The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)

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Abstract

Both the ECJ *Melki* ruling and the new French system of priority constitutional referral have received considerable scholarly attention, whether from the perspective of EU law or from that of domestic or comparative constitutional law. This paper looks at the *Melki* story primarily from the standpoint of domestic judicial politics. The decision of the *Cour de cassation* to send a reference for a preliminary ruling to the judges in Luxembourg on the conformity of the new interlocutory procedure with EU law cannot be separated from the context in which it occurred. Nor can the strong reactions that it elicited be properly understood without examining the background of the constitutional reform and the role which EU law and the ECHR have come to play in the French legal system. As what was initially a modest reform was successfully reframed by the Council and its allies in the legal academy as a "legal revolution" promising to bring human rights back to its homeland, the new concrete review mechanism posed a growing threat to the *Cour de cassation*'s influence. The reform, it is argued, threatened to undermine not only its grip on the lower civil courts but also to chip away at the considerable autonomy it had enjoyed in developing ECHR law in the French context. In these circumstances, the *Melki* reference may be viewed as a last-ditch (and with hindsight poorly judged) attempt to use EU law to derail a reform that was on its way to reconfigure inter-court relations in France at the expense of the *Cour de cassation*. With the *Melki* route – killing the priority referral mechanism by dragging the ECJ into the domestic "*guerre des juges*" – blocked, the Court is now isolated and under pressure to apply the new procedure in a way that is more favourable to the Constitutional Council.

1. Introduction

Both the ECJ *Melki* ruling[1] and the new French system of priority constitutional referral have received considerable scholarly attention, whether from the perspective of EU law[2] or from that of domestic or comparative constitutional law.[3] This paper looks at the *Melki* story

[1] Cases C-188/10 and C-189/10*, Aziz Melki and Selim Abdeli* [2010] ECR 00000.

[2] Florence Chaltiel, 'La Cour de justice de l'Union européenne poursuit le dialogue sur les rapports entre conventionalité et constitutionnalité (A propos de CJUE, 22 juin 2010)' (2010) 153-154 Petites affiches 6 ; Caterina Drigo 'La Corte di giustizia riafferma il proprio primato: la questione prioritaria di costituzionalità al vaglio dei giudici di Lussemburgo' [2010] Diritto pubblico comparato ed europeo 1484 ; Asteris Pliakos, 'Le contrôle de constitutionnalité et le droit de l'Union européenne: la réaffirmation du principe de primauté' [2010] Cahiers de droit européen 487 ; Daniel Sarmiento, 'Cuestión prejudicial y control previo de constitucionalidad. Comentario a la sentencia Melki del Tribunal de Justicia de la UE' (2011) 37 Revista española de Derecho Europeo 97 ; Fabrice Picod, 'Question prioritaire de constitutionnalité et droit de l'Union européenne' (2010) 509 La Semaine Juridique - édition générale 949 ; Denys Simon and Anne Rigaux, 'La priorité de la question prioritaire de constitutionnalité : harmonie(s) et dissonances(s) des monologues juridictionnels croisés' (2010) 29 Les Cahiers du Conseil constitutionnel 63 ; Denys Simon and Anne Rigaux, 'Le feuilleton de la question prioritaire de constitutionnalité: Drôle de drame, Quai des brumes, Le jour se lève?' [2010] (6) Europe 1 ; Sinisa Rodin, 'Back to Square One – Past, Present and Future of the Simmenthal Mandate' (2011) 40 Documentos de Trabajo CEU 1,19.

[3] Gerald L. Neuman, 'Anti-Ashwander : Constitutional Litigation as a First Resort in France' (2010) 43 N.Y.U. J. Int'l L. & Pol. 15 ; 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 ; Bertrand Mathieu, 'La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg' (2010) 464 La Semaine Juridique

primarily from the standpoint of domestic judicial politics. The decision of the *Cour de cassation* to send a reference for a preliminary ruling to the judges in Luxembourg on the conformity of the new interlocutory procedure with EU law cannot be separated from the context in which it occurred. Nor can the strong reactions that it elicited be properly understood without examining the background of the constitutional reform and the role which EU law and the ECHR have come to play in the French legal system. As what was initially a modest reform was successfully reframed by the Council and its allies in the legal academy as a "legal revolution" promising to bring human rights back to its homeland, the new concrete review mechanism posed a growing threat to the *Cour de cassation*'s influence. The reform, it is argued, threatened to undermine not only its grip on civil courts lower in the hierarchy but also to chip away at the considerable autonomy it had enjoyed in developing ECHR law in the French context. In these circumstances, the *Melki* reference may be viewed as a last-ditch (and with hindsight poorly judged) attempt to use EU law to derail a reform that was on its way to reconfigure inter-court relations in France at the expense of the *Cour de cassation*. With the *Melki* route – killing the priority referral mechanism by dragging the ECJ into the domestic "*guerre des juges*" – blocked, the Court is now isolated and under pressure to apply the new procedure in a way that is more favourable to the Constitutional Council.

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866 ; Philippe Manin, 'La question prioritaire de constitutionnalité et le droit de l'Union européenne' [2010] L'Actualité Juridique Droit Administratif 1024.

