a relationship of effectiveness between the principles of the Constitution and the “branches” of law, and even a direct normative effectiveness of constitutional principles on the conformation of institutions and private legal relationships themselves. Technically, it gives a name to the increased role of constitutional norms in the resolution of conflicts, including between private actors, and to the influence of these norms on legal, regulatory, and jurisprudential productions.

In France, this contemporary notion is the result of the (re)valorization of the Constitution’s normative force. It developed as the Constitution asserted itself as a material reference point of the legal order and claimed to be legally effective. We cannot go back to the reasons for this change as it would force us to recount the tormented history of constitutional justice in France. We will simply recall that they involved asserting some major precepts aimed at activating constitutional normativity. In this light, constitutional principles are true legal principles; they integrate the positive legal order, and they play a role in its application, even without the mediation of the legislator. The idea of constitutionalization is associated with the rediscovery of constitutional sources and an expansive effect of constitutional norms, whose material and axiological content is spread throughout the legal system.¹⁴

As seen in the writings of Dean Favoreu, it accompanies the fundamentalization of constitutional law and is quite widely measured by the influence of fundamental rights and freedoms. Professor Michel Fromont, in his article published in the “Mélanges Eisenmann” collection in 1974, introduced the concept into French law from its German origin¹⁵ and thus became its inspired conveyor. This original conceptual association, which fueled a debate with the “fundamentalists,” is certainly not irrefutable, neither in general (constitutionalization is also based on the principle of equality and the principle of proportionality, which have a much broader spectrum of applicability), nor in particular (the notion of “fundamental” law is used by the French Constitutional Council). But the performative power of constitutionalization has fueled, more than this

constitutionality: L. Favoreu, “La constitutionnalisation de l’ordre juridique. Considérations générales,” *Revue Belge de Droit constitutionnel*, (1998), 233.

14. Luis Roberto Barroso, “Le néoconstitutionnalisme et le constitutionnalisation du droit. Le triomphe tardif du droit constitutionnel,” (2006).

15. M. Fromont, “Les droits fondamentaux dans l’ordre juridique de la République fédérale allemande,” *Mélanges Eisenmann*, 9.

differentiation has altered, the reality of the phenomenon in positive law. Legal knowledge, like any other scientific knowledge, can become self-fulfilling as pragmatist sociology teaches us. The law is partially constitutive of the reality it regulates.

Constitutional justice, of which Dean Favoreu was the tireless propagator, is by its very institution the contemporary instrument for achieving this projection of a *constitutionalized law*.¹⁶ But its effectiveness owes much to the establishment of the legal means particular to the duty of the Constitutional Courts responsible for the application and observance of the constitutional norm, with regard to laws and other provisions of ordinary law. In a way, it is the procedural aspect of constitutionalization which makes it possible to say whether constitutionalization did or did not take place.

Once we have made these clarifications, we could think that the question today is not so much whether the constitutionalization of law has taken place (it is not disruptive) but to assess the degree of constitutionalization and determine its scope. However, are we only capable of measuring it when we are faced with the difficulty of isolating this phenomenon within the complex set of normative production and the intricacy of jurisprudential relationships? While the French jurists are all aware of the reality of the process (even those who resent it), they know only partially how to assess the exact impact of constitutionalization on the production of legal solutions. But at least we know that the constitutionalization of law is neither automatic nor a single, identical process, and we know its levers. And it is with regard to them that we can check whether they all apply in France, today more than yesterday, which we believe to be the case.

III. THE CONDITIONS FOR ACHIEVING CONSTITUTIONALIZATION

Some authors have attempted to establish these conditions.¹⁷ For us, there are essentially three conditions.

16. Not. L. Favoreu, "L'influence de la jurisprudence du Conseil constitutionnel sur les diverses branches du droit," *Itinéraires*, Etudes en l'honneur de Léo Hamon, *Economica*, (1982), 235; "La constitutionnalisation du droit," in *L'unité du droit*, Mélanges Roland Drago, *Economica*, (1999), 25. See the commemorative publication, L. Favoreu, *La Constitution et son juge*, *Economica*, (2014).

17. See Ricardo Guastini, "La 'constitucionalización' del ordenamiento jurídico: El caso italiano," in Miguel Carbonnel, *Neoconstitucionalismo(s)*, (2003), 49.

