CONSTITUTIONAL JUSTICE AND CONSTITUTIONAL POLITICS IN FRANCE

Policy arguments in the case law of the Constitutional council

Introduction

1) *The framework of Constitutional justice in France*. From its creation in 1958 up until 2008, the Constitutional council (*Conseil constitutionnel : C.C.*) had stood apart from most other comparable constitutional courts in the west in that it only reviewed acts of parliament *before* they entered into force. This model of a priori abstract review was (and still is) embodied in two main constitutional provisions. Under article 61 (2) C:[1]

> 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 (...).[2]

Article 54 C creates another procedural vehicle for constitutional review. It has a separate purpose, namely to allow for a check on the compatibility between treaties and the Constitution before those treaties are ratified:

> 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 involved may be given only after amending the Constitution.

Since the constitutional reform of 2008, a new mechanism permits individuals to challenge statutes already in force that infringe their constitutional rights:

[1] Article 61 (1) C creates a procedure of mandatory review for organic laws, referendary bills, and the standing orders of the houses of parliament.

[2] All the translations of the 1958 Constitution (quoted as 'article xx C' used in this article are from the *Légifrance* website: www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/la-constitution-du-4-octobre-1958.5071.html.

> If, 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 by the *Cour de cassation* to the constitutional council, within a determined period.

This new procedure of preliminary reference,[3] known as *Question prioritaire de constitutionnalité,* has not, however, induced the court to significantly alter the way in which its cases are drafted. The court's 'style' has remained essentially the same.

2) *The Constitutional council's judicial style*. The C.C. has developed a case law that is widely seen as having improved the rule of law and the protection of civil liberties. It has, it is often said, given France the bill of rights that was missing in the 1958 constitution. Few members of the general public bother to read the court's decisions. But the general point of view among legal academics is that the court's judicial style is satisfying. While the early cases were very short and did not seem to give adequate reasons, this has changed. 'Today, while not reaching the size of foreign constitutional courts, the decisions are lengthy, carefully justified and look like lessons in constitutional, parliamentary, criminal or financial law'.[4] Yet this positive assessment is not unanimous. A minority of observers point to the insufficient amount of reasons given in some specific cases. Words such as 'elliptical', 'obscure', 'incoherent' have been used in doctrinal literature. Mostly, there is a sense that reason giving is insufficient. Certainly, there is no absolute standard. Long cases can lack adequate justification, while *brevitas* has been commended, in some contexts, as a judicial virtue. This is particularly the case in French law, where courts generally prefer clarity – which is equated to brevity – to lengthy opinions. Yet, legal commentators have sometimes been struck by the remarkable brevity of some of the C.C.'s cases. What should we say, for instance, of the reason giving for the 2008 Decision by which the court 'reviewed' an amendment to the standing orders of the '*Congrès*' (a body which is empowered to alter the constitution according to article 89 C) :

---

[3] I use the translation suggested by Gerald Neuman in his illuminating article: 'Anti-Ashwander: constitutional litigation as a first resort in France' (2010) 43 *New York University Journal of International Law and Politics* (2010) 15, p. 17.

[4] D Rousseau, *Droit du contentieux constitutionnel*, 7th edn (Paris, Montchrestien, 2006), p.155.

The (relevant) provisions have been enacted in keeping with article 18 of the constitution and do not violate any other constitutional rule.[5]

This is the lowest possible level of reason-giving that can be thought of. This judicial style has been replicated in responses to the preliminary referrals brought under article 61-1 (*Question prioritaire de constitutionnalité* : QPC). If anything, most 'QPC' decisions are even shorter than the 'DC' ones (those delivered under articles 61 (1) 61 (2) and 54 C). In fact, one commentator deplored the utter 'lack of reason giving'[6] of the important 'QPC' decision of august 2010 regarding the statute reforming the university system.[7]

Hyperformalism

In order to move beyond the intuition that the C.C.'s decision are 'too short' or provide inadequate reason giving, I suggest to make use of what American legal theory has had to say about 'formalism'. Formalism has been defined as 'the theory that all questions of law can be resolved by deduction, that is without recourse to policy, except for questions arising from rules that explicitly require policy argument'.[8] Formalism consists in doing *as if* the solution to legal problems consisted in deducing particular conclusions from more general or more abstract premises. The formalist judge 'applies the rule by establishing that the wording of the rule fits the facts of the case'.[9]