In reconstructing (and to some extent debunking) the *Melki* story, I first stop at its main protagonists and figures, which include judicial as well as non-judicial actors. Next, I describe what the constitutional status quo was prior to the introduction of concrete review by the constitutional revision of July 2008. In the section that immediately follows, I then discuss how the reform might have developed had it not been "hijacked" by the Constitutional Council and the constitutional law professors' lobby. In the last three sections, I chart the succession of events that culminated in the ECJ *Melki* judgment, from the adoption of the organic law implementing the new Article 61-1 of the Constitution to the *Cour de cassation*'s final decision on the merits. Especially striking is the short timeframe and the pace at which the courts – domestic and supranational – responded to each other's move when the application of the priority referral mechanism was in its early stage and early jurisprudential pronouncements were likely to shape its future development in decisive manner.

2. A Multi-Character Story

The *Melki* story features a rich collection of characters appearing at different points in the unfolding legal-political drama. Judicial actors have, of course, assumed centre-stage. The *Cour de cassation*, the French supreme court for civil and criminal law matters, is for many – and for French constitutional scholars in particular – the main villain in the plot. On the other hand, the Constitutional Council and the *Conseil d'Etat*, the supreme court for administrative issues, are supposed to be the great heroes of the constitutional saga. Somewhat reluctantly drawn in the domestic judicial

battle, the Court of Justice – the supranational guest star, as it were, in what is still primarily a French production – makes an important appearance but as a rather ambiguous character, sometimes viewed with suspicion. Moreover, without really showing its face in any act of the play, the European Court of Human Rights (ECtHR) remains an invisible presence in the controversy over the role of supranational law in the French legal system.

Not to be overlooked, however, is the part played by non-judicial actors in the reconfiguration of French judicial politics, which constitutes the backdrop of the *Cour de cassation*'s reference to the ECJ. That the law professoriate often acts as a kind of specialised interest group promoting its own legal agenda is not exactly a novel proposition in European Union studies.[4] Yet the public debate surrounding the adoption of the priority referral mechanism and the *Cour de cassation*'s behaviour in dealing with it shows that what holds for EU law scholars holds equally well for French constitutional law professors. Expanding the influence of the Constitutional Council was in their own interest as constitutional law "experts". So it should come as no surprise that the most prominent among them proved

[4] See Martin Shapiro and Alec Stone, 'The new constitutional politics of Europe' (1994) 26 Comparative Political Studies 397, 415 (characterizing legal scholarship as a form of "highly specialized lobbying"); Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 European Law Journal 165 (documenting the close links between EU institutions and EU law scholars).

ardent advocates of the new procedure.[5] Enjoying comparatively better access to the media than other legal academics (who might have been less enthusiastic about the reform), they worked relentlessly to praise, to celebrate, and to promote the new procedure. Along with Profs. Guy Carcassonne, Dominique Rousseau and Olivier Duhamel (three of the most frequent legal contributors to *Le Monde*, the influential Parisian newspaper), the likes of Bertrand Mathieu (president of the French association of constitutionalists), and Jean-Claude Colliard (who in addition to his academic credentials is a former member of the Constitutional

[5] This appears to confirm the hypothesis that when a court's jurisdictional specialization is congruent with the specialization of a sub-section of the law professoriate the former's and latter's interests will converge. The fact that in the Kelsenian model judicial review is entrusted to a constitutional court rather than to a supreme court with a more comprehensive subject-matter jurisdiction means that its institutional interests are more likely to be aligned with the section of the legal academy called on to comment on its operations. The relative cosiness that characterises the relations between constitutional law scholars and constitutional courts across much of Europe is further reinforced by the fact that law professors are in a privileged position to fill vacancies on these courts. A scholar will be less inclined to criticise an office to which she herself aspires. For an argument to that effect in the German context see Bernhard Schlink, 'German Constitutional Culture in Transition' (1993) 14 Cardozo Law Review 711. For a tentative theorisation of the connection between public opinion, legal scholarship and judicial power see Arthur Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 European Political Science Review 297, 320-323. At a more general level, this fits the theory of interest-group mobilisation developed by Nobel-laureate Mancur Olson in *The Logic of Collective Action* (Harvard University Press, Cambridge (Mass.), 1965).

Council) did much to raise expectations about the impact of the reform; and were, of course, the first to lambaste the *Cour de cassation* when it appeared to stand in the way of the great constitutional revolution.[6]

Finally, we should not forget the legislative branch and in particular the Legal Affairs Committees in the two parliamentary chambers, the Senate and the National Assembly. As gate-keeper and agenda-setter, the Committees and their respective chairman – Hughes Portelli and Jean-Luc Wasserman – played a key role in the implementation of the constitutional reform. More crucially for the equilibrium shift in the French judiciary that would ensue, Parliament – captured by those favourable to the expansion of the Constitutional Council's remit – reacted swiftly to what had then come to be described as the systematic sabotage of the reform by the *Cour de cassation*. As we shall see, the threat of legislative override is now a sword of Damocles hanging over the Court. Next time around, its judges will no doubt think twice before defying the Constitutional Council.