III.A.

First condition: The Constitution must include substantial rules which can be applied usefully in the various branches of law. This proposal calls for two sets of observations.

First of all, it is not measured, as we often say, by the length of the list of rights and freedoms and their demonstrative presence in the body of the constitutional text. Here, judges (not only the Constitutional Council) play a key role through their interpretations sometimes creative and (re)structuring. Let us take for example contract law: if both the contract and liability are, in the Constitution, deprived from any textual ground, it has not prevented the Constitutional Council, much to the contrary, from gradually building a body of solutions.¹⁸ Another example, in the field of environmental law, the effective scope of rights is not limited to the Constitution itself, it is also the judge who not only recognizes new obligations (such as vigilance) but also principles of direct applicability and enforceability . . . which command the realization of rights.

Secondly and briefly, Constitutionalization manifests itself in the material supremacy of the Constitution. According to Michel Verpeaux, it is indeed a “legal and moral supremacy which explains that constitutional rules serve as basis or foundations to other rules.”¹⁹ The French situation makes certain that the Constitution does not fall victim to directly political contingencies. On the one hand, the French Constitution presents itself as an accumulation or a sedimentation of texts that are more than two hundred years apart. On the other hand, the more recent additions benefit from the grandeur of older texts and rely on a strongly asserted unity of legal value.

III.B.

The second condition is the existence of mechanisms adapted to the dissemination of constitutional norms. The Constitutional justice system plays this role, with varying degrees of speed and effectiveness depending on whether it operates under limited or otherwise developed review procedures.

Obviously, the opening of the incidental review (QPC) in France, effective since 2010, has increased the number of situations where we

18. N. Molfessis et al, “Le Conseil constitutionnel et le droit des biens et des obligations,” in *Nouveaux Cahiers du Conseil constitutionnel*, (2011), no. 31.

19. M. Verpeaux, “Brèves considérations sur la constitutionnalisation des branches du droit,” *Revue française de droit administratif*, (2014), 1203.

encounter each branch of law. A civil, criminal, tax, or commercial case can no longer be apprehended solely through its civil, criminal, fiscal, and commercial dimension, since the constitutional argument is looming and it will sooner or later be mobilized, or even constitute the issue of the dispute. It would be excessive to say that the Constitution is the backdrop of all litigation but also equally excessive to consider that judicial actors are exempt from thinking about it. The French QPC has given another dimension to the dissemination of constitutional logic. It appears today to be the privileged channel of influence for the Constitution, partly because of the multiplication of appeals, which—little by little—make it possible to examine the conditions for the application of structuring rules in every field. In this way Constitutionalization accelerates mechanically.²⁰

In this regard, the French experience makes it possible to moderate the answers usually given to the question of whether there is a privileged procedural instrument favoring or accentuating the constitutionalization of the branches of law. Sometimes the same virtue can be achieved by concrete review and direct appeal.

III.B.1.

When constitutional review develops in the context of applying constitutional norms to concrete situations, it has apparently a more powerful constitutionalizing effect. This is a rather widespread idea, both in France and elsewhere, that forms the background of the debate on the alleged—and allegedly inevitable—objectification of the QPC review.²¹ It is not without intuitive common sense: the constitutionality of ordinary rules seems better adjusted where the scope of constitutional principles and their normative impact, as well as the implications of constitutional solutions adopted, may appear clearer and more concrete. Here, Constitutionalization would be more sensitive than abstract review. In fact, it is within this form of review that the “mediation” between constitutional law and ordinary law has occurred in most systems, not only under American law and the constitutional jurisprudence of the Supreme

20. For example, to illustrate this dynamic, see P. Jourdain, “La constitutionnalisation du droit de la responsabilité civile, le droit français,” *Responsabilité civile et assurances*, March 2016, study no. 4. The author points out that in this field, the Constitutional Council was initially hesitant. The grounds for the first decisions were erratic, varying from one decision to the other, and not conducive to generalization. Then the decisions made as a result of QPCs allowed the Council to clarify its doctrine and set out principles through much more advanced grounds.

21. On this matter, we will take the liberty of referring to our contributions in *La question prioritaire de constitutionnalité. Approche de droit comparé*, Bruylant, coll. A la croisée des droits, (2014).

