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***129 JOINED CASES C-188/10 AND C-189/10, PROCEEDINGS AGAINST AZIZ MELKI AND SÉLIM ABDELI OR HOW THE LAST SHALL BE THE FIRST: THE COURT OF JUSTICE RULES ON PRIORITY CONSTITUTIONAL REVIEW**

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INTRODUCTION: THE REINFORCED ROLE OF THE EU IN HUMAN RIGHTS PROTECTION

The coming into force of the Lisbon Treaty on December 1, 2009 [FN1] is for many reasons a memorable event in the history of European integration for many reasons. The introduction of a permanent President of the European Council and a High Representative for Foreign Affairs and Security Policy, the reinforcement of the role *130 of the European Parliament, and the creation of a single legal personality for the Union are most commonly named as some of its most important achievements. [FN2]

December 1, 2009 was also the day that the Charter of Fundamental Rights of the European Union became primary law. [FN3] By virtue of Article 6(1) of the Treaty on European Union, the current Charter has the same legal value as the Treaties. [FN4]

Before the Lisbon Treaty, the protection of fundamental rights was not a core issue of the Union. The Charter now provides a specific E.U.-catalogue of fundamental rights for its citizens. Some of these rights are new. For example, the Charter guarantees specific protection of personal data. [FN5] freedom of the arts and scientific research, [FN6] the right to conduct a business, [FN7] and the right of workers to collective bargaining. [FN8] Other rights are guaranteed elsewhere in national constitutions or in the European Convention on Human Rights. In general, the Charter reaffirms “with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.” [FN9] The Charter is primarily directed at the Union's institutions but also governs the conduct of Member States when they are implementing E.U. law. [FN10] On October 19, 2010, the Commission adopted a strategy to ensure respect for the Charter. [FN11]

*131 Barely one year after the Lisbon Treaty's entry into force, it is perhaps too early to assess how the Union Courts (the Court of Justice, the General Court, and the Civil Service Tribunal) will integrate the new Charter in their jurisprudence. In any event, it is clear that the Union's role in human rights protection will increase. This raises the question of how this process will fit into the existing jurisdictional framework, which was basically designed by the courts of the Member States and, as a matter of the last resort, by the European Court of Human Rights. [FN12] What position are the Union Courts going to take?

When it comes to identifying the relationship between the Union and the jurisdiction of the European Court of Human Rights, it is a near-certainty that the Union will become a Party to the European Convention. The Lisbon Treaty explicitly states that: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” [FN13] The Commission was required to conduct the negotiations on behalf of the Union and started to do so on July 7, 2010. [FN14] The Court of Justice has issued a discussion document on the matter, emphasizing the subsidiary character of the Convention's control and insisting on a mechanism to effectively bring issues about the consistency of EU acts with the Convention before the Court. [FN15] The Charter provides that insofar as it “contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.” [FN16] Even before the entry into force of the Lisbon Treaty, the judicial dialogue between the two organizations' supranational courts was intense. The Court of Justice regularly referred to jurisprudence by the European Court of Human Rights, leading the latter to introduce a presumption of Convention-conformity of E.U.

law under certain conditions. [FN17]

*132 As the Charter also applies to Member States when they implement EU law, it is likely that there will be an intensification of judicial dialogue between the Union Courts and national courts. This dialogue will most certainly remain a complex interchange for several reasons. First of all, with yet another catalog of fundamental rights in force, new questions of interpretation will arise. It is clear that the interpretation adopted by Member States of certain rights guaranteed in their constitutions will be influenced by Court of Justice's Charter jurisprudence (which, in turn, is influenced by the European Court of Human Rights). On the other hand, the Charter provides that "in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." [FN18] As a result, the content of fundamental rights is likely to be determined through a complex exchange between multiple partners within the European Union.

There are also potential procedural complications that may arise in the course of this judicial dialogue. In some Member States, constitutional review of statutes is vested exclusively in a constitutional court. In these jurisdictions, ordinary judges facing a potential unconstitutionality are sometimes required to refer the matter to specialized constitutional judges for a preliminary ruling. [FN19] At the same time, under Article 267 TFEU, ordinary judges can refer questions concerning the compatibility of national legislation with E.U. law to the Court of Justice, and E.U. law also empowers national judges to refuse to apply national legislation contrary to E.U. law. [FN20] Thus, if fundamental rights are becoming an integral part of European norms, a problem arises due to the varying procedures through which national legislation can be challenged as violating a fundamental right: besides centralized review of legislation by domestic constitutional courts, both diffuse review by ordinary national courts and referral of a matter concerning a fundamental right to the Court of Justice are possible. The result of this may very well be that national judges confronted with a problem governed by EU fundamental rights law will be tempted to "court-circuit" the national constitutional court either by referring the matter to the Court of Justice or by immediately invalidating the legislation on their own authority under E.U. law.

*133 The issue is equally relevant with regard to fundamental rights protection in general international law (particularly with regard to the European Convention on Human Rights, but also with regard to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights). [FN21] Recently, Belgium and France have enacted legislation that attempts to streamline constitutional and conventional review. The legislation provides for a system of priority referral to the national constitutional court in cases where the fundamental rights guaranteed by the national constitution coincide with international law binding upon Belgium and France, taking the view that this obligatory transit through constitutional review enhances the legal protection of the citizen. In *Melki/Abdeli*, [FN22] the Court of Justice was confronted with these new national rules of procedure. The French Court of Cassation (*Cour de cassation*), the referring jurisdiction, first questioned the compatibility of the new rules with E.U. law. On the merits, the case concerned the compatibility of border controls within the *Schengen* area. Although the Court of Cassation raised a second question about that issue, this case note discusses only the first, procedural topic.

I. FACTUAL AND LEGAL BACKGROUND TO THE CASE

Aziz Melki and Sélim Abdeli were subjected to police control at the border post of Saint-Aybert in the North of France, in accordance with Article 78-2, paragraph 4, of the Code of Criminal Procedure (*Code de procédure pénale*). The French police intercepted their car on a highway close to the Belgian border. Melki and Abdeli were identified as Algerian nationals unlawfully present in the country. They remained in detention and their deportation from the French territory was ordered on March 23, 2010. [FN23] Melki and Abdeli challenged their continued detention before the judge ruling on their provisional detention (*juge des libertés et de la détention*). They argued that the control to which the police had subjected them was a border control contrary to France's obligations under Article 67(2) TFEU with regard to the free movement of persons. That provision states that the Union shall ensure the absence of

internal border controls for persons. In addition, Melki and Abdeli argued that, in the light of Article 88-1 of the French Constitution, France's commitments resulting from the Lisbon Treaty had constitutional value. [FN24] Article 88-1 provides that France “shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as *134 they result from the treaty signed in Lisbon on 13 December, 2007.” [FN25] In short, Melki and Abdeli claimed that both a constitutional and a European issue were at stake.