3. The Constitutional Status-Quo

By their very nature, institutional reforms redistribute powers and create winners and losers with gains and losses commensurate to the importance of the reform.

[6] Unsurprisingly, the EU-law commentariat took much less disapproving a view of the *Cour de cassation's* behaviour throughout the *Melki* saga. See e.g. Denys Simon and Anne Rigaux, note 2; Jacqueline Dutheil de la Rochère, 'La question prioritaire de constitutionnalité et le droit européen' (2010) 46 Revue Trimestrielle de Droit Européen 577.

3.1. Institutional Limits on the Expansion of Constitutional Law

Who stood to win most from the introduction of concrete review in the French legal system? The Constitutional Council, of course. Under the constitutional status quo, the French provision for the judicial review of legislative acts was arguably the most restrictive, in procedural terms, when compared with those existing for other European constitutional courts. First, only politicians (MPs, Prime, Minister, President of the Republic, etc.) could refer laws to the Council. Second, statutes could be reviewed only before promulgation. Thus a bill once promulgated could no longer be challenged on constitutional grounds. These limitations, however, did not prevent the Council to emerge from a position of relative obscurity at the beginning of the Fifth Republic to become a key player in the legislative process.[7]

The rise of the Council is precisely what made possible the resurgence of constitutional law scholarship as the leading sub-field within public law (*droit public*). Because the supreme administrative court, the *Conseil d'Etat*, was *the* judicial body dealing with public law matters, the leading scholarly figures of public law were primarily specialists of the *Conseil d'Etat*'s jurisprudence. In fact, constitutional law could hardly pretend to be a field in its own right. Not until the 1970s, when the Constitutional Council began to transform the Constitution's preamble into hard law, did constitutional

[7] See Sylvain Brouard, 'The Politics of Constitutional Veto in France: Constitutional Council, Legislative Majority and Electoral Competition' (2009) 32 Western European Politics 384; Alec Stone, *The Birth of Judicial Politics in France* (OUP, Oxford, 1992).

law emerge as a respected and autonomous discipline, enabling figures such as Louis Favoreu to gain name-recognition by writing almost exclusively on constitutional issues.[8] Nevertheless, the absence of concrete review or of an individual complaint mechanism meant not only that the Constitutional Council was isolated from the rest of the judiciary; it also meant that arguments grounded in constitutional law had little traction and thus barely featured in litigation before the ordinary courts. French constitutional scholars could only glance with envy at Italy and Germany, where constitutional law could be invoked before even the humblest tribunal. There, unlike in France, no lawyer could afford to ignore constitutional law. All this to say that constitutional law scholars, too, were among those who stood to reap net benefits from the reform. After all, what is good for the Council is also good for constitutional law academics.

3.2. Better Off Under the Status Quo: the *Conseil d'Etat* and the *Cour de cassation*

For the *Cour de cassation* and the *Conseil d'Etat*, by contrast, the reform looked more like a bane than a boon. First, the introduction of concrete review is bound to upset the hierarchies in place in the judicial system. Circumventing their supreme court, lower courts may use the procedure to displace established precedents so as to gain more leeway in their decision-making. A cursory look at the experience of other legal systems reveals that

[8] See Bastien François, 'Le juge, le droit et la politique : éléments d'une analyse politiste' (1990) 1 Revue Française de Droit Constitutionnel 49.

the relations between supreme and constitutional courts are not exempt of frictions. In Spain, Italy, Germany or Belgium, to mention but a few examples, supreme court judges regularly complain about the activism of their constitutional colleagues.[9] Famous is, of course, the tug of war – known as the *Guerra dei due Corti* – between the Italian Constitutional Court and the *Corte di cassazione*.[10] As several commentators have noticed, many aspects of the *Melki* narrative are reminiscent of the Italian judicial saga.[11] Second, another reason is that through a generous infusion of supranational law, the two supreme courts had come to operate as quasi-constitutional courts. Article 55 of the French Constitution stipulates that international treaties have priority over ordinary legislation. Encouraged by an early decision of the Constitutional Council, which had refused to equate the violation of a treaty obligation with a violation of the Constitution,[12] the

[9] Jörg Menzel, 'Hundert Bände Verfassungsrechtsprechung' in Jörg Menzel (ed.), *Verfassungsrechtsprechung* (Mohr Siebeck, Tübingen, 2000) 1, 24-27 (highlighting episodes of tension between the Federal Constitutional Court and the *Bundesgerichtshof*, Germany's supreme court for civil and criminal matters); Leslie Turano, 'Qui Custodiet Ipsos Custodes ?: The Struggle for Jurisdiction Between the *Tribunal Constitucional* and the *Tribunal Supremo*' (2006) 4 ICON 151 (discussing the Spanish Constitutional Tribunal's rampant conflict with the *Tribunal Supremo*, which culminated in the latter's issuing a ruling to order constitutional judges to pay damages to a claimant whose constitutional case had been dismissed).

[10] Nicola Assini, *L'oggetto del giudizio di constituzionalità e la "guerra delle due Corti"* (Giuffrè, Milan, 1973).

[11] See Mathieu note 3 at 867.