Court of the United States, but also in Europe through the promotion of the concept of full applicability.²² In this regard, however, it is possible to issue two reservations.

On the one hand, in the global context, it is necessary to be aware of the poor application of constitutional law in many countries which, precisely, develop concentrated and abstract review to correct what is perceived as a weakness of diffuse review. In South America, the latter is often seen as a source of multi-specialization, division of constitutional law and low effectiveness.

On the other hand, the mediatory function of normative review can also be observed in the context of abstract review, whose contribution can be assessed in the context of mixed models. Portugal is a good example, for it is not possible there to refer matters to the court for direct constitutional review of situations or private relationships, that is, for the direct application of constitutional principles to those situations or relationships. And the French case, with its QPC, testifies that abstract review is an equally powerful driving force for constitutionalizing the branches of law.

III.B.2.

Moreover, the procedural instrument of direct appeal with an expanded field, as in Germany, or the Spanish remedy of Amparo, can quickly be transposed as the standard of constitutionalization.²³ It translates into giving individuals leave to appeal to the Constitutional Court against any public authority's decision, including judicial decisions, on the basis of a violation of a fundamental right. Could it be the alpha and omega of the constitutionalization of law?

It is not quite so clear-cut. The power of direct appeal is associated with the direct subordination of *situations* or *private relationships* to constitutional principles, which is a preferred means of constitutionalization. In comparative law, the issue has at times been of particular significance, especially with reference to the extension of certain fundamental rights' compulsory force to "private entities"

22. Thus, Article 1, paragraph 3, of the 1949 German Basic Law states: "*The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law,*" a phrase which in turn has been used in the 1978 Spanish Constitution, Article 53, paragraphs 1 and 3. Article 35, paragraph 1, of the Federal Constitution of the Swiss Confederation states that "*Fundamental rights must be upheld throughout the legal system.*"

23. Still recently in that sense, see N. Bucher et T. Riehm, "Le recours constitutionnel, vecteur de constitutionnalisation du droit privé allemand," *Revue Trimestrielle de droit Civil*, (2017), 811.

themselves. Here we are thinking especially of the unprecedented statement, as far as we know, found in Article 18, paragraph 1 of the 1976 Portuguese Constitution.²⁴ This is based on the recognition of the *Drittwirkung* of fundamental rights,²⁵ or if one prefers (although the spatial metaphor is not without a downside) the “horizontal effect” of fundamental rights is when fundamental rights are applicable to private persons by other private persons. It is in a way the constitutionalization of intersubjective relationships. This theory is known in France—Rivero defended it—but it has been viewed differently.²⁶ These horizontal effects have a more limited scope. They have distinguished themselves in the field of the right to privacy, but especially around the principle of equality in that a weaker person is influenced by a stronger person, for example in his or her work relationships, or in gender equality.

In short, from the viewpoint of the process of constitutionalization, the systems of constitutional justice stand in relief depending on whether they are limited to the constitutional review of legal *norms* as it is commonly understood.²⁷ It is clear that when, as the German Constitutional Court specifically states, the fundamental constitutional

24. This article states: “*This Constitution’s provisions with regard to rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies.*” In another context, the Federal Constitution of the Swiss Confederation also states that “*The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons*” (Article 35, paragraph 3).

25. The German theory distinguishes the direct horizontal effect (*mittelbare*) from the indirect horizontal effect (*unmittelbare*). The former was carried out by the former President of the Federal Labor Court, Hans-Carl Nipperdey, and aims to allow judges to apply constitutional rights directly to relationships between private persons, considering that these rights directly apply to individuals by imposing on them obligations similar to those imposed on the bodies of state power. The latter, which prevailed (Lüth, January 15, 1958), was developed by Professor Düring and indicates that it affects relationships between private persons through compulsory rules and general principles of private law. The dissemination of fundamental rights throughout the whole law is achieved through their objective dimension. The recent German doctrine bases this theory on the positive obligation, incumbent on the State, to protect fundamental rights in a purely private dispute which would affect such rights.