At the heart of the preliminary question referred to the Court of Justice lies French procedural legislation inspired by an earlier Belgian statute. Under the Special Law (*Bijzondere Wet, Loi spéciale*) of July 12, 2009, [FN26] the Belgian legislature made changes to that country's constitutional review procedure in order to promote coherent interpretation of fundamental rights at the national level by reinforcing the role of the Constitutional court in cases where the fundamental rights guaranteed by national and Union law coincide. Previously, judges identifying a possible violation of the Constitution could ask the Constitutional Court (*Grondwettelijk Hof, Cour constitutionnelle*) [FN27] for a preliminary ruling, [FN28] similar in nature to the preliminary rulings delivered by the European Court of Justice. Since 2009, the Constitutional Court's Special Law has provided that, where it is claimed before a court of law that a statute “infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law.” that court shall first refer the question of constitutional compatibility to the Constitutional Court for a preliminary ruling. [FN29] Accordingly, if a Belgian judge is confronted with a statute governing an area covered by EU law that allegedly infringes upon a fundamental right guaranteed both in the Belgian Constitution and in EU law, the matter must be referred to the Constitutional Court.

In France, the Constitutional Council (*Conseil constitutionnel*) [FN30] issues preliminary rulings on constitutional matters at the request of the Court of Cassation or the Council of State (*Conseil d'Etat*). [FN31] Until 2008, statutes could only be referred to the Council for constitutional review prior to enactment. The current French rules of procedure dealing with concurrence of constitutional and European or international law questions are very similar to the Belgian ones on which they are *135 modeled. [FN32] Article 23-2, paragraph 2 of Order (*Ordonnance*) no 58-1067 of November 7, 1958, amended by Organic Law (*Loi organique*) 2009-1523 of December 10, 2009, provides that in any event, “where pleas are made before the court or tribunal challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on whether to submit the question on constitutionality to the Council of State or the Court of Cassation.” [FN33] It is then up to the Council of State or Court of Cassation to decide whether to refer the question to the Constitutional Council for evaluation. Moreover, if the plea of unconstitutionality is brought before either of these two supreme courts, Article 23-5, paragraph 2 of the Order equally requires them to rule on the referral of the question to the Constitutional Council as a matter of priority.

On March 25, the judge deciding on the provisional detention of Melki and Abdeli ordered that the constitutionality issue be submitted to the Court of Cassation. [FN34] The Court of Cassation then had to decide whether or not to refer the question to the Constitutional Council under the conditions put forward by the 1958 Order. [FN35]

The Court of Cassation found that the obligatory priority might violate EU law. Article 267 TFEU (formerly Article 234 EC) provides that the Court of Justice has the jurisdiction to give preliminary rulings concerning the interpretation of EU law and concerning the validity of the acts of its organs. For the lower courts of Member States, requesting such a ruling is optional; [FN36] for courts against whose decisions there is no judicial remedy under national law, it is mandatory. [FN37] Thus, the question arises *136 of whether it is contrary to Article 267 TFEU for a Member State to require its courts to introduce an order of referrals and to direct certain questions as an initial matter to its national Constitutional Court. This is the issue the Court of Justice had to address in the *Melki/Abdeli* case. On April 16, 2010, the Court of Cassation referred two questions to the Court of Justice, one of which inquired whether Article 267 TFEU precludes national legislation establishing an interlocutory procedure for constitutional review that requires national courts to rule, as a matter of priority, on whether to refer a question to the national constitutional

court when there is simultaneously a conflict between the law under review and a provision of EU law. [FN38]

II. FINDINGS OF THE COURT

Because the case concerned the detention of individuals (although Melki and Abdeli were, in fact, no longer detained at the time the question was presented) and because the Court of Cassation only has three months to decide to refer a matter to the Constitutional Council, [FN39] it requested the Court of Justice to rule on the questions urgently. [FN40] Following Article 23a of its Statute, [FN41] the Court accelerated the procedure, delivering a decision within two months--on June 22, 2010. [FN42]

A. Observations Submitted to the Court

In addition to France, no fewer than seven other Member States made observations to the Court in *Melki/Abdeli*. [FN43] As the French legislation was more or less a copy of its Belgian counterpart, it was no surprise that France and Belgium followed the same line of argument. The French government, however, adopted a different interpretation of the procedural requirements imposed by the French law. It argued that the purpose of the law could not be to refer questions on the compatibility of domestic legislation with EU law to the Constitutional Council, as the Court of Cassation had implied. If that were the case, ordinary courts would lose the opportunity to apply Article 267 TFEU. The French government maintained that it is up to the ordinary and administrative courts to examine whether legislation is *137 consistent with EU law, to apply the legislation, or to refer questions to the Court of Justice at the same time as, or subsequent to, the submission of a constitutionality question. [FN44] Any judge could, under certain conditions, rule on the substance of the case without awaiting the result of a national procedure for assessing the constitutionality of a national law or at least could take interim or preventive measures to ensure the immediate protection of the rights granted to individuals under EU law. [FN45]

The Czech government argued that the primacy of EU law dictates that national courts give full effect to EU rules by declining to apply contrary provisions of national law without first referring the matter to the national constitutional court. [FN46] Germany contended that “the exercise of the right to make a reference to the Court of Justice for a preliminary ruling, which is conferred on every national court or tribunal by Article 267 TFEU, must not be obstructed by a provision of national law which makes a reference to the Court of Justice, for an interpretation of EU law, subject to the decision of another national court.” [FN47] The Polish government submitted, somewhat more enigmatically, that Article 267 TFEU does not per se preclude legislation of the kind at issue, given that the national procedure “does not adversely affect the substance of the rights and obligations of national courts resulting from Article 267 TFEU.” [FN48]

The Commission took a skeptical position towards the referring judge's interpretation of the French law. Specifically, it considered Article 267 TFEU to prohibit national legislation under which every challenge to the compatibility of a legislative provision with EU law would enable the challenger to claim a breach of the Constitution arising from that legislative provision. If every challenge of EU fundamental rights and freedoms were, by virtue of a catch-all disposition, also automatically a challenge of the Constitution, and if there were a priority interlocutory procedure, the Commission concluded that the burden of ensuring that EU law was observed would be “implicitly but necessarily transferred from the court ruling on the substance of a case to the Conseil constitutionnel.” [FN49]

As long as the court ruling on the substance retains jurisdiction to apply E.U. law, the Commission concluded, a priority interlocutory procedure could be compatible with E.U. law, provided that a number of conditions are met. Particularly, “the national court must remain free to, simultaneously, refer to the Court of Justice for a preliminary ruling any question which it considers necessary, and to adopt any measure necessary to ensure provisional judicial protection of the rights guaranteed under E.U. law.” [FN50] The national court also must not be prevented from consulting the Court under any circumstances. Furthermore, the Commission also found necessary “first, that the inter-

locutory procedure for the review of constitutionality does not lead to a stay of the substantive proceedings for an *138 excessively long period and, second, that, at the end of that interlocutory procedure and irrespective of its outcome, the national court remains entirely free to assess whether the national legislative provision is consistent with E.U. law, to disapply that provision if that court holds that it is contrary to E.U. law, and to refer questions to the Court of Justice for a preliminary ruling if it considers that to be necessary.” [FN51] Consequently, in the Commission’s view, a conditional prohibition for judges to disapply national law on their sole authority was not excluded by E.U. law.