In the case law of the C.C., formalism is not one of several methods that are used in the course of constitutional adjudication: it is the exclusive one. I would therefore submit that the 'style' of adjudication of the C.C. is 'hyperformalist'. In fact, recourse to the deductive mode is self-evident and is never questioned. French courts have never been, it seems, impressed by Oliver W. Holmes' famous remark that 'general propositions do not decide concrete cases'. Hyperformalism is visible in several features of the court's process of decision making: - the principle that judicial deliberations ought to remain secret; - the principle of unanimity: there are no dissenting opinions; - the order in which decisions are drafted, by way of a 'judicial syllogism'.

---

[5] Décision n° 2009-583 DC, 22 June 2009, 'Résolution modifiant le règlement du Congrès'.
[6] O Beaud, *Les libertés universitaires à l'abandon* ? (Paris,Dalloz, 2011), p. 288.
[7] Décision n° 2010-20/21 QPC, 6 August 2010.
[8] D Kennedy, *A Critique of Adjudication (fin de siècle)*, (Cambridge, Harvard University Press, 1997), p. 101-102.
[9] Ibid.

It is as if constitutional 'norms' made their apparition in a moment of judicial epiphany. They appear as self-evident truths whose content, applicability to the case, and implications on the reviewing process, do not stand in need of a justification. Consequences unfold themselves mechanically, in an impersonal fashion, without appearing to require any explanation or demonstration along the way.

1) The court's choice of a certain set of applicable constitutional norms – generally called 'norms of reference' - is never justified. The syllogistic reasoning increases the 'oracular' quality of the court's work. An example of this is the 1971 case in which the C.C. famously decided that the content of the Constitution's 1958 preamble was legally enforceable, as well as – by reference in the 1958 preamble – that of the 1946 preamble and the 1789 Declaration of the rights of man and the citizen. From 1958 to 1971 it was held that the preamble did not have legal force. Yet when the court reversed this position, it did so in a very « minimalist » way, by simply stating that:

> Having regard to the constitution, *and especially its preamble.* … Among the fundamental principles acknowledged by the laws of the Republic and solemnly reaffirmed by the preamble of the constitution, it is appropriate to (*il y a lieu de*) include the principle of freedom of association. This principle is the foundation of … the statute of 1 July 1901.[10]

Why should the 1958 preamble be considered from then on as legally enforceable? Why is it 'appropriate' to count freedom of association as one of the principles to which the 1946 preamble is pointing (although it is not expressly referred to in its text)? No answers were provided in the 1971 case. It is only in 1988 that the C.C. provided some explanations as to the criteria according to which a certain principle should count as a 'fundamental principle acknowledged by the laws of the Republic'.[11]

2) Secondly, this apparent automaticity applies also to the consequences that should be drawn from a comparison between the 'major' premise (the constitutional norm) and the 'minor' premise (the legislative provision). The deduction process, and its possible justifications or alternatives, is entirely opaque. Let me take the example of a decision of November 1986,[12] rendered during the first of those chaotic periods of French politics known

[10] Décision n° 71−44 DC, 16 July 1971, 'Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association' (emphasis added).
[11] Décision n° 88-244, 20 July 1988, 'Loi portant amnistie'.
[12] Décision n° 86-218 DC, 18 November 1986, 'Loi relative à la délimitation des circonscriptions pour l'élection des députés'.

as *cohabitations*. Some opposition parliamentarians had referred a controversial electoral reapportionment bill. The C.C. first spelled out the reference norms applying to the case:
- the principle of equality before the law, drawn from article 2 C.
- article 3 C insofar as it states that 'National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum … Suffrage … shall always be universal, equal and secret'.
- article 24 C which states that 'Members of the National Assembly (…) shall be elected by direct suffrage'.
- article 6 of the Declaration of 1789 which states that the law 'must be the same for all'.

The court went on to state that:

> As a result (*il résulte de ces dispositions*) the National assembly, appointed by direct universal suffrage, should be elected according to bases that are essentially demographic (*sur des bases essentiellement démographiques*).