26. See D. Ribes, *L’Etat protecteur des droits fondamentaux: recherche en droit comparé sur les effets des droits fondamentaux entre personnes privées*, thèse Aix-Marseille, (2005). Rapp. A. Seifert, “L’effet horizontal des droit fondamentaux, Quelques réflexions de droit européen et de droit comparé,” *RTD Eur.* (2012), 801. On the comparative analysis of the debate in France, see O. Beaud, “Les obligations imposées aux personnes privées par les droits fondamentaux: un regard français sur la conception allemande,” *Jus Politicum*, no. 10, (2013). For an illustration of constitutionalization linked to the consecration of constitutional requirements in terms of rights and freedoms relating to relationships between private persons, see I. Odoul-Asorey, *Négociation collective et droit constitutionnel. Contribution à l’étude de la constitutionnalisation des branches du droit*, LGDJ, coll. Bibliothèque de droit social, (2013).

27. Here, the reference to the legal norm would not include, for example, contractual norms or jurisprudence.

rights “reveal an objective order of values which must be the constitutional choice of all the branches of law,”²⁸ the dissemination effect of the fundamental rights (*Ausstrahlungswirkung*) is more aggressive. It is also clear that this influence is intensified by the possibility for the constitutional jurisdiction to review, within the framework of the direct appeal, the interpretation of a dispute by an ordinary jurisdiction.

When this is not the case, the constitutional order is not more neutral and constitutionalization is not nonexistent, but the constitutional jurisdiction participates in the compliance process only by reviewing the norms themselves and not immediately the concrete situations or the horizontal relationships. Then, it is up to ordinary courts, within their jurisdiction, to assume the constitutional supervision of ordinary rights. The task is easy when the courts generally have the possibility to refer directly to the Constitution, in the systems where this possibility is acknowledged. The courts then play a significant role in the constitutionalization of law.

III.B.3.

At first sight, the situation is less obvious in France for two connected reasons.

First of all, the participation of ordinary jurisdictions in the normative review is less clear²⁹ and the constitutional review of their jurisprudence less established. On this last point, it is necessary to remember that the French QPC asserted itself as a right to dispute the constitutionality of the impact given to a legislative provision by the *Conseil d’Etat* and the Court of Cassation through their interpretation. However, this right does not allow the direct criticism of jurisprudence by itself, nor the possibility to dispute either judicial decisions as jurisdictional standard or the combined interpretation of legal provisions. The window of opportunity is narrower but not nonexistent. In the French system, the constitutional review of the jurisprudence is still widely exercised by the supreme jurisdictions themselves (*Conseil d’Etat* and Court of Cassation). The difficulties caused by the unclear boundaries between the judge who makes the

28. BVerfGE 7, 198 [205] I, Lüth, January 15, 1958.

29. Let us remember that in order to be examined by the Constitutional Council a QPC must first be referred to that body by the *Conseil d’Etat* or the Court of Cassation (if necessary after a first examination before ordinary jurisdictions). This first examination is about appreciating the “seriousness” of the question asked. This activity cannot be compared to a constitutional review but its true nature fuels a debate around the existence of a “negative” constitutional review exercised by these jurisdictions, while the French system rests on a centralization of the review by the Constitutional Council.

referral to the Constitutional Council and the one who gives the interpretation, and the underlying institutional stakes,³⁰ should not hide the substantive process. These courts do not hesitate to give an interpretation in accordance with the Constitution when examining the application for referral, nor to reverse a decision in order to align their jurisprudence with that of the Constitutional Council. In that respect, if the QPC does not formally allow the review of the substantive law as a whole, nor the normative process of interpretation itself (unlike the German direct appeal), it still has a visible influence on the interpretation method of the judge and the legal method generally.

Secondly, the dissemination of constitutional norms rests on the ability of the Constitutional Council to impose an interpretation in compliance with the Constitution despite the lack of enforcement mechanisms in the event it is not being followed.

III.C.

This is precisely the third element that we need to consider in the diagnosis. The other actors in the legal system must participate in the development of constitutionalization.

III.C.1.

It is, on the one hand, the role of the administrative and judicial courts to receive and relay the constitutional norms interpreted by the Constitutional Council.³¹

They do so even if it means reforming their own jurisprudential constructions, as did the Conseil d'Etat for example to ensure the constitutionality of environmental law by readjusting its theories (starting with the implicit repeal and the theory of balance) and principles (particularly the independence of urban planning laws).³²

Above all, they do so more clearly today, especially in their role as “doormen” or “gatekeepers” for the QPCs and, after some resistance (which was also the manifestation of an opposition to constitutionalization

30. For this matter we will refer to M. Disant's article “Le contrôle par les juridictions suprêmes de leur propre jurisprudence. De l'exception jurisprudentielle en QPC,” in M. Fatin-Rouge Stéfani and C. Severino (eds.), *Le contrôle de constitutionnalité des décisions de justice*, ed. CNRS, coll. Confluence des droits, 269-280.