Starting as well from the referring court’s interpretation, Advocate General Mazák had concluded, especially in view of the *Mecanarte* judgment discussed below, that the mandatory reference to a constitutional court, and the resulting limiting or shifting of the judge’s option or obligation under Article 267 TFEU to refer questions to the Court of Justice, was contrary to E.U. law. [FN52] As a result, he took the position that Articles 23-2, paragraph 2 and 23-5, paragraph 2 of the French Order violated EU law in as far as they required a judge to refer a question to the Constitutional Council to assess the unconstitutionality of a national law on the grounds that it violates EU law. [FN53]

B. The Court’s Assessment

In his Opinion before the Court of Justice, the Advocate General did not question the interpretation put forward by the Court of Cassation. Although he was under no obligation to do so, he could have taken this opportunity to discuss the issue on a broader level, as the Court of Justice ultimately did. Undoubtedly, the Court understood that it was faced with a particularly sensitive issue for different Member States. In addition, it was clear that there was a crucial difference in interpretation of the French law between the Court of Cassation and the French government. As expected, the Court of Justice did not itself determine the correct interpretation of the French procedural rule at issue—it cannot. Generally speaking, it is up to the referring judge to determine what the national rule means, [FN54] although the interpretation should be, insofar as possible, in accordance with E.U. law. The Court was nevertheless wise not to acquiesce to the Court of Cassation’s proposed interpretation. The Court of Justice offered an interpretative framework in which the French rule could be upheld and left it to the French court to determine whether the disputed law could actually be interpreted according to the suggested framework. [FN55]

As a matter of principle, the Court reiterated its older case law stating that a national court remains free to refer any necessary question to the Court of Justice for a preliminary ruling at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality. [FN56] Still, a national procedure implying that the referring judge is prevented from *immediately* halting application of the disputed national legislative provision was *139 conditionally acceptable to the Court. It explained that in such a case EU law requires that the national court remain free, “first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union’s legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.” [FN57]

As a result, Article 267 TFEU excludes national legislation establishing an interlocutory procedure for constitutional review insofar as the priority nature of that procedure prevents national courts from exercising their right (or fulfilling their obligation) to refer questions to the Court of Justice both before the submission of a question to the constitutional court and after the decision of the latter. [FN58] Article 267 nevertheless allows Members to prevent a judge from setting aside a national rule *immediately* on grounds of E.U. law so long as the judge remains free to refer questions to the Court of Justice for a preliminary ruling at whatever stage of the proceedings he considers appropriate. In addition, the judge should be empowered to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under E.U. law. Finally, at the end of the constitutional review procedure, the judge remains free to disapply the national rule if he considers it to be contrary to E.U. obligations. [FN59]

III. COMMENTS

A. The Court's Earlier Jurisprudence: From Rheinmühlen-Düsseldorf to Küçükdeveci

The Court of Justice began its judgment in *Melki/Abdeli* by reiterating that national judges have the widest discretion in referring matters to the Court if they reason that a pending case raises questions regarding the interpretation or validity of E.U. acts. No decision, even a binding one, by a superior national court can deprive a court of first instance of the opportunity to ask the Court of Justice for a preliminary interpretation except when the decision by the superior national court is based upon a previous referral to the Court of Justice of a question substantially identical to the one that an inferior national court wishes to refer. [FN60] As the European Court of Justice concluded in *Rheinmühlen-Düsseldorf*: “If inferior courts were bound without being able to refer matters to the court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.” [FN61]

Furthermore, the Court held that any national court could decide on its own motion to refuse to apply any national rule conflicting with E.U. law. That is the basic principle derived from the 1978 *Simmenthal* judgment where the Court ruled that any provision of a national legal system and any legislative, administrative, or *140 judicial practice which might impair the effectiveness of E.U. law by “withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [E.U.] rules from having full force and effect” is incompatible with the requirements that are the very essence of E.U. law. [FN62] As a result, a national judge who is called upon to apply an E.U. regulation is under a duty

to give full effect to those provisions, [even] if necessary[,] refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means. [FN63]

This same requirement was also reflected in *Factortame*, explaining that E.U. law “must be interpreted as meaning that a national court which, in a case before it concerning [Union] law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.” [FN64]

In the *Mecanarte* judgment, the Court ruled on a situation very close to *Melki/Abdeli*. Insofar as it opined that the national law at issue was in violation of the Constitution, a Portuguese court was doubtful as to whether it was still competent to refer a question to the Court of Justice. Procedurally, the Portuguese Constitution mandated referral of the case to the Constitutional Court, and as a result, only the Constitutional Court could, if appropriate, refer a question to the Court of Justice. [FN65] In answer to the question whether this situation was compatible with E.U. law, the Court of Justice found that the essential purpose of its jurisdiction was to ensure that E.U. law is applied uniformly by the national courts. Therefore, the system of preliminary rulings required that the national courts have the widest possible powers to refer questions on the interpretation or validity of E.U. regulations to the Court of Justice. The Court of Justice concluded that the effectiveness of E.U. law would be jeopardized if an obligation to refer a matter to a constitutional court could prevent a judge from referring his questions to the Court. [FN66] Thus, the fact that a declaration of unconstitutionality is subject to a mandatory referral to a national constitutional body does not imply that a national court, by virtue of that reason, loses the right to or escapes the obligation to refer questions to the Court of Justice. [FN67] In fact, the Court in *Mecanarte* specifically stated that “[i]t must be made clear in this regard that the discretion enjoyed by the national court under the second paragraph of Article [267 TFEU] includes a discretion to decide at what stage of the procedure it is appropriate to refer a question to the Court for a preliminary ruling.” [FN68]

*141 In determining the relationship between the decisions of national constitutional courts and E.U. exigencies, the recent *Küçükdeveci* judgment is also relevant. [FN69] In that case, the referring German judge was confronted

with national legislation that prevented him from refusing to apply German law so long as the law at issue had not been declared unconstitutional by the German Constitutional Court (*Bundesverfassungsgericht*). The Court of Justice reaffirmed that a request for a preliminary ruling under Article 267 TFEU cannot be “transformed into an obligation because national law does not allow that court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court.” [FN70] Similarly, in September 2010, the Court of Justice indicated that, presuming it were even possible for the German Constitutional Court to permit a national law to remain in force after that court had found the law to be contrary to E.U. law as a means of avoiding a legal vacuum, that it had the sole authority to decide under what conditions this kind of abeyance would be permissible. [FN71]

B. The Specific Problem of Directive Implementation

In connection with the question raised in *Melki/Abdeli*, though not directly applicable to that case, the Court discussed a special problem concerning the transposition of E.U. directives. In dicta, the Court reiterated its *Foto-Frost* rule regarding the validity of acts originating from E.U. institutions. [FN72] In general, the Court accepts that national courts, based on their own authority, may consider the acts of E.U. institutions to be valid and also that those courts may not deem such acts to be invalid. The reason that national courts are not given the power to invalidate E.U. acts is because “[d]ivergences between courts in the Member States as to the validity of [Union] acts would be liable to place in jeopardy the very unity of the [Union] legal order and detract from the fundamental requirement of legal certainty.” [FN73] Instead, by virtue of the position it holds within the E.U., the Court of Justice claims sole authority to invalidate E.U. acts. [FN74]

If a national law transposing an E.U. directive were repealed for its unconstitutionality, however, the Court could be prevented from reviewing the Directive's compatibility with similar requirements of E.U. law. Certainly, since the coming into force of the Charter of Fundamental Rights, that is a reasonable concern. The difference is not just a matter of procedure: basically, whereas a constitutional court can only repeal the laws falling within its jurisdiction, the Court of Justice can *142 force the directive to disappear in all 27 Member States. As the Court explained in *Melki/Abdeli*:

To the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law--which merely transposes the mandatory provisions of a European Union directive on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law. [FN75]

Attempting to deal with this side-effect in *Melki/Abdeli*, the Court first affirmed the *Foto-Frost* rule and concluded that the priority constitutional review of a national law merely transposing a European directive cannot undermine the exclusive jurisdiction of the Court of Justice to declare an act of the European Union invalid. [FN76] Second, it recalled that before the interlocutory constitutional review of an implementing law can be carried out in relation to the same grounds which cast doubt on the validity of the Directive concerned, national courts of the last resort are required under the third paragraph of Article 267 TFEU to refer a question regarding a Directive's validity to the Court of Justice. [FN77] According to the Court--thereby adding a condition to the three aforementioned conditions--the question of whether a directive is valid in the context of the transposition of a directive should take priority in the light of the obligation to transpose said directive. Accordingly, the Court of Justice should be consulted “prior” to the priority constitutional review. Furthermore, “[i]n addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.” [FN78]

The Court of Justice's reasoning appeared to encompass French constitutional review of transposed legislation on

grounds *not* present in E.U. primary law (constituting so-called “rules or principles inherent to the constitutional identity of France”). [FN79] In any case, not executing an E.U. obligation solely for constitutional reasons proper to an individual Member State would be contrary to the primacy of E.U. law and the Court's decision in *Internationale Handelsgesellschaft*. In that case, the Court stated:

In fact, the law stemming from the [Treaties], an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] being called into question. Therefore the validity of a [Union] measure or its effect within a Member *143 State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure. [FN80]

A Member State invalidating a law transposing a directive for purely domestic reasons would therefore be in breach of E.U. law.

As one author remarked, the judgment of the Court on this issue reads like an invitation for the Constitutional Council to reconsider its position about the impossibility of it referring questions to Court of Justice. [FN81] Repeating the position that it took in a 2008 case, [FN82] the Council had decided shortly following the referral of *Melki/Abdeli* to the Court of Justice that:

[I]nsofar as it is required to give its ruling before the promulgation of the statute in the timeframe provided for by Article 61 of the Constitution, the Constitutional Council cannot refer the matter to the European Court of Justice on the basis of Article 267 of the Treaty on the Functioning of the European Union In all events, it is incumbent upon Courts of law and Administrative Courts to review the compatibility of a statute with European commitments entered into by France and, if need be, to make a reference for a preliminary ruling to the European Court of Justice. [FN83]

Article 61 requires that the Constitutional Council must rule on new legislation within one month. In the context of reviewing legislation already promulgated, a decision is expected within three months, [FN84] which makes a referral to the Court of Justice theoretically possible, though only in the case of accelerated procedures.

C. Dragging the Court into a French “*guerre des juges*”?

The referral of *Melki/Abdeli* to the Court of Justice certainly provided an opportunity to fine-tune earlier jurisprudence concerning the procedural issues set out above. In reality, however, the case of *Melki* and *Abdeli* raised more problems for the French legal order than it caused for the European legal order. As it appears, the Court of Justice was dragged, to a certain extent, into a national *guerre des juges*; the Court of Cassation was on one side, the Constitutional Council on the other, and the Council of State more or less on the side of the latter.

As *Melki/Abdeli* suggests, the Court of Cassation considered Article 78-2, paragraph 4 of the Code of Criminal Procedure, which allowed identity control within the 20 kilometer wide *Schengen*-buffer, to potentially violate E.U. rules on the free movement of persons and, through Article 88-1, of the Constitution. The Court of Cassation then submitted to the Court of Justice that the new French procedural rule could prevent French judges from applying Article 267 TFEU both *144 before submitting a question on constitutionality and after the decision of the constitutional jurisdiction on that question. Therefore, the new procedural rule could be contrary to E.U. legal principles. [FN85]

The interpretation adopted by the Court of Cassation of the amendments to the 1958 Order--which disregarded the opinion of its Advocate General [FN86]-- caused astonishment and debate. [FN87] An important part of the French academy considered the judgment of April 16, 2010 to be aberrant--motivated by institutional strategy and barely based on legal grounds. [FN88] It was suggested that the move was part of a trench war between the Court of Cassation and the Constitutional Council, the former allegedly being reluctant to trust the removal of decision-making power from its hands to the Constitutional Council. It is true that post-enactment constitutional review is still new

to France's institutional framework, and undoubtedly, the actors involved are still determining the limits of their new territory. If, however, the rules on priority constitutional review had been found to be contrary to E.U. law, the result would have limited referrals to the Constitutional Council and enabled ordinary courts to immediately disapply national law that they considered contrary to E.U. law.

The legal construction that the Court of Cassation proposed in its referral to the Court of Justice was criticized on two major grounds. First, it can be argued that Article 88-1 of the Constitution does not imply an automatic “constitutionalization” of the E.U. obligations of France. Second, in general, as the French government suggested to the Court of Justice, it is nationally contested that the new rules of procedure make it totally impossible for an ordinary judge to apply Article 267 TFEU.

1. In France, E.U. Obligations Are Not Automatically Constitutional Obligations

The meaning of Article 88-1 of the Constitution and its consequences for the status of E.U. law within the French legal order have yielded great debate before. [FN89] *145 From an international legal perspective, it is indeed bizarre to qualify Article 88-1 as “internalizing” E.U. law. Monist systems do not require a transposition of international law into national law. In his conclusions, the Advocate General before the Court of Cassation pointed to jurisprudence going back more than thirty years indicating that the Constitutional Council has systematically refused to conclude that a statute inconsistent with a Treaty is ipso facto unconstitutional. [FN90] He stated that “the referral that could be ordered [to the Constitutional Council] would [effectively capture] the constitutional judge [with] ... a question he cannot resolve, since it would imply, through the artificial interface of Article 88-1, the verification of the conformity of a law with a treaty, an operation the Constitutional Council always refused to undertake[.]” [FN91]

In a May, 12, 2010 case, the Council repeated that, unlike what *Melki/Abdeli* asserted about Article 88-1 of the Constitution, the 1958 Order specified that not every European obligation incumbent on the French state is automatically a constitutional one: “[t]he argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot therefore be deemed to constitute an argument as to unconstitutionality.” [FN92] Nevertheless, it is true that when it comes to the transposition of E.U. directives, the Council does take into account the directive as a reference norm. [FN93] Some consider that position to be a hybrid one: either the Council interprets Article 88-1 as establishing only France's commitment to participate in the European project (not implying any positive obligation, including the transposition of directives) or the Article goes beyond that (implying positive obligations, which in that case cannot be limited to the transposition of directives). [FN94] The Council of State has followed the position of the Constitutional Council, concluding that the transposition of a directive into national law is an obligation resulting from E.U. law and that, through Article 88-1 of the Constitution, it acquires the character of a constitutional obligation. [FN95] Even then, however, the “constitutionalization” is only indirect. [FN96]

2. The Priority Constitutional Review Procedure Does Not Limit the Ordinary Judges' Jurisdiction to Apply Article 267 TFEU