[12] Constitutional Council, Ruling of 15 January 1975, no. 74-54 DC.

ordinary courts in the two hierarchies began to use Article 55 to disregard legislative measures in the name of transnational law – which, in practice, essentially meant EU law and ECHR law.[13] Hence the *Cour de cassation* and the *Conseil d'Etat* could not set statutes aside for unconstitutionality but they could set statutes aside for "unconventionality" (*inconventionnalité*).[14] France had thus something resembling a decentralised system of judicial review, albeit one based on international treaties rather than on the Constitution.

This being said, there was a number of reasons to expect that the reform would have a more disruptive effect on the *Cour de cassation* than on the *Conseil d'Etat*. For a start, the civil/criminal courts differ significantly from their administrative counterparts in matters of organisation. The *Conseil d'Etat* exerts much tighter control on the lower echelons of its judicial hierarchy than does the *Cour de cassation*. Whereas all magistrates sitting on the civil and criminal courts (including the *Cour de cassation*) are recruited through the *Ecole nationale de la magistrature*, their colleagues from the administrative courts are either graduates from the prestigious *Ecole nationale d'administration* (ENA) or civil servants recruited via a special (and less distinguished) examination. In practice, it is the former who rule the roost in what is effectively a two-tier career system. Virtually

[13] See Elisabeth Lambert Abdelgawad and Anne Weber, 'The Reception Process in France and Germany' in Helen Keller and Alec Stone Sweet (eds.), A Europe of Rights: The Impact of the ECHR on National Legal Systems (OUP, Oxford, 2008) 107.

[14] Neumann note 3 at 17-18.

all the members of the *Conseil d'Etat* are *énarques*, as are the presidents of the Administrative Courts of Appeals, who are all at the same time members of the *Conseil d'Etat*. What is more, the *Conseil d'Etat* controls the budget of the administrative courts and manages the careers of its low-rank judicial personnel. The *Cour de cassation*, by contrast, has no comparable prerogatives. Indeed, both the budget and the human resources of civil and criminal courts are not in judges' hands but managed directly from the Ministry of Justice.[15] These considerations suggest that lower administrative courts – more docile towards their supreme court – would be less subversive in their use of the new interlocutory procedure. The *Cour de cassation*, by contrast, had good reasons to fear that more numerous and less subservient civil court magistrates would behave in less predictable fashion.

Another difference between the *Cour de cassation* and the *Conseil d'Etat* regards their relative degree of affinity with the Constitutional Council on the one hand and with the executive branch on the other. Regarding the Constitutional Council, many foreign observers might find it more than a little intriguing that the two institutions are housed in the same Parisian palace. More importantly though, the all-important office of secretary general of the Council is traditionally filled by a member of the *Conseil d'Etat*. Akin to a super law clerk, the secretary general prepares the

[15] See Hélène Pauliat, 'Le modèle français d'administration de la justice: distinctions et convergences entre justice judiciaire et justice administrative' (2008) 125 Revue Française d'Administration Publique 93.

Council's deliberations and seems to have ample opportunities to influence its members. Add to that that yet another *Conseiller d'Etat*, Renaud Denoix de Saint-Marc, sits on the Council since 2007, and it becomes clear that the *Conseil d'Etat* had some reassurance that its institutional interests would not be entirely disregarded by the constitutional judges. Even more striking are the links between the *Conseil d'Etat* and the executive. Unlike the *Cour de cassation*, the *Conseil d'Etat* is not only a judicial body, but doubles as advisory committee to the executive branch. The government has the obligation to consult it when sending bills to the legislature and on enacting secondary legislation. Moreover, it is fairly common for a *Conseiller* to leapfrog from one civil service job to the next – generally at the highest level of responsibility – throughout her career, with shorter or longer spells back at the *Palais Royal*. In other words, the *Conseil*, at least its personnel, is closely entangled with the administration of the state. While providing the *Conseillers*, who tend to have a strong *esprit de corps*, with unmatched career opportunities, this situation also nurtures a culture of legal protectionism. The *Conseil d'Etat* is not viewed as a particularly pro-European court. EU scholars need no reminder that it was the last of all high courts in Western Europe to accept the supremacy of EU law. Whereas the *Cour de cassation* had embraced supremacy early on, in 1975, it took fourteen years more to the *Conseil d'Etat* and repeated clashes with the ECJ to follow suit.[16] Not that it has had a particularly easy ride with the ECtHR

[16] A story brilliantly recounted in Karen Alter, *Establishing the Supremacy of European Law* (Studies in European Law, OUP, Oxford, 2001) 124-180.

either. Its double function as judicial body and as government advisor has been a big bone of contention between the two courts, some fretting that the Strasbourg court might rule it as inconsistent with the principle of judicial impartiality deriving from Article 6 of the Convention.[17] Despite occasional frictions with the Constitutional Council, some on the *Conseil d'Etat* may see it as a useful counterweight to the two supranational courts. One able to oppose the legitimacy of the Constitution to the forces of legal integration.