31. On the topic, see M. Disant, *L'autorité de la chose interprétée par le Conseil constitutionnel*, LGDJ, (2010), preface by Jean-Louis Debré and Patrice Gélard.

32. See Y. Aguila, “Les acteurs face à la constitutionnalisation du droit de l'environnement,” *Nouveaux Cahiers du Conseil constitutionnel*, (2014), no. 43, which alludes to “concentric circles.”

and a certain remoteness from the Constitution), in the implementation of criteria for transmitting referrals to the Constitutional Council. To the point that this participation can sometimes appear as an interference in the constitutional review itself, revealing all else being equal an appetite long denied for the constitutional substance.

They do so generally as well when they roll out even more strongly, including compulsorily, the absolute effects of reservations (*les réserves*) of interpretation formulated by the Council,³³ in which Dean Favoreu discerned the subtle vector of constitutionalization. Article 62 of the Constitution allows the Constitutional Council to impose an interpretation in accordance with the Constitution, without significant reluctance, which is often copied and incorporated into legislation by the legislator. A criminologist, probably accustomed to the continued presence of the process in his discipline, could thus point out, even before the coming forth of the QPC, that “the reservation of constitutional interpretation technique must be integrated into the theory of criminal law sources in that it inserts itself between the Constitution, which is the basis for the legal system, and the law, which the criminal judge will have to apply.”³⁴

III.C.2.

But there is also a role for the litigants to play, without which nothing would be possible . . . which is why constitutionalization presupposes an acclimation to constitutional law, a constitutional culture among legal professionals, which today takes the form of a “constitutional reflex” that if not fully achieved is at least sought out, and promoted by the QPC. Empirical analysis is still lacking to arrive at a definitive conclusion, but the presence of the constitutional argument has undoubtedly increased in stature.

In this respect, we should not focus solely on judicial culture while neglecting the popular culture of the Constitution, which is still in its infancy in France. There is still a long way to go for the Constitution to inspire and structure public debate on all social issues, so that citizens “take ownership of the Constitution” as the authors of the 2008 reform have said. Whether one approves of it or not, the current aspiration in France to constitutionalize climate protection, public ethics, local identity, transparency or digital technology, testifies to the fact that public opinion

33. Two remarkable recent examples: CE, 8 juin 2016, *AFEP*, Leb.; Cass. soc., September 14, 2016, no. 16-40223.

34. G. Royer, “La réserve d’interprétation constitutionnelle en droit criminel,” *R.S.C.*, (2008), 825.

appeals to the Constitution and considers it even more as a founding document, beyond what the courts claim. In these circumstances, the Constitutional Council's communication and promotion activities among an enlarged audience are not insignificant: support for the publication of popular educational and civic works (*Raconte-moi le Conseil constitutionnel*) ["Tell me about the Constitutional Council"], the organization of the first "Night of the Law" on October 4, 2017, a general competition in schools with an suggestive title "Discover our Constitution," presentation of an annual report on the activities of the Constitutional Council, various communication systems, all of this calls for research projects to stimulate evaluative works on the effects of the QPC. All this is part of a process of acculturation to the Constitution and consolidation of the position of the Constitutional Council as a public institution that fully assumes its function in cultural, social and democratic life.

IV. THEN, WHERE ARE WE NOW?

In the 1990s, especially at a Congress held in Dijon,³⁵ those in favor of the constitutionalization of the branches of law wanted others to acknowledge the position of the Constitution, the constitutional judge and litigation, which were often criticized. One will remember how, just twenty years ago, the constitutionalization process could still face strong opposition, being seen as a threat and a usurpation of the powers of the Conseil d'Etat and the Court of Cassation.³⁶

IV.A.