The Court of Cassation suggested that referring a case to the Constitutional Council would imply that the referring judge gave up on the possibility of applying Article 267 TFEU. Before the Court of Justice, the French government disavowed this interpretation of the amended 1958 Order and relied on decisions by the *146 Constitutional Council and the Council of State delivered shortly after the order for a preliminary ruling by the Court of Cassation where they affirmed their previous positions. [FN97] In a May 12, 2010 case, [FN98] the Constitutional Council repeated--in a barely concealed reaction to the question prompted by the Court of Cassation--what it had already stated with regard to the enactment of the new procedure of priority constitutional review: “[t]his priority merely results in specifying the order in which the arguments raised before the court to which the matter is referred be examined. It does not restrict the jurisdiction of said court, once the provisions pertaining to the priority preliminary ruling on the

issue of constitutionality have been complied with, to ensure the superiority over national laws of legally ratified or approved treaties or agreements and norms of the European Union.” [FN99]

According to the Constitutional Council, examining a violation of E.U. law is a decision of the ordinary and administrative judges. The Council dedicated several paragraphs to this point: “[f]irstly, the authority attached to the decision of the Constitutional Council under Article 62 of the Constitution does not restrict the jurisdiction of Courts of law and Administrative Courts to ensure that such commitments shall prevail over a statutory provision which is incompatible with the same, even when the said provision has been held to be constitutional.” [FN100] As a consequence, any judge “may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of the court.” [FN101] The same principle applied to referring questions to the Court of Justice. [FN102] As a result, the Council concluded: “notwithstanding the reference on the Treaty signed in Lisbon on December 13th 2007, it is not [the Court of Justice's] task to review the compatibility of a statute with the provisions of this Treaty.” [FN103]

Before the Court of Cassation, the Advocate General had already pointed to the paradoxical reasoning that required an ordinary court to refer a matter which it could decide itself to a different jurisdiction that was incapable of doing so: “[o]ne cannot see how to get out of such an aporetic situation, unless by admitting that the Constitutional Council, to which the question should be addressed with priority ... considers that the problem cannot be resolved except by the judge firstly seized, to which the case would be sent back.” [FN104]

*147 Two days after the Constitutional Council's judgment, the Council of State specified that the 1958 Order did not prevent a judge from immediately ceasing the application of any law contrary to E.U. rules or, if he chose so, to refer the matter to the Court of Justice. [FN105] It is clear that in the proceedings before the Court of Justice, the French government, under the influence of two other supreme jurisdictions, came up with a much more E.U.-friendly interpretation of the national procedure than the Court of Cassation had previously done. Some authors, however, consider leaving the judge free to refer a question to the Court of Justice at any time to be an interpretation *contra legem*, as the “priority” character is undermined. [FN106]

IV. CONCLUDING REMARKS

Melki/Abdeli constitutes a new phase in the process of delineation of national and supranational judicial territory when it comes to coincidence of fundamental rights. The Court of Justice refuses to sacrifice its jurisdiction to answer preliminary questions at any point. It is, however, willing to conditionally allow Member States to issue procedural rules suspending the ordinary judge's capacity to immediately disapply national law at odds with E.U. law. This qualifies as a slight correction to the *Simmenthal* case law.

By distinguishing the situation of immediate judicial disapplication from the referral of questions to the Court of Justice, the Court seemed to understand the motivation of the French and Belgian governments for having introduced the priority procedure. As stated above, the underlying motives of both countries were to ensure that a constitutional examination would actually be carried out, thereby contributing also to a coherent interpretation of fundamental rights. The absence of such a rule would mean that a constitutionality check was not “necessary” to decide the case, potentially rendering constitutional review obsolete whenever a rule of national law was at odds with E.U. law. The governments' concerns were rooted in the practical reality that each countries' constitutional court has the power to completely invalidate unconstitutional laws. By contrast, when an ordinary judge declines to apply a national rule on the grounds that the rule is incompatible with E.U. law, the decision has immediate effect only in the specific case pending before him. [FN107] The Court's decision deserves credit for adopting a position that is not too rigid when it comes to determining the procedural freedom Member States enjoy in this context. Certainly, within the context of

the interpretation of fundamental rights, it is clear that the judicial dialogue between national and international judges, as well as among national judges, can only be effective if each actor is willing to take into account the other's perspective.

However, at least in France, the process has not yet come to an end. On June 29, 2010, after receiving the Court of Justice's clarifications, the Court of Cassation again refused to refer the case of *Melki/Abdeli* to the Constitutional Council, finding that the Court was not competent to take the provisional measures that the Court of *148 Justice deemed necessary in order to preserve the priority constitutional review procedure. It stated that

in case of impossibility to satisfy that demand, as is the case for the Court of Cassation, before which the procedure does not allow to make use of such measures, the judge has to decide on the conformity of the disputed provision from the point of view of the law of the Union by disapplying the provisions of the modified Order of 7 November 1958, establishing a priority review of the question of constitutionality. [FN108]

In the French Parliament, the system is currently being evaluated, including the possibility of the necessity to change the procedure applicable before the Court of Cassation, or to at least provide a possibility for the Constitutional Council to suspend proceedings in the case of referral of a question to the Court of Justice when a law transposing a directive is concerned. [FN109]

As far as the Belgian priority procedure is concerned, the Tribunal of First Instance (*Tribunal de première instance*) of Liège in 2009 requested a ruling by the Court of Justice to verify whether E.U. law precludes national legislation from requiring the national court to make a reference to the Constitutional Court for a preliminary ruling without that court being able to ensure immediately the effect of E.U. law. [FN110] The similarities between France and Belgium are considerable. During the parliamentary procedure, the Belgian framers of the bill indicated that it was not their intention to exclude the opportunity of the ordinary judge to apply E.U. rules but only to organize an *order* of questions. [FN111] Representatives of the Belgian Court of cassation, however, indicated that they considered the priority rule to be incompatible with the *Simmenthal* line of reasoning. [FN112] At the time of writing, the court has not yet ruled. If the case is admissible, there is a fair chance that the substance of the decision will be analogous to the *Melki/Abdeli* judgment. Meanwhile, the Belgian Constitutional Court indicated in a July 2010 decision that it considers itself competent, referring to *Factortame*, to take all necessary provisional measures needed to preserve the rights of individuals under E.U. law during the process of constitutional review. [FN113] A few weeks before that, the Council of State reaffirmed that the Constitutional Court's Special Law did not imply a limitation on the ability of referring courts to examine a disputed law themselves for consistency with European or international law, even if the Constitutional Court took *149 European or international law into account when executing constitutional review. [FN114] Judicial dialogues can be silent but clear.

The *Melki/Abdeli* case is a significant new development that serves to fine-tune the relations between national constitutional and European exigencies. From a wider perspective, the issue can re-emerge in different forms. E.U. law is, though important, only a limited part of the whole of international law to which the priority constitutional review procedures in both France and Belgium apply. In both countries, the jurisprudence of the Court of Cassation has established the primacy of international law with direct effect, allowing courts to disapply on their own authority any law contrary to it. [FN115] Insofar as no international law stands in opposition to this approach, it seems logical that national law can exclude the application of that principle. [FN116] In any case, *Melki/Abdeli* is a landmark judgment in a judicial dialogue where the last word has not yet been said.