As far as substantive law is concerned, such a 'deduction' is hardly open to reproach. It was, it seems, perfectly justifiable to translate the democratic principles expressed in the constitution into the 'fundamental rule' (*règle fondamentale*) of *bases essentiellement démographiques* of the reapportionment exercises. This was certainly *justifiable*, yet the case makes no attempt at justifying it. Formalism takes the shape of a minimalist approach to judicial reason giving. No explanation is given as to why this set of constitutional norms should apply to the case. And nothing is said about why and how the 'fundamental rule' should be deduced from these constitutional norms.

This minimalist style is not restricted to the court's control of parliamentary legislation. It also extends to the court's competence, under article 54 C, to control the compatibility between treaties and the constitution, so as to make their ratification possible. The C.C. refers to certain elements of the act or treaty which is submitted to its control without commenting on them. Then, in a separate paragraph, it draws the apparent conclusion that the provision in question is (or not) compatible with the constitution. In commenting on one of the high profile cases regarding the compatibility of the Maastricht Treaty with the constitution, one of the best experts of the court's case law, while approving the decision's substance, regretted this minimalist approach. He spoke of a 'pedagogical disappointment' and a 'lack of explanation':

> The C.C. does not say *in what way* the treaties provisions (have the effect of) jeopardizing the 'essential conditions of exercise of national sovereignty'. It contents itself with

expounding at length the three phases of the creation of the *monnaie unique*, by quoting the relevant articles of the Treaty. It is as if the very fact of mentioning these modalities would suffice in themselves to prove, self-evidently as it were, that they have an adverse effect on these 'essential conditions'.[13]

Justifications

However surprising this approach to judicial review should seem, especially to non-French eyes, it does not lack justifications. At least three such justifications should be mentioned.

1) *The rationality argument*. The C.C. 'has' reasons, but does not 'give' them, at least not in full. An implicit premise of the mainstream doctrinal approach is that judicial review is inherently rational. It is the business of academic commentary to make this rationality come to light by reconstructing it. Certainly, the C.C. does not come up with a great deal of reasons in its judicial decisions, but reasons are there, as is evidenced by the recourse to the 'judicial syllogism'. Hyperformalism, in other terms, is only a radical variety of rationalism. That the C.C. should be rational is also made abundantly clear by the methods it uses to decide cases. The court requires from the legislator that it should legislate rationally. An important aspect of this requirement of rationality is the proportionality principle. The court itself also shows its concern for rationality by treating like cases alike. In other terms, it is very keen to create a body of precedents and stick to it.[14]

2) *The 'if it ain't broke, why fix it ?' argument*. The argument runs like this. Despite its shortcomings, the C.C.'s method has proved its worth. The court's case law has had beneficial effects on the rule of law and civil liberties, and this is what should matter. The advantages largely outweigh the possible inconveniences. Since 1958, and especially since 1971, the C.C. has quashed many bills that violated important constitutional principles, especially in the field of civil liberties. It has created a body of case law that sets guidelines for lawmakers as well as other public authorities. It matters little that the way its members are appointed is somehow questionable. The way in which they decide cases is also of little importance. George Vedel, a famous law professor as well as a member of the C.C.'s panel from 1980 - 1989 has put it this way: 'its irrationality, its rusticity, its empiricism have been some of the ingredients, and not

[13] D Rousseau, *Droit du contentieux constitutionnel*, p. 349-350.
[14] See the remarks of a former member of the judicial panel: D Schnapper, *Une sociologue au Conseil constitutionnel*, (Paris, Gallimard, 2010), p. 289 ff.

the least ones, of its success'.[15] Undoubtedly there is something to this argument. An 'irrational' process brings about a rational outcome. The trick has been seen before. However, how do we know that the outcome is rational? In other words, how can we be so sure that the court's style, the brevity of its cases, the opacity of its functioning are in fact conducive to greater freedom or a better protection for the rule of law? Should one have so much faith in the cunning of reason? Does not western legal culture emphasize the importance of means as opposed to ends? Law is very much concerned with the intrinsic, non-instrumental, value of forms. Reason giving is a formal requirement, yet one on which depends the very existence and manifestation of legal substance.