Today, the time for conquest has passed. The "interdisciplinary" nature of the constitutional text is witnessed weekly in QPC decisions. It has become ordinary. All this without the possibility to ascertain, or rather refute, the quite vain fears that the thriving of constitutional law as a legal and contentious discipline can be assimilated to a conquest of public law over private law—even if, moreover, the dispute between the publicization of private law and the privatization of public law has not necessarily faded away.

35. B. Mathieu and M. Verpeaux, *La constitutionnalisation des branches du droit*, Economica, Actes du 3ème Congrès de l'AFDC, coll. Droit public positif, (1998).

36. See the debate on this topic in G. Drago, B. François and N. Molfessis (eds.), *La légitimité de la jurisprudence du Conseil Constitutionnel*, LGDJ, coll. Etudes juridiques (1999), from a symposium held in Rennes in September 1996.

Thus, there is no disciplinary supremacy. No branch of law has or will ever have a monopoly on the Constitution and constitutional review. Moreover, the history of law teaches us that the French courts, even the Court of Cassation, have always considered the Constitution a legal text to which they could resort, even if they have been able to refrain from doing so. The constitutionalization of the branches of law is not inward-looking, on the contrary.

Moreover, the *summa divisio* of law, so typical in the French legal system, was not replaced by a constitutional *summa concentratio*. Fortunately, this critical analysis of a “constitutionalization-conversion” did not take place. In fact, it has never really been considered, except to unsuccessfully discredit the originally very subversive initiative of connecting both the constitutional and ordinary worlds.

Constitutionalization has never been intended to replace the civil, criminal, or administrative laws with constitutional norms. The propagation of the doctrine of “living law” in the review performed by the Constitutional Council testifies very clearly to the fact that the material law of these branches existed prior to the intervention of the constitutional judge, which Dean Vedel called “the precedence of non-constitutional law over constitutional law,”³⁷ another way of saying that “the Constitution was built on the law and not the law on the Constitution.”

Naturally, the intervention of the Constitutional Council is likely to redraw the lines and reassess methods, and it is understandable that this sometimes appears to be unwise or adventurous when a constitutional concept disrupts the balance of the field in question.³⁸ But, in fact, constitutionalization is often akin to consolidation, not opposing the different movements of law but integrating them into the constitutional order. We might almost feel a bit disappointed when this is not the case, which is what happened to the civil-law scholars for example when the Constitutional Council refused to constitutionalize either Article 1382 (now 1240) of the Civil Code or the principle of full reparation that is generally attached to it.³⁹ This does not prevent the Council from expressing its attachment to the principle of fault-based tort law, which

37. G. Vedel, “Aspects généraux et théoriques,” in *L’unité du droit*, Mélanges Roland Drago, Economica, (1996), 6; rappr. “Réflexions sur quelques apports de la jurisprudence du Conseil d’Etat à la jurisprudence du Conseil constitutionnel,” Mélanges René Chapus, Montchrestien, (1992), 657.

38. For instance B. de Lamy, “Juridictionnalisation de la procédure pénale: l’aventureuse constitutionnalisation du ‘droit à,’” *RSC*, (2016), 393.

39. For instance P. Jourdain, “La constitutionnalisation du droit de la responsabilité civile, le droit français,” *op. cit.*

they consider a constitutional requirement and which they induced from Article 4 of the 1789 Declaration and the fundamental right to freedom which it proclaims.

IV.B.

The testimonies, manifestations, and illustrations are innumerable both of the generalization and of the recurrence of the constitutionalization of the branches of law. We will not list them all here. This undertaking would require the mobilization of civil, labor, criminal, tax-law specialists, among others. Let us just say, as a basic representation, that these phenomena are observed in the different disciplines with more or less consistency. It seems that the empirical search for methods of acculturation and reception of the constitutional substance offers broad interdisciplinary fields of research.