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[FN1]. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Com-

munity, art. 6(2), Dec. 1, 2009, 2007 O.J. (C 306) 1.

[FN2]. For a general discussion of the Treaty of Lisbon, see BENIAMIN ANGEL & FLORENCE CHALTIEL, *QUELLE EUROPE APRES LE TRAITÉ DE LISBONNE?* 196 (2008); ESTELLE BROSSET ET AL., *LE TRAITÉ DE LISBONNE: RECONFIGURATION OU DÉCONSTITUTIONNALISATION DE L'UNION EUROPÉENNE?* (2009); MARIANNE DONY, *APRES LA RÉFORME DE LISBONNE: LES NOUVEAUX TRAITÉS EUROPÉENS* (2008); EUROPEAN UNION LEGAL ORDER AFTER LISBON (Patrick Birkinshaw & Mike Varney eds., 2010); STEFAN GRILLER & JACQUES ZILLER, *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* (2008). *See also* Matej Avbelj, *The Treaty of Lisbon: An Ongoing Search for Structural Equilibrium*, 16 COLUM. J. EUR. L. 521 (2010); Paul Craig, *The Treaty of Lisbon: Process, Architecture and Substance*, 33 EUR. L. REV. 137 (2008); Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617 (2008).

[FN3]. Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389 [hereinafter Charter of Fundamental Rights]; *see also* BERTRAND FAVREAU *LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE APRES LE TRAITÉ DE LISBONNE* (2010); THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY (Steve Peers & Angela Ward eds., 2004). The text of the Charter was finalized on December 12, 2007 in Strasbourg. Press Release. Eur. Union, Charter of Fundamental Rights: The Presidents of the Commission, European Parliament and Council Sign and Solemnly Proclaim the Charter in Strasbourg (Dec. 12, 2007). <http://europa.eu/rapid/pressReleasesAction.do?reference/IP/07/1916>. It replaced the 2000 charter adopted at Nice and entered into legal force along with the Treaty of Lisbon. *Id.*

[FN4]. Consolidated Version of the Treaty on European Union. art. 6(1), Mar. 30, 2010, 2010 O.J. (C 83) 13.

[FN5]. Charter of Fundamental Rights art. 8.

[FN6]. *Id.* art. 13.

[FN7]. *Id.* art. 16.

[FN8]. *Id.* art. 28.

[FN9]. *Id.* pmb. ¶5.

[FN10]. *Id.* art. 51(1).

[FN11]. *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573 (Oct. 19, 2010) final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:HTML>.

[FN12]. All 27 Member States of the EU are High Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

[FN13]. Consolidated Version of the Treaty on the Functioning of the European Union. art. 6(2), Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

[FN14]. Press Release, Luxembourg European Council (June 4, 2010), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf

[FN15]. EUR. COURT OF JUSTICE, DISCUSSION DOCUMENT ON CERTAIN ASPECTS OF THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (May 5, 2010), available at <http://>

curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf.

[FN16]. Charter of Fundamental Rights art. 52(3).

[FN17]. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 107. This jurisprudence was further developed as applied to the EU in several cases. *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. Netherlands* (App. No. 13645/05), EUR. COURT OF HUMAN RIGHTS (Jan. 20, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kokkelvisserij&sessionId=69045821&skin=hudoc-en>; *Connolly v. Germany* (App. No. 73274/01), EUR. COURT OF HUMAN RIGHTS (Dec. 9, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=connolly&sessionId=69045694&skin=hudoc-en> (in French); *Etablissements Biret et Cie S.A. v. Germany* (App. No. 13762/04), EUROPEAN COURT OF HUMAN RIGHTS (Dec. 9, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=biret&sessionId=69045726&skin=hudoc-en> (in French); see also Tobias Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organizations Under the European Convention on Human Rights*, 10 HUM. RTS. L. REV. 529 (2010). For additional comments on the *Bosphorus* case, see Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87 (2006); Joseph Phelps, *Reflections on Bosphorus and Human Rights in Europe*, 81 TUL. L. REV. 251 (2006); Steve Peers, Case Note, *Bosphorus-- European Court of Human Rights*, 2 EUR. CONST. L. REV. 443 (2006); Sebastian Winkler, *Die Vermutung "äquivalenten" Grundrechtsschutzes im Gemeinschaftsrecht each dem Bosphorus-Urteil des EGMR*, 2007 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 641 (2007).

[FN18]. Charter of Fundamental Rights art. 52(4).

[FN19]. Currently, there are separate constitutional courts in 16 Member States, including Belgium, Bulgaria, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. In 10 of those, judges can refer preliminary questions to the court (Belgium, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, and Slovakia). In Portugal and Spain, the constitutional court serves as an appeal authority for decisions made by lower judges concerning the constitutionality of laws.

[FN20]. E.g., Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, ¶ 21.

[FN21]. In Belgium, for example, the Court of Cassation decided three controversial decisions in 2004 holding that it was able to review the conventionality of a national law without referring the matter to the Constitutional Court for constitutional review on the grounds that the Constitution did not impose more constraints than the ECHR. *Cour de cassation [Cass.] [Court of Cassation]*, Nov. 9, 2004, AR P040849N, 20, <http://www.cass.be>; *Cass.*, Nov. 16, 2004, AR P040644N, <http://www.cass.be> (Belg.); *Cass.*, Nov. 16, 2004, AR P041127N, <http://www.cass.be> (Belg.). For comments on these cases, see Benoit Gors, *Une cause de refus de renvoi préjudiciel: la primauté de la Convention européenne sur la Constitution*, 38 REVUE BELGE DE DROIT CONSTITUTIONNEL 507 (2005); Jan Velaers, *Samenloop van grondrechten: het Arbitragehof, titel II van de Grondwet en de internationale mensenrechtenverdragen*, 60 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT 297 (2005).

[FN22]. Joined Cases C-188/10 & C-189/10, *In re Melki*, 2010 ECJ EUR-Lex LEXIS 666 (June 22, 2010).

[FN23]. See *id.* ¶ 16.

[FN24]. See *id.* ¶¶ 17, 19.

[FN25]. 1958 CONST. art. 88-1 (Fr.).

[FN26]. Loi spéciale modifiant l'article 26 de la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage [Special law modifying article 26 of the special law of January 6, 1989 on the Court of arbitration], *Moniteur Beige* [M.B.] [Official Gazette of Belgium], July 31, 2009, 51617 [hereinafter Special Law]; see Francis Delpérée, *SÉNAT DE BELGIQUE COMMISSION DES AFFAIRES INSTITUTIONNELLES, PROPOSITION DE LOI SPÉCIALE MODIFIANT L'ARTICLE 26 DE LA LOI SPÉCIALE DU 6 JANVIER 1989 SUR LA COUR D'ARBITRAGE* (2008), available at <http://www.senate.be/www/?MIval=/Registers/ViewReg&COLL=S&POS=1&PUID=67109963&TID=67111268&LANG=fr> [hereinafter Belgian Senate Report].

[FN27]. About the Constitutional Court and its functions, see *LA COUR D'ARBITRAGE VINGI ANS APRÈS* (Anne Rasson-Roland, David Renders & Marc Verdussen eds., 2004); PATRICIA POPELIER, *PROCEDEREN VOOR HET GRONDWETTELIJK HOF* (2008); MARIE-FRANÇOISE RIGAUN & BERNADETTE RENAULD, *LA COUR CONSTITUTIONNELLE* (2008).