3) *The deference argument*. Only hyperformalism is consistent with the court's office. This can be expressed in different ways. a/ Courts should not meddle with politics. The court's hyperformalism is a way for the C.C. to refrain from setting foot in the political arena. To quote John Bell : 'the distinction between judging and politics remains embedded in the common understanding of a legal system'.[16] This comment has not aged, and France is no exception. If anything, the distinction is enforced more strictly south of the Channel. b/The court is not an advisory body. In an early case, the C.C. had stated that it had no competence to deliver 'advices' except in the cases provided for by the constitution (as in article 16 C which deals with executive emergency powers).[17] c/ The C.C. is a court and not an academic commentator or a kind of 'philosopher judge' in the way Plato spoke of 'philosopher kings'. This is a variety of the 'separation of powers' argument. It obviously makes a lot of sense. Yet this argument is weakened by several facts. First, the Court has developed a practice of issuing home-made 'commentaries' of its own cases, as well as press releases. They appear on its web site as well as other journals. Secondly, the 'advising' or 'guiding' role of the court is in fact emphasized by its (numerous) supporters as one of its main roles. It is commonplace for legal commentators and the medias to call the C.C. 'the wise' (*les sages*). As other constitutional courts, the C.C. regularly issues reserves of interpretation (*réserves d'interprétation*) by which it interprets statutory provisions in such a way as to render them compatible with the constitution. This removes the venom from the relevant provisions and makes it possible to judge them compatible with the constitution, should they be interpreted according to these guidelines.

---

[15] G Vedel, *Preface* to D Rousseau, *Droit du contentieux constitutionnel.*
[16] John Bell, *Policy arguments in judicial decisions*, (Oxford, Clarendon Press, 1983), p. 1.
[17] Décision n° 61-1 AUTR, 14 September 1961, 'Demande d'avis' ; (1961) *Recueil des décisions du Conseil constitutionnel*, p. 55.

Constitutional Politics in France: the court and political reasons

To sum up: the French constitutional court decides cases in a 'hyperformal' way in which reason giving is limited to a minimum. This practice is justifiable, as we saw. It is in keeping with French legal culture. In any case, it does not violate the constitution. The court is supposed to give reasons for its decisions,[18] and it does so, however sparingly. Yet hyperformalism goes against the tide of contemporary law, in France as well as in most western countries. The duty to give reasons has been constantly reinforced in most courts of law, as well as other public authorities. Contemporary political philosophy (John Rawls, Jurgen Habermas), which thinks universally and normatively, has insisted on the paramount importance of this duty.

My purpose here is by no means to advocate a change in the manner and form of constitutional adjudication in France. It seems more interesting to show that it is related to a very specific approach to politics which permeates French public law. In the French language, only one word – '*politique*' - is used to refer to 'party politics' as well as to 'policy'. French lawyers, as well as the general public, are keen to understand '*politique*' as something which essentially differs from 'law' (*droit*). The office of judges, it is thought, is to say what the law is, not to meddle with '*politique*'. Yet there is more to politics than this narrow approach. It is quite obvious that the constitution itself is a political reality. It purports to provide a framework for political life in a given political community. It is based on a certain understanding of society, a certain set of values. It is meant to constrain the action of political authorities. A French lawyer has gathered some fame by saying that, thanks to the C.C., the law had 'seized politics' (*la politique saisie par le droit*).[19] He meant that, during the first *cohabitation* of a left wing president and a right wing parliamentary majority in 1986-1988, the C.C. acted as a moderator of political strife. The constitution, as stated by the C.C., forced the ministry and the majority to moderation in implementing their political agendas. Yet it is somewhat difficult to understand how exactly 'the law' has 'seized' politics and purified it. Constitutional litigation is inherently political, as well, certainly, as it is inherently legal. It is a commonplace to speak of 'policy-making' on the part of constitutional courts, or of

[18] See the *ordonnance organique* of 7 November 1958 which provides for such a requirement for all the respective competences of the court. The 'advisory opinions' of article 16 C fall under a similar requirement.

[19] Louis Favoreu, *La politique saisie par le droit : alternances, cohabitation et Conseil constitutionnel,* (Paris, Economica, 1988).

'judicialised legislative politics'.[20] Some constitutional cases are the basis, or significantly inform, the conduct of whole areas of public policy. If this is the case, it seems hardly plausible that constitutional courts can indeed steer clear from political activity. It seems more apposite to set aside the unhelpful myth of 'politics seized by the law' – or at least to treat as an element of ideological justification, not of scientific description – and to ask oneself in what way constitutional courts take political reasons into consideration without ceasing to act judicially.