At this stage, a bibliographic study is sufficient to measure how much in France the authors of different disciplines, both in the academic and professional worlds, include this phenomenon in their analyses. Several contributions dealing with civil social, administrative, and economic law had already been devoted to it in the publication for the fiftieth anniversary of the French Constitution. But we have no choice but to recognize the accentuation and generalization of this reference document. Constitutional sources are addressed in every “Grands arrêts” edition, including the publications of “Grands arrêts de la jurisprudence civile,” those of criminal case law or, more recently, the publications of “Grandes décisions du droit des personnes et de la famille.”⁴⁰ Every variation of constitutional law is the subject of a volume in *Jurisclasseur* (a professional reference book), including constitutional civil law, constitutional labor law, constitutional business law, constitutional tax law, and so forth. Generally speaking, although the generational phenomenon must be taken into account, the echo is significant in the main textbooks, including previously less suitable fields such as social security law,⁴¹ welfare and social action law,⁴² urban and construction law,⁴³ public service law,⁴⁴ but also of course economic law,⁴⁵ procedural law,⁴⁶ and

40. A. Bateur (ed.), LGDJ, (2016), 2nd edition.

41. J.-J. Dupeyroux, M. Borgetto, R. Lafore, Dalloz, (2011).

42. M. Borgetto, R. Lafore, Montchrestien, (2012).

43. J.-B. Auby, H. Périnet-Marquet, R. Noguelou, Montchrestien, (2012).

44. F. Melleray, *Economica*, (2013).

45. J.-Y. Chérot, *Droit public économique*, *Economica*, (2007).

46. On Civil procedure, see in particular S. Guinchard et G. Drago, “Droit constitutionnel et procédure civile,” *Répertoire Dalloz*, octobre 2018. Particular mention should be made of the

territorial authority law.⁴⁷ Significantly, President Stirn entitled his reference work “The Constitutional sources of administrative law. Introduction to public law.”⁴⁸ It is the entire constitutional corpus that inspires his “General introduction to law” which is usefully built on the contemporary system of sources.⁴⁹ And, of course, the evolution of these “rights seized by the Constitution,” to use Dominique Rousseau’s terminology, finds its proper place in the works on constitutional litigation and in the encyclopedias⁵⁰—which express its jurisprudential policies. Significant research in the different disciplines is now devoted to this⁵¹ and appears in the multiple footnotes and articles that regularly discuss, in the wide range of specialized magazines, the “contribution” of the QPC in a given field.

Unless we all fell victim to an illusion, and whatever the assessment, whether criticism or regret, it cannot be denied that this movement is quite common today. At times very developed, it is occasionally more limited and reduced. In any case, it is very difficult to identify disciplines outside the process or immune to it, or within some blind spots of constitutionalization. The constitutional review of the law is not subject to any special restriction or modulation, either in terms of method or the parameters of review. Private law norms are not treated differently from public law norms. Because it embraces the entire objective law, constitutional review is strictly indifferent to the branches of law; none is excluded, none is favored. There is no Constitution “à la découpe” (in pieces).

pioneering work of Dean Serge Guinchard who highlighted the phenomenon from the 22nd edition of his *Civil Procedure* manual (Précis Dalloz) in 1991, in his Handbook of *Jurisdictional Institutions* (Précis Dalloz) since the 3rd published in 1991 and in its manual of *Procedural Law* (Précis Dalloz) since its creation in February 2011. For a resumption of the phenomenon even in more reluctant authors, for instance L. Cadet, J. Normand, S. Amrani Mekki, *Théorie générale du procès*, PUF, (2010).

47. B. Faure, *Droit des collectivités territoriales*, Dalloz, coll. Précis, 4th edition, (2016). “Only thirty years ago,” the author wrote, “it would have been impossible to start a teaching of territorial authority law with the Constitution” and to add that “we could not do without it now” (p. 20).

48. B. Stirn, *Les sources constitutionnelles du droit administratif. Introduction au droit public*, LGDJ, (2011).

49. P. Deumier, *Introduction générale au droit*, LGDJ, (2011).

50. For instance A. Jeammaud and A. Lyon-Caen, “Suprématie de la Constitution et droit social,” in *Traité international de droit constitutionnel*, Dalloz, (2012).

51. For instance A. Cappello, *La constitutionnalisation du droit pénal, pour une étude du droit pénal constitutionnel*, Thèse, LGDJ, (2014); L. Philip, *Droit constitutionnel fiscal: évolution d’une jurisprudence*, Economica, (2014).

IV.C.

The varying nature and level of permeation does not alter the reality of the phenomenon. It simply leads to three final comments on the French situation.