4. Changing the Institutional Configuration of the Judiciary: The New Concrete Review Mechanism

The introduction of concrete review had already been mooted in the early 1990s. But nothing came out of the constitutional debate at the time. It would take President Nicolas Sarkozy's grand constitutional reform for concrete review to find its way into the Constitution. In what has become a hallmark of President Sarkozy's reforms, the actual constitutional revision turned out to be somewhat less of a rupture with the past (to use the President's election slogan) than when first floated. Voted into law with the rest of the constitutional overhaul on 23 July 2008, the brand-new Article 61-1 specified:

> 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

[17] Jean-François Flauss, 'Actualité de la Convention européenne des droits de l'homme' [1996] L' Actualité Juridiques Droit Administratif 383.

Cour de Cassation to the Constitutional Council, within a determined period.

An Institutional Act shall determine the conditions for the application of the present article.

Note the absence of reference to "priority" or to any equivalent concept. As we shall see in the next section, the word is something of a Johnny-come-lately. It did not appear until the vote on the institutional act (organic law) implementing the provision.

Looking at Article 61-1 and comparing it with similar interlocutory procedures in place in other countries, the mechanism strikes as exceptionally restrictive. Concrete review usually means that any judge whatsoever can refer a constitutional issue directly to the constitutional tribunal. Not so with the French referral mechanism. As illustrated in Figure 1, the *Conseil d'Etat* and the *Cour de cassation* operate as filter. They have the duty, and therefore the power, to decide whether a question is worth sending to the Constitutional Council.

<<Figure 1 about here>>

The addition of a filter would seem to be a concession to the two supreme courts – a guaranty that the reform would not upset the operations of the two judicial hierarchies too much. After all, what else could have been the rationale for this procedural innovation?

In any case, the text approved in the summer of 2008 suggested that referrals would be few and far between and thus the impact of the reform rather modest.

That was, however, without counting with the Constitutional Council and its supporters in the legal academy.

5. Reframing the Reform: The Constitutional Council and the Constitutional Law Lobby

The parliamentary debates on the implementing legislation began in April 2009 with the government presenting a draft bill on the "question of constitutionality" (*question de constitutionnalité*).[18] The bill did not yet speak of a "priority constitutional referral" (*question prioritaire de constitutionnalité*), but it already specified that whenever a statutory provision is challenged both on constitutional and on treaty grounds, the judge in the main cause would have to examine the constitutional question first.[19] This was a departure from the assumption some had made during the debates leading to the adoption of Article 61-1. In the Senate report on the constitutional amendment, the prevailing idea was still that the ordinary courts would decide the treaty questions before making referrals to

[18] See Assemblée nationale, Projet de loi organique relatif à l'application de l'article 61-1 de la Constitution, Document no. 1599, 8 April 2009.

[19] Article 23-2, point 3

the Constitutional Council. This, it was then argued, would ensure that the Council would not be overburdened with referrals.[20]

In a remarkable reversal, the notion that supranational law had crowded out the Constitution and that the opportunity should seized upon to restore it to its place at the apex of the legal order began to take hold among legislators. In hearings before the legal affairs committees of the two chambers, EU law scholars argued that it was "unnecessary" and "pointless" to require the judge in the main cause to consider constitutionality before conventionality.[21] However, they were both out-numbered and out-voiced by their constitutional law colleagues. Before the National Assembly's Legal Affairs Committee, Bertrand Mathieu, Guy Carcassonne and Jean-Claude Colliard emphasised the "need" to give priority to the Constitution over treaty law.[22] Betrand Mathieu, again, and Guillaume Drago, yet another constitutional law professor, made the same point before the Legal Affairs

[20] Sénat, Rapport no. 387, 11 June 2008 (available online: http://www.senat.fr/rap/l07-387/l07-3871.pdf, accessed 15 September 2011) at 178. See also Neumann note 3, at 23.

[21] So Anne Levade and Paul Cassia before the National Assembly's Legal Affairs Committee, Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, 23 June 2009, Compte rendu no. 58, and 30 June 2009, Compte rendu no. 63.

[22] As did Professor Nicolas Molfessis, a private law lawyer, but with one foot firmly in constitutional law, see the debates in the National Assembly note 20 above.

Committee of the higher chamber, where no other academic lawyer was heard.[23]

They did not have to wait long for their lobbying efforts to pay off. In early September, the National Assembly's Legal Affairs Committee adopted an amendment – tabled by the Committee's chairman, Jean-Luc Wassermann – inserting the word "priority" in the draft legislation, thus giving the procedure its final name: *question prioritaire de constitutionnalité* – soon to become "*QPC*" in the jargon of French lawyers.[24]

The campaign of the reform's proponents was not over, however. Once secured the final vote on the implementing legislation, they went on to publicise the new mechanism. The Constitutional Council sent a package, complete with a DVD outlining the *QPC*, to the members of all bar associations across the country. Its President, Jean-Louis Debré described the new procedure as a "very important advancement for the rule of law" and as "the end of a French exception in Europe".[25] Meanwhile, Marc Guillaume, the Council's secretary general, and Denys de Béchillon, another law professor, penned an editorial in the daily *Les Echos* presenting the

[23] Sénat, Commission des lois, 23 September 2009 (http://www.senat.fr/compte-rendu-commissions/20090921/lois.html, accessed 15 September 2011).

[24] Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, 3 September 2009, Compte rendu no. 73.