The notion that judges legislate has been a commonplace in english speaking countries since Dicey's 'judicial legislation' and Holmes's 'interstitial legislation'. French legal theory, thanks to Michel Troper, is now familiar with the notion that the C.C. is a 'co-legislator'. If these words are to be taken seriously, this should induce us to look behind the usual explanations of the office of courts in terms of separation of powers. French doctrinal discussion about adjudication and the normative power of courts, however, has not enjoyed the level of sophistication reached in English speaking countries. The usual account remains that the legislation/adjudication divide involves another cleavage between politics (the business of legislators) and law (the role of courts). It would seem that the distinction carries a lot of ideological force in the French context, especially when it comes to providing justifications for the rule-making power of the constitutional court. Yet it has little practical value, and this is the more apparent when this rule-making exercise is performed in the field of constitutional law. It is next to impossible to distinguish the law of the constitution, of which courts would be the guardians, from political arguments, from which they would respectfully stay clear.

As far as the C.C. is concerned, it obviously handles political arguments *lato sensu*. To take only one fairly straightforward example, equality before the law (one of the constitutional principles most frequently referred to in French constitutional litigation) cannot be anything but political. It reflects a political understanding of life in society: that of democracy and democratic values. In France, this principle is central to the idea of a republican state. The C.C. has done a great deal to shape it through a long line of cases. The same obtains of such principles as national sovereignty. What are they if not political? Constitutional principles are rarely anything else than reconfigured politics. This is of course

[20] See eg: A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe,* (Oxford University Press, 2000), ch 3 (*in fine*). Retrieved at: www.oxfordscholarship.com/view/10.1093/0198297718.001.0001/acprof-9780198297710-chapter-3.

not the same kind of politics as the one that takes place in and between parties. It is politics at the level of society as a whole, expressed in legal form. Constitutional courts have become the place where contradicting views of the common good – the categorical imperative of political activity – are confronting each other with a view to becoming the expression of political unity. Constitutional politics is not expressed in the same way as the politics of electoral platforms, party strife, and the other forms of day-to-day political controversy in media or houses of parliament. It might be that some arguments of 'pure law' intervene in constitutional adjudication. But I find it hard to see what 'pure law' could mean in this context. All the possible arguments that come up in constitutional litigation – from the court's jurisdiction to substantive issues – have a political aspect. Every particle of constitutional litigation is politically charged. When the C.C. denied its jurisdiction with regard to constitutional amendments, it quite plausibly did so for reasons that had to with politics.[21] To become 'constitutional politics' – an expression that was frequent in the nineteenth century and has since lost currency – political arguments must be such that they can be expressed in a court of law. The most important 'test' in this regard is not so much one of neutrality as one of universality:[22] in a given community, a political reason that is not acceptable by all has to be cast aside from constitutional adjudication. It cannot be expressed in constitutional form. Be that as it may, the law, especially the law of the constitution, is inherently political insofar as it deals with issues of life in society. Were it not political, it would be irrelevant.

The *Conseil constitutionnel* and policy arguments

In the American and British theory of adjudication, a policy argument comes up as a substantive justification to which judges appeal 'when the standards and rules of the legal system do not provide a clear resolution of a dispute'.[23] The 'policy argument' mode is an alternative to the 'deductive mode'. In France, should the concept of 'policy argument' be in any way helpful, it should be accepted that policy arguments come up in the course of what appears as a fully deductive exercise. The mode of reasoning which is characteristic of French

[21] I take the liberty to refer to: D Baranger, 'The Language of Eternity : Judicial Review of the Amending Power in France (or the absence thereof)', (2011) 44 *Israel Law Review*, pp. 408-410.

[22] In other words, the test can to some degree be compared to Kant's test of universalisability. This is the more so in countries such as liberal democracies of the west where morality is very much understood as consisting mostly of universal, rather than local, cultural or historical, principles.

[23] Bell, *Policy Arguments*, p.23.

constitutional adjudication is, as we said earlier, one of extreme formalism. The C.C., as well as most other French courts, adheres to the notion that legal problems can be solved exclusively through deduction. Duncan Kennedy has summarized the attitude of American lawyers to judicial reasoning as being one that relies upon an implicit distinction between a 'deductive mode' and the mode of 'policy arguments'. In the deductive mode, the judge always reasons from the more abstract and/or the more general towards the more concrete and/or particular. In the 'policy argument' mode, to the contrary, the premise is that 1/ the issue of law is not solved by resorting to a valid rule, and that 2/ the valid norm requires that the judge should take into account some 'non-deductive' reasons in order to choose an inferior rule. In the case of American law, such policy arguments can be: social utility, morality, rights (such as free speech) or other 'legal values' (Kennedy) such as preference for a rule as opposed to an equitable principle.