[FN28]. The corpus of reference norms of the Belgian Constitutional Court is limited to certain parts of the Constitution. These include Title II, establishing fundamental rights.

[FN29]. Special Law, *supra* note 26, art. 26-4.

[FN30]. To learn more about the Constitutional Council and its functions, see PIFRRE AVRIL & JEAN GICQUEL, *LE CONSEIL CONSTITUTIONNEL* (2005); GUILLAUME DRAGO, *CONTENTIEUX CONSTITUTIONNEL* (2006); LOUIS FAVOREU & LOÏC PHILIP, *LE CONSEIL CONSTITUTIONNEL* (2005); DOMINIQUE ROUSSEAU, *DROIT DU CONTENTIEUX CONSTITUTIONNEL* (2008).

[FN31]. 1958 CONST. art. 61-1 (Fr.).

[FN32]. See e.g., *LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LEGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, COMPTE RENDU NO 58* (2009); *PROJET DE LOI ORGANIQUE RELATIF A L'APPLICATION DE L'ARTICLE 61-1 DE LA CONSTITUTION: EXPOSE DES MOTIFS* (2009), available at <http://www.assemblee-nationale.fr/13/pdf/projets/p11599.pdf>.

[FN33]. *Loi 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution* [Law 2009-1523 of December 10, 2009 relating to the application of Article 61-1 of the Constitution], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Dec. 11, 2009, p. 21379. The Belgian legislation was referred to repeatedly in the French Parliament. See JEAN-LUC WARSMANN, *ASSEMBLEE NATIONALE, RAPPORT FAIT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LEGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LE PROJET DE LOI ORGANIQUE (NO 1599) RELATIVE A L'APPLICATION DE L'ARTICLE 61-1 DE LA CONSTITUTION* (2009), available at <http://www.assemblee-nationale.fr/13/rapports/r1898.asp>.

[FN34]. Cour de cassation [Cass.] [supreme court for judicial matters] Question prioritaire de constitutionnalité [QPC] decision No. 12132, June 29, 2010, http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/12132_29_16765.html; Cass. QPC decision No. 12133, June 29, 2010, http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/12133_29_16764.html. The referring judge asked: “is Article 78-2, paragraph 4, of the Code of Criminal Procedure detrimental to the rights and freedoms guaranteed by the Constitution of the French Republic?”

[FN35]. *Ordonnance 58-1067 du 7 novembre 1958 portant Loi organique sur le Conseil Constitutionnel* [Order 58-1067 of Nov. 7, 1958 establishing the organic law of the Constitutional Court], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 7, 1958, p. 10129, art. 23-4 [hereinafter Ordinance 58-1067]. The contested law should be applicable to the case or constitute the grounds for prosecution, and it should not be declared in accordance with the Constitution by the Council already (notwithstanding a change of circumstances). In addition,

a question should be “new” or of a “serious nature.”

[FN36]. TFEU art. 267(2).

[FN37]. TFEU art. 267(3).

[FN38]. See *Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶ 22.

[FN39]. Ordinance 58-1067, *supra* note 35, art. 23-4.

[FN40]. Cass. QPC decision No. 12003, Apr. 18, 2010, <http://combatsdroitshomme.blog.lemonde.fr/files/2010/04/arret-2.1272009355.pdf>.

[FN41]. Protocol No. 3 on the Statute of the Court of Justice of the European Union to the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty Establishing the European Atomic Energy Community, Mar. 30, 2010, 2010 O.J. (C 83) 210. Article 23a of the Protocol provides: “The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.”

[FN42]. The decision was frequently commented upon. *E.g.*, Francis Donnat, *La Cour de justice et la QPC: chronique d'un arrêt prévisible et imprévu*, 2010 RECUEIL DALLOZ 1640 (2010); Henri Labayle, *Question prioritaire de constitutionnalité et question préjudicielle: ordonner le dialogue des juges?*, 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 659 (2010); Gilles Lucazeau, *Constitution, Convention ou Traité, La guerre des trois aura-t-elle lieu?*, 2010 LA SEMAINE JURIDIQUE EDITION GÉNÉRALE 1330 (2010); Frédéric Scanvic, *La question de constitutionnalité est-elle vraiment prioritaire?*, 2010 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 1459 (2010); Denys Simon & Anne Rigaux, *Solange, le mot magique du dialogue des juges ...*, EUROPE, July 2010, at 1.

[FN43]. Observations were made by Belgium, the Czech Republic, Germany, Greece, the Netherlands, Poland, and Slovakia, Greece, the Netherlands and Slovakia did not comment on the first question.

[FN44]. See *Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶¶ 25, 34.

[FN45]. See *id.* ¶ 35.

[FN46]. *Id.* ¶ 37.

[FN47]. *Id.*

[FN48]. *Id.*

[FN49]. *Id.* ¶ 38.

[FN50]. *Id.* ¶ 39.

[FN51]. *Id.*

[FN52]. *Id.* ¶ 72

[FN53]. *Id.* ¶ 77.

[FN54]. See, *e.g.*, Case C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008 E.C.R. I-505, ¶ 19; Case C-58/98, *In re Corsten*, 2000 E.C.R. I-7919 ¶ 24.

[FN55]. *See Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶ 57.

[FN56]. *Id.* ¶ 52.

[FN57]. *Id.* ¶ 53.

[FN58]. *Id.* ¶ 57.

[FN59]. *Id.*

[FN60]. Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1974 E.C.R. 33, ¶ 4.

[FN61]. *Id.*

[FN62]. *Simmenthal*, 1978 E.C.R. 629, ¶ 22.

[FN63]. *Id.* ¶ 24.

[FN64]. Case C-213/89. *The Queen v. Sec'y of State for Transport, ex parte Factortame Ltd.*, 1990 E.C.R. 1-2433.

[FN65]. Case C-348/89. *Mecanarte - Metalúrgica da Lagoa Ld^a v. Chefe do Serviço da Conferência Final da Alfândega do Porto*, 1991 E.C.R. I-3277.

[FN66]. *Id.* ¶¶ 43-45.

[FN67]. *Id.* ¶ 46.

[FN68]. *Id.* ¶ 48.

[FN69]. Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, 2010 WL 152458 (Jan. 19, 2010).

[FN70]. *Id.* ¶ 55; *see also* Timothy Roes, *Case Law: Case C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG*, 16 COLUM. J. EUR. L. 497 (2010).

[FN71]. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, 2010 ECJ EUR-Lex LEXIS 744, ¶ 67 (Sept. 8, 2010).

[FN72]. Case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, ¶¶ 18-20; *see also* Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 E.C.R. 1-6199, ¶ 53; Case C-344/04, *International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, 2006 E.C.R. I-403, ¶ 27; *Joined Cases C-143/88 & C-92/89, Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe*, 1991 E.C.R. I-415, ¶ 17.

[FN73]. *Id.* ¶ 15.

[FN74]. *See id.* ¶ 17-18.

[FN75]. *Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶ 55.

[FN76]. *Id.* ¶ 54.

[FN77]. *Id.* ¶ 56.