[25] See *Le Figaro*, 25 May 2010, http://www.lefigaro.fr/politique/2010/05/25/01002-20100525ARTFIG00801-un-progres-pour-l-etat-de-droit-dans-notre-pays.php (accessed 15 September 2009).

freshly promulgated reform.[26] And, of course, the pages of legal periodicals were replete with articles by constitutional law professors exalting the new procedure.[27] By raising the expectations about its impact, the proponents of the reform implicitly suggested that a reluctance to send referrals to the Council would be regarded as judicial treason. In an interview published in *Le Monde* shortly after it came into force, the Council's President made the message even more explicit: "the filter should not become a stopper".[28]

6. Mounting Tensions

The new referral mechanism took effect on 1 March 2010. After that, the courts moved in an accelerated sequence of judicial tit-for-tat. As shown in Figure 2, the short timeframe in which the courts spelled out their position on the new procedure is not one of least remarkable aspect of the *Melki* story.

<<Figure 2 about here>>

[26] 'La question prioritaire de constitutionnalité : rendez-vous le 1er mars' *Les Echos*, 28 December 2009.

[27] See e.g. Dominique Rousseau, 'Vive la QPC ! La quoi ?' (2010) 26 Gazette du Palais 13 ; Bertrand Mathieu, 'La question prioritaire de constitutionnalité : une nouvelle voie de droit' (2009) 52 La semaine Juridique 54 ; Michel Verpeaux, 'Le Conseil constitutionnel : juge de la question prioritaire de constitutionnalité' [2010] L'Actualité Juridique Droit Administration 88.

[28] *Le Monde*, 28 May 2010, http://www.lemonde.fr/politique/article/2010/05/28/je-veux-que-la-procedure-de-question-prioritaire-de-constitutionnalite-fonctionne-rapidement_1364308_823448.html (accessed 15 September 2011).

No less than five decisions on the compatibility of the new discipline with EU law were rendered in less than three months.

The *Cour de cassation* made the opening move. In two sets of proceedings involving respectively Sélim Abdeli and Aziz Melki, two undocumented Algerian nationals who had been arrested in an area close to the French border with Belgium, the defense contended that their arrest contravened both EU law (the Schengen Agreement) and the Constitution. The judge in the main cause – the *juge des libertés et de la detention* (judicial body deciding on matters of provisional detention) – sent the question to its supreme court in accordance with the new priority referral procedure. On 16 April, the *Cour de cassation* decided not to refer the question to the Council but to seek an expedited ruling from the Court of Justice on the compatibility of the new mechanism with EU law. The move immediately met with violent criticism from the side constitutional law scholars. A stream of articles condemning the *Cour de cassation* appeared in major newspapers as well as in law journals.[29]

[29] See Guy Carcassonne and Nicolas Molfessis, 'La Cour de cassation à l'assaut de la question prioritaire de constitutionnalité' *Le Monde*, 23 April 2010 ; Bertrand Mathieu note 3 ; Dominique Rousseau and David Levy, 'La Cour de cassation et la question prioritaire de constitutionnalité : pourquoi tant de méfiance ?' (2010) 115-117 Gazette du Palais 12. On constitutional law blogs the contributors did not mince their words either, see (constitutional law) Professor Didier Ribes on http://www.bfdc.org/ and the posting 'La Cour de cassation flingue d'entrée de jeu le caractère prioritaire de la question de constitutionnalité (Cass., QPC 16 avr. 2010, n° 10-40002)' on

The language used by the *Cour de cassation* in formulating its question to the Court of Justice was rather blunt:

> Does Article 267 of Treaty on Functioning of European Union... preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order no. 58-1067 of 7 November 1958, created by Organic Law no. 2009-1523 of 10 December 2009, in so far as those provisions require courts to rule as a matter of priority on the submission to the Constitutional Council of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?[30]

According to the Court, the question followed from two related considerations. First, because a constitutional provision, Article 88-1, incorporates EU mandates the legislature to act in conformity with legal obligations resulting from EU law, the Constitutional Council had the power to review legislative enactments for inconsistency with EU. Second, by virtue of Article 62 of the French Constitution, all public authorities are bound by the decisions of the Constitutional Council. The French high court reasoned that in light of these provisions the organic law effectively led to the task of ensuring the supremacy and direct effect of EU law being

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http://www.paperblog.fr/3127081/. (Blogs accessed 16 September 2011.) See also on the radio-waves the recriminations of Olivier Duhamel, 'Les juges de la Cour de cassation sabotent la réforme' *France Culture*, 13 May 2010.

[30] Cass., 16 April 2009, No. 10-40.001. (Translation adapted from the English version of the ECJ ruling, note 1.)

transferred to the Constitutional Council in contravention of the *Simmenthal* doctrine. Once a question had been referred to the Council, the judge in the main cause could no longer send a reference to the ECJ, nor set aside a legislative measure she viewed as contrary to EU law.