It will not do to just look the other way and deny that there is a political aspect to constitutional adjudication. What is needed is the methodology to point out what exactly is political in it, and what legal form it takes. One of the virtues of reasoning in terms of policy arguments – a term of art almost entirely unknown in French legal theory and language – is that it helps identify the political dimension in the process of adjudication. I would submit that the C.C. has recourse to such policy arguments, although this is acknowledged neither in case law nor in doctrinal literature, and is most probably unconscious. The strength of the 'politics seized by law' argument is such that any claim that there is a political element to judicial reasoning is treated as heresy. The deductive mode seems to be all there is to judicial methodology. In decisions that are so concise, so neutral, so beautifully juridical, what place would there be for policy arguments? Yet, even in these remarkably brief cases, there appear to pop up some expressions that seem strikingly close to policy arguments: 'public order' (*ordre public*), 'good administration of justice' (*bonne administration de la justice*), 'requirements of public services' (*exigences du service public*), and so on. In fact, authorities that refer bills or statutes to the C.C. as well as individuals who bring a referral process by way of a 'QPC' are keen to use such arguments in their statements of claim.

In the U.S. or in Britain, courts convert arguments drawn from extra-judicial discussion into policy arguments, *ie* arguments of general interest that will be incorporated into judicial reasoning, through, for instance, a test of proportionality or a test of reasonableness. Thus, political reasons are 'universalized' so as to leave the sphere of party politics or sectarian interests, and can be such as to be accepted by all. A reason one gives aims at persuading a

certain person or a group. Otherwise, it does not count as a reason. In this way, the legal understanding of reason has moved insensibly from an aristotelian 'right reason' or the absolute 'Reason' of classical metaphysics to the 'reasons' of contemporary moral deliberation. In the case of courts, especially constitutional ones, reasons must be such as count for all. They aim at the public good. They are political without being partisan. In France, the C.C.'s hyperformalism shows how these political reasons should be expressed in a form that is different from that of public debate or parliamentary deliberation. Otherwise, they do not pass the test of universalisation and cannot be 'constitutionalised'. The danger is obviously that the more these norms fit the (implicit) test of universalisation, the more shallow or 'empty' they are, thus leaving some room to arbitrariness on the part of the court as well as the public authorities that will implement statutory law in the future.

In French doctrinal literature, the general approach to these principles, rules, fundamental rights, *etc*. is a normative one. All the component parts of a judicial decision are 'norms' belonging to different normative categories. These categories are generally created by the C.C. itself. Divergences about their precise categorization are the bread and butter of constitutional law. An instance of this is the ongoing discussion about the status of the rights contained in the 2004 Environment Charter. The charter is a part of the constitution, thanks to the reference made to it since 2005 in the constitution's preamble. Article 1 of the Charter creates a 'right for everyone to live in an environment that is balanced and respectful of good health' ('*droit (...) à vivre dans un environnement équilibré et respectueux de la santé*'). Some constitutional experts have expressed the view that this 'right' was in fact an objective of constitutional value (*objectif de valeur constitutionnelle* : OVC). These objectives are not expressed directly in the constitution. They are creatures of the C.C.'s case law. An OVC is a kind of judge-made constitutional sub-principle that binds the legislative power. OVCs bind the legislator insofar as they are seen as necessary to the respect of a constitutional principle. For instance, freedom of opinion is a constitutional principle, expressed in article 11 of the 1789 Declaration of the rights of man and the citizen. The 'pluralist expression of the social and cultural trends', however, is an OVC created by the C.C. and which is ancillary to freedom of opinion. The legislator has to fulfil this objective when it regulates the media industry.[24] Another example is the objective of 'intelligibility and accessibility' of legislation.[25]

[24] Décision n° 82−141 DC, 27 July 1982.
[25] Décision n° 2005-512 DC, 21 avril 2005, 'Loi d'orientation et de programme pour l'avenir