[FN78]. *Id.*

[FN79]. Francis Donat, *supra* note 42; Jérôme Roux, *La Cour de justice et le contrôle incident de constitutionnalité des directives de l'Union: remarques sur un obiter dictum*, 2010 RECUEIL DALLOZ 2524 (2010). For an analysis of the concept of the “rules or principles inherent to the constitutional identity of France,” see Edouard Dubout, “*Règles ou principes inhérents à l'identité constitutionnelle de la France*”: une supra-constitutionnalité?, 83 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 451 (2010).

[FN80]. Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, ¶ 3.

[FN81]. Labayle, *supra* note 42.

[FN82]. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008-564DC, June 19, 2008, J.O. 10228, ¶ 45.

[FN83]. CC decision No. 2010-605DC, May 12, 2010, J.O. 8897, ¶ 18 (official English translation). The same case, proposing an interpretation of the French priority review legislation fundamentally opposing the one adopted by the Court of Cassation, is discussed later in more detail.

[FN84]. Ordinance 58-1067, *supra* note 35, art. 23-10.

[FN85]. See *Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶¶ 46-47; Cass QPC decision No. 12003, Apr. 16, 2010, <http://combatsdroitshomme.blog.lemonde.fr/files/2010/04/arret-2.1272009355.pdf> (Fr.).

[FN86]. See Conclusions of Avoc. Gen. Domingo, Cass. QPC No. 10-40.001 & 10-40.002, Apr. 16, 2010, 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 455 (2010).

[FN87]. Patrick Gaïa, *La Cour de cassation résiste ... mal. A propos de l'arrêt du 16 avril 2010*, 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 458 (2010); Bertrand Mathieu, *La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg*, 2010 LE SEMAINE JURIDIQUE EDITION GENERALE 866 (2010); Bertrand Mathieu, *Point sur les premières décisions du Conseil d'Etat et de la Cour de cassation sur des questions prioritaire de constitutionnalité*, 2010 CONSTITUTIONS 218 (2010). For a more complete explanation of the Court's motivations to refer the case, see Marie Gautier, *La question de constitutionnalité peut-elle rester prioritaire? A propos de l'arrêt de la Cour de cassation du 16 avril 2010*, 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 449 (2010); Philippe Manin, *La question prioritaire de constitutionnalité et le droit de l'Union européenne*, 2010 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 1023 (2010).

[FN88]. One author compared the decision with the infamous “arrêts de parlement,” referring to the power usurpations by the supreme court of Paris in the Ancien Régime. Bertrand Mathieu, *Point sur les premières décisions du Conseil d'Etat et de la Cour de cassation sur les questions prioritaires de constitutionnalité*, 2010 CONSTITUTIONS 218 (2010). Another commentator suggested that “it is recommended to forget about the decision of the Court of Cassation. As quickly as possible.” Gaïa, *supra* note 87. See also Gautier, *supra* note 87, for her references to newspaper articles.

[FN89]. Gaïa, *supra* note 87.

[FN90]. CC decision No. 74-54DC, Jan. 15, 1975, J.O. 671.

[FN91]. Conclusions of Avoc. Gen. Domingo, Cass. QPC Nos. 10-40.001 & 10-40.002, Apr. 16, 2010, 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 455 (2010) (author's translation).

[FN92]. CC decision No. 2010-605DC, May 12, 2010, J.O. 8897, ¶ 11.

[FN93]. This applies at least in the case of “manifest incompatibility” of a law with the directive it is supposed to transpose. Even then, however, it leaves the door open to refer the matter to the Court of Justice. *See, e.g.*, CC decision No. 2008-564DC, June 19, 2008, J.O. 10228; CC decision No. 2006-540DC, July 27, 2006, J.O. 11541.

[FN94]. Gautier, *supra* note 87.

[FN95]. Conseil d'Etat [CE] [Council of State] Ass., Oct. 20, 2009, Rec. Lebon 467.

[FN96]. Bertrand Mathieu, *La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg*, 2010 LE SEMAINE JURIDIQUE EDITION GENERALE 866, 867 (2010).

[FN97]. *Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶ 48.

[FN98]. CC decision No. 2010-605DC, May 12, 2010, J.O. 8897. For French comments on the case. see Anne Levade, *Contrôle de constitutionnalité et contrôle de conventionnalité ne sont pas jeux de hasard: la réplique du Conseil constitutionnel à la Cour de cassation*, 2010 RECUEIL DALLOZ 1321 (2010); Denys Simon & Anne Rigaux, *Le feuilleton de la question prioritaire de constitutionnalité: Drôle de drame, Quai des brumes, Le jour se lève?*, EUROPE, May 2010, at 1.

[FN99]. CC decision No. 2009-595 DC, Dec 3, 2009, J.O. 21381, ¶ 14 (official English translation).

[FN100]. CC decision No. 2010-605DC, May 12, 2010, J.O. 8897, ¶ 13 (official English translation).

[FN101]. *Id.* ¶ 14.

[FN102]. *Id.* ¶ 15.

[FN103]. *Id.* ¶ 16.

[FN104]. Conclusions of Avoc. Gen. Domingo, Cass. QPC Nos. 10-40.001 & 10-40.002. Apr. 16, 2010. 2010 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 455 (2010) (author's translation).

[FN105]. CE, May 14 2010, Rec. Lebon.

[FN106]. *See* Scanvic, *supra* note 42; *see also* Paul Cassia & Emmanuelle Saulnier-Cassia, *La QPC peut-elle être prioritaire ?*, 2010 RECUEIL DALLOZ 1636 (2010).

[FN107]. *See Melki*, 2010 ECJ EUR-Lex LEXIS 666, ¶ 36.

[FN108]. Cass. QPC decision No. 12132, June 29, 2010, http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/12132_29_16765.html (author's translation); *accord* Cass. QPC decision No. 12133, June 29, 2010, http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/12133_29_16764.html.

[FN109]. ASSEMBLEE NATIONALE COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LEGISLATION ET DE L'ADMINISTRATION GENERALE DE LA REPUBLIQUE, RAPPORT D'INFORMATION SUR L'EVALUATION DE LA LOI ORGANIQUE NO 2009-1523 DU 10 DECEMBER 2009 RELATIVE A L'APPLICATION DE L'ARTICLE 61-1 DE LA CONSTITUTION (2010), <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2838.pdf>.

[FN110]. Reference for a Preliminary ruling from the Tribunal de Premiere Instance de Liège (Belgium) Lodged on

23 November 2009--Claude Chartry v. Etat Beige, 2010 O.J. (C 37) 3.

[FN111]. BELGIAN SENATE REPORT, *supra* note 26, at 6.

[FN112]. *Id.* at 18.

[FN113]. Cour constitutionnelle [CC] [Constitutional Court] décision no 96/2010, July 29, 2010, ¶ B.29, <http://www.const-court.be/> (Belg.).

[FN114]. Conseil d'Etat [CE] [Council of State] July 2, 2010, Orde Van Vlaamse Balies, No. 206.397, ¶ 11.2, <http://www.conseildetat.be> (Belg.).

[FN115]. *See, e.g.*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] ch. mixte, May 24, 1975, D. 1975, 497 (Fr.); Cour de cassation [Cass.] [Court of Cassation], May 27, 1971, ARR. CASS. 1971, 967 (Belg.).

[FN116]. *See* Scanvic, *supra* note 42.

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