Had the ECJ followed this construction of the organic law, it would almost surely have declared it inconsistent with EU law. Yet the Constitutional Council on 12 May, followed by the *Conseil d'Etat* two days later, proposed a different reading, which promised to make the organic law EU-law-compatible. Seized through the abstract review procedure by politicians who challenged the constitutionality of a bill regulating online gambling, the Constitutional Council jumped on the opportunity to issue a *dictum* on the relationship between the priority referral procedure and EU law. It argued that the judge in the main cause:

> …may also take all and any conservatory measures as may be necessary. He 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. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 [as modified by the Organic Law on the Priority Referral Procedure]…preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application

> in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union;[31]

Apparently anxious to avert a clash with the Court of the Justice, the Council added:

> Lastly, Article 61-1 of the Constitution and sections 23-1 and following of the Ordinance of November 7th 1958 referred to hereinabove do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary hearing on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.[32]

Two days later, the *Conseil d'Etat* handed a ruling in which it defended the same reading of the organic law:

> …these provisions do not preclude the administrative judge, as ordinary judicial guardian [*juge de droit commun*] of the application of European Union law, to ensure its effectiveness in situation where no priority constitutional referral has been made or, when it has, upon completion of the procedure or even at any time during a pending referral if there is urgent need to prevent a legislative measure from producing effects that are contrary to European Union law; what is more, the administrative judge retains the possibility at any time, and whenever it appears appropriate, to

[31] CC, 12 May 2009, no. 2010-605 DC, at point 14. (Official translation.)

[32] *Id*. At point 15.

> send a reference for a preliminary ruling to the European Court of Justice pursuant to Article 267 TFEU;[33]

Rejecting the premises of the *Cour de cassation*'s reasoning, the *Conseil d'Etat* and the Constitutional Council thus presented the Court of Justice with a deal which preserved most of the *Simmenthal* doctrine without simultaneously killing the new procedure. The question now was whether the Luxembourg Court would sign up to it. Would the ECJ accept that the existence of an interlocutory procedure such as the one introduced in France could in some circumstances lead a domestic court to delay the disapplication of legislative measure deemed inconsistent with EU law?

7. Denouement

Eventually, of course, the ECJ did. It rendered its expedited ruling on 22 June, just nine weeks after receiving the *Cour de cassation*'s reference. After reasserting the essential tenets of its *Simmenthal* jurisprudence, it first observed that "under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law". In light of the decisions handed by the *Conseil d'Etat* and the Constitutional Council, the Court went on to say, "such an interpretation of the national provisions which introduced the mechanism for review of constitutionality at issue in

[33] CE, 14 May 2010, *Rujovic*, no. 312305, cons. 1. (Translation is mine.)

the main proceedings cannot be ruled out".[34] Crucially, though, the Court made a concession on the immediate effect of EU law supremacy:

> In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless requires that that court be 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.[35]

The Court thus accepted the modus vivendi offered by the *Conseil d'Etat* and the Constitutional Council.

This outcome left the *Cour de cassation* uncomfortably isolated. On 29 June, it handed its final ruling on the issue. The convoluted reasoning suggests a Court unsure of where it wants to go. The Court concluded that, since it did not have the power to take the measures necessary to ensure the provisional judicial protection of the rights conferred under EU law, it had no choice but to leave the organic law unenforced on this occasion. Therefore, it refused to send the initial referral to the Council and instructed the judge in the main cause to set aside the legislative provisions

[34] See note 1, para. 50.

[35] *Id*. Para. 53.

on the basis of which Aziz Melki and Sélim Abdeli had been arrested as contrary to EU law.[36] This was unlikely to endear the Court to its critiques.

8. Epilogue: The Aftermath of *Melki*

In later and over the summer new controversies erupted after the *Cour de cassation* refused to refer constitutional questions about important pieces of legislation to the Council.[37] Again, the Court faced fierce criticism from constitutional law scholars.[38] But this time, the legislators went out of their way to punish the unruly high court. The Organic Law on the Priority Referral Procedure had created a special panel within the *Cour de cassation*, chaired by the Court's President, to examine the referrals from the lower courts. In July, Hughes Portelli, President of the Senate's Legal Affairs Committee and……constitutional law professor at University Panthéon-

[36] Cass., *Melki*, 29 June 2010, no. 1040.001.

[37] Cass., *Mme X et al. v. Fédération nationale des déportés et internés, résistants et patriotes et autres*, 7 May 2010, no. 12009 (dismissing a referral against a law outlawing genocide and holocaust denial); Cass., *M.A…X*, 19 May 2010, no. 12020 (declining to refer a constitutional question about the instructions given to the jury in criminal cases on the ground that the challenge concerned not the law itself but its construction by the *Cour de cassation*) ; Cass., *Société Mermoz aviation Ireland Limited*, 15 June 2010, no. 12095 (dismissing a referral concerning the conditions under which home medical checks are covered by the health system on the ground that the statute being challenged had already been modified).

[38] Dominique Rousseau, 'La mise en place de la QPC crée un big-bang juridictionnel en France' *La Tribune*, 21 July 2010 ; Guy Carcassonne *et al*., 'Libérons la QPC ! La Cour de cassation s'oppose à la réforme de la question prioritaire de constitutionnalité' *Le Monde*, 16 July 2010.