What we see at play here is a process in which bits of judicial reasoning that operate like policy arguments are squeezed into pre-existing normative categories – some drawn from the constitution or its (enforceable) preamble, such as the 'fundamental principles recognized by the laws of the republic'; others created by the court or by doctrinal writing – such as the objectives of constitutional value or other *sui generis* categories such as 'principles of constitutional value' (for instance, the 'constitutional principle of the protection of public health'[26] which is also called, in the same decision, an 'imperative'). In other cases, the court has used a broad categorization, such as that of 'goal of general interest' or 'protection of general interests'. This was the terminology used in 1985 to define some broad objectives of environmental law such as a duty to respect the 'natural character of spaces', the 'quality of landscapes', or the 'ecological equilibrium'.[27] But beyond these broad normative appellations, how should one call the 'necessity to defend public health', or to 'protect natural spaces', or to ensure a certain degree of pluralism in the medias, if not policy arguments? More often than not, in fact, these policy arguments appear without any reference to a normative category. This has been the case of the 'goal of political or social appeasement' which justified an act of amnesty in 1988.[28] More recently, the C.C. has mentioned 'the legal complexity of the law regarding the enforcement of punishments'. This complexity, the court said, was an obstacle to the participation of ordinary citizens in certain judicial panels.[29]

The fact that the analysis in terms of policy argument has not been imported from English or American academic writing is itself of significance. Considerations of policy are frequently translated into norms by the C.C. in order to fit into deductive ('syllogistic') judicial reasoning. The academic discipline of 'constitutional litigation' (*contentieux constitutionnel*, a blooming branch of constitutional law) treats these policy arguments as 'norms of reference', or in other words as sources of the C.C.'s review. It is certainly correct to do so. Nothing should bear on judicial reasoning that is not normative. Yet this is at the same time entirely tautological. As soon as something enters the field of judicial reasoning (by being mentioned in a case) it becomes *per se* normative. This is also somewhat sterilizing, insofar as it conceals

---

de l'école'.

[26] Décision n° 90-283 DC, 8 January 1991, 'Loi relative à la lutte contre le tabagisme et l'alcoolisme'.

[27] Décision n° 85−189 DC, 17 July 1985, 'Loi relative à la définition et à la mise en oeuvre de principes d'aménagement'.

[28] Décision n° 88−244 DC, 20 juillet 1988, 'Loi portant amnistie'.

[29] The « *tribunal de l'application des peines* » or the « *chambre de l'application des peines* ». Décision n° 2011−635 DC, 4 August 2011, « Loi sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs ».

the heterogeneous nature of judicial reasoning. An imperative of public policy does not have the same nature as a fundamental right. The 'preservation of public interest' or the 'requirements of public order' do not have the same legal status as civil liberties. In fact, they are often used to counterbalance such rights or liberties in the course of a test of proportionality. This is especially the function of the argument of 'the safeguard of public order'. The C.C. customarily refers to 'the necessary conciliation between the respect of liberties and the safeguard of the public order without which these liberties could not be exercised'.[30]

Conclusion

The purpose of this article was to defend the view that the case law of the constitutional council could be analysed in terms of policy arguments. By having recourse to policy arguments, the C.C. acts as the guardian of collective interest. At the end of the day, most policy arguments in the C.C.s case law fall into one single, all-encompassing one, the mother of all policy arguments *à la française* : general interest. Thus they could be called 'public policy imperatives', or, to use a label created by the C.C. itself 'imperatives of general interest'.[31] This technique shows that the C.C. is more than just the bulwark of individual liberty that is often depicted in specialist literature. It defends other values that are central to French public law, first amongst which is a fairly traditional understanding of public intervention as based on *intérêt général.* In other words, policy arguments are a means by which the Constitutional council brings to life the coldest of the cold monsters of French public law: the State.

Denis Baranger

Professor of public law at the University Panthéon-Assas (Paris II) and fellow of the Institut Universitaire de France. He notably published : *Écrire la constitution non écrite : Une introduction au droit politique britannique*, PUF, Léviathan, 2008 and *Parlementarisme des origines*, PUF, Léviathan, 1999.

[30] Décision n° 85-187 DC, 25 janv. 1985, 'Loi relative à l'état d'urgence en Nouvelle-Calédonie'.
[31] Décision n° 86-218 DC, 18 November 1986.