On the one hand, this permeation depends widely on the judicial activity of the Constitutional Council (and hence on that of the legislator), on its request and assessment abilities in order to draw strong lines, sometimes beyond micro-constitutional disputes. This is also due to the pedagogical qualities of constitutional decisions, to the knowledge and reception forms according to the branch of law in question, and to the legal culture of those practicing it. And of course, it is important for the Constitutional Council to increasingly promote the systematization of their review, criteria, and reasoning.

On the other hand, under the current system, given the narrow space in which the Constitutional Council must maneuver, it is rather inappropriate to use certain technical conditions aimed at increasing the appropriation of the Constitution. Thus, the opening of the constitutional proceedings to third parties and litigants has made significant progress with the QPC, to the point of making the French constitutional jurisdiction one of the most open to the admissibility of such interventions. But this participation in the debates which take place before the Constitutional Council following the transmission of an application for a priority preliminary ruling (QPC), which supports so much the buy-in by individuals in systems influenced by Common Law, remains legitimately conditioned by very short ruling deadlines⁵² that ensure the efficiency of the procedure. Moreover, in view of the excesses and instrumentalization of the *amicus curiae* procedure from which these systems suffer, we agree that this “ratifies the relevance of the choice made by French law.”⁵³ Let us beware of what remains in France a fantasy, which is to contemplate constitutional proceedings as a great forum of communion around the Constitution.

Finally, the strength of constitutional review and its ability to make an open discussion possible must be considered in the light of the review techniques and levels implemented by the Constitutional Council. There

52. The Constitutional Council must rule within one month for the *a priori* review and within three months for the *a posteriori* review (QPC).

53. E. Zoller, “L’influence des tiers dans le procès constitutionnel en droit français: une comparaison avec le droit des Etats-Unis,” in *Les pouvoirs d’instruction des juridictions constitutionnelles et la formation de l’intime conviction des juges constitutionnels*, PUAM, Cahiers de l’ILF no. 6, (2016), 35.

is no activism on the part of the French constitutional judge but, on the contrary, the will to avoid any major interference in social issues and to limit its review when judging social and even economic disputes. This is of course not a particularity of French law as this hesitation is shared in comparative law (Belgium, Switzerland, Portugal, Spain, Italy, Canada, etc.). Nevertheless, in light of the accepted formula that the Constitutional Council “does not have the same discretion as that of Parliament,” it is understandable that the influence of constitutional jurisprudence is less discernible when it moves, as in the case of family law, in the same direction as the legislator on these issues.

As a conclusion, which is not really one, it seems that we cannot appreciate solely the utility of constitutionalization through the weight of constitutional jurisprudence related to such and such discipline. The same applies to the major innovations, which are not solely the result of the solutions that can be reached through the constitutional approach. What matters is the increased awareness of the method and qualification which must be identified for the limits imposed on judicial freedom and the possibility of extracting from those limits a *jus commune*. The value added is due to an *immersion* of the branches of law and the judicial interpreters in a broader judicial-constitutional culture. The process is not one-sided because, as the use of the QPC has shown, the request for constitutional law is made *through* disciplined questioning—which moreover can, in a radical version, foster the idea that we should withdraw constitutional issues from constitutionalists who are under the influence of inductive reasoning. Some people do not hesitate to evoke in an excessive manner the loss of scientific interest for a discipline that no longer has its own independent object, that is, one which disappears in the field of each of the other branches of law. If we must avoid the risk of fractionating constitutional fields, still we are decidedly far from a self-centered constitutional drift.

V. SUMMARY

The uses of the word “Constitutionalization” and what it refers to are evolving. They include a complex reality which makes the Constitutionalists wonder about the state and future of their discipline. Constitutionalization summarizes in one word the aspiration to *become Law*. Technically, the processes of constitutionalization refer to hetero-limitative analyses, within a legal system, highlighted by the jurists who wonder, one way or another, about the role of constitutional provisions *in*

and *on* the law. This Article offers an analysis of the situation in France, while we recently celebrated the 60th anniversary of the French Constitution, on October 4, 2018, and the 10th anniversary of the constitutional amendment which introduced in July 2008 the incidental constitutional review with the “Priority Preliminary Ruling on the Issue of Constitutionality” (QPC in French). Analyzing the mutations at work in France, while confronting them with comparative experiences, offers a broader perspective on the concept of constitutionalization of law. The French case, for instance, with its QPC testifies that the abstract constitutional review is an equally powerful driving force for constitutionalizing the branches of law.