Assas, tabled an amendment abolishing the special panel and entrusting the examination of the referrals to the Court's ordinary chambers. The MPs adopted the amendment which was attached to a bill on the Judicial Council (*Conseil supérieur de la magistrature*), the body overseeing judicial appointments.[39] Asked to review the bill, the Constitutional Council upheld the amendment despite its long-standing jurisprudence prohibiting similar legislative riders.[40]

By decentralising the examination of lower court referrals, the amendment made it more difficult for the high court judges to coordinate so as to use the filter strategically. But it would have merely been a minor setback for the *Cour de cassation* had it not been followed by constant threats of legislative override lest the Court failed to demonstrate more enthusiasm for the new procedure. At the end of the summer, only six months after the reform took effect, the National Assembly's Legal Affairs Committee carried a series of hearings to make a first assessment of its implementation. The *Cour de cassation*'s president, Vincent Lamda, denounced a smear campaign against his tribunal. But, isolated, he could not prevent constitutional scholars – Guy Carcassonne and Bertrand Mathieu – and MPs alike from literally pillorying the Court.[41] Most of the

[39] Organic Law of 22 July 2010, no. 2010-830.

[40] CC, 19 July 2010, no. 2010-611 DC.

[41] Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, 1 September 2010, Compte rendu no. 81, and 2 September 2010, Compte rendu no. 82. See also the report by the Committee's chairman

debates on the future of the procedure actually focused on how to modify the supreme-court filter so as to prevent the *Cour de cassation* from acting as a "stopper".[42]

Indubitably the *Cour de cassation*'s institutional standing has emerged seriously diminished from the episode. The *Melki* case may have marked the beginning of a durable shift of power within the French judiciary.

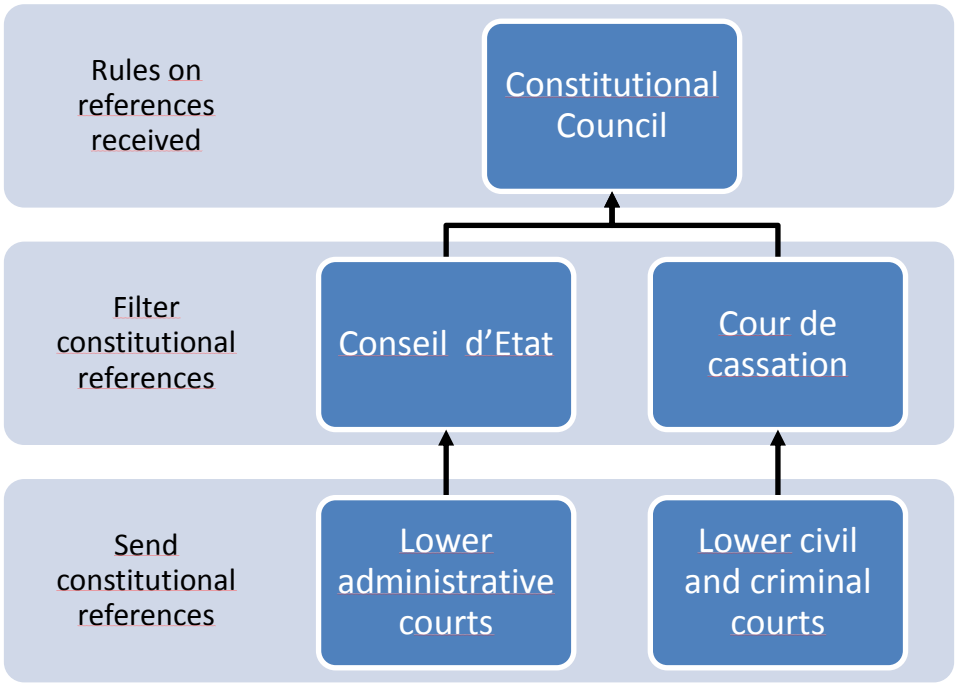

Figure 1. Filtered Concrete Review Introduced by the July 2008 Constitutional Reform

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Jean-Luc Warsmann, Rapport d'information, 5 October 2010, no. 2838, http://www.assemblee-nationale.fr/13/pdf/rap-info/i2838.pdf (accessed 16 September 2011).

[42] The metaphor, which by then had apparently gained wide currency in legal circles, was used by Professor Guy Carcassonne during his hearing on 1 September 2010.

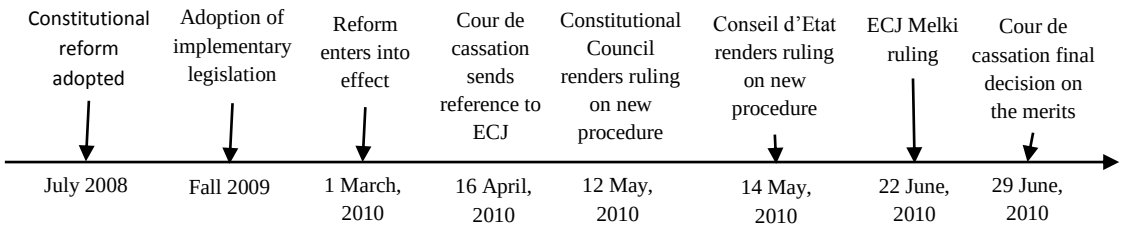

Figure 2. The 2008 Constitutional Reform and the *Melki* Reference, Timeframe