The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment

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Coincidence of human rights review by national and European courts – Courts questioning and delimiting each other's jurisdiction – Evolution of judicial review of legislation in Belgium and France – Rules giving priority to *national* human rights review over *European* human rights review – *Melki* judgment Court of Justice – Conformity with Union law – Balance between effectiveness of EU review and effectiveness of constitutional review – Effectiveness of human rights – Obligatory *a priori* human rights review of secondary Union law

Introduction

Less than a century ago, the adagium *non de legibus, sed secundum leges iudicandum* (one should not judge the law but according to the law) reflected the common practice throughout Europe. Since these days, the field of human rights protection against legislation has developed into a core asset of all European legal orders. As a result, in most EU member states, the conformity of legislation with human rights is nowadays examined by four instances: the judiciary, the constitutional court, the European Court of Justice and the European Court of Human Rights.

This unique system of multilevel human rights protection does, however, entail two perils. The risk of conflicting judgments concerning human rights' scope, content, exceptions, mutual relations and application in a given case should be settled by the Strasbourg Court being the final interpreter and by applying the principle of the widest protection.

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European Constitutional Law Review, 7: 355–391, 2011

doi:10.1017/S1574019611300028

The second peril consists of the four human rights instances questioning and delimiting each other's jurisdiction. The latter problem has recently arisen both in Belgium and in France, as well at the national level as between the national and the European level. In both countries, the main protagonists were the *Cour de cassation* and the constitutional court (*Cour constitutionnelle/Conseil constitutionnel*). Both discussions were taken to the European level to be judged by the European Court of Justice, although this court is one of the parties concerned. The Luxembourg Court delivered an ambiguous judgment, stressing the absolute character of its full effect doctrine, while conditionally leaving room for a limited priority to constitutional review.

This paper focuses on the second peril, both because of its recent jurisprudential developments and because of its potential effects on legal certainty and effective human rights protection. The first chapter summarizes the evolution of judicial review in Belgium and France, including the divergent views on the hierarchy of the reference norms. The second chapter focuses on the solution given to the debates on the competence for reviewing legislation's conformity with human rights in both countries. The Belgian coincidence procedure was *mutatis mutandis* transposed into French law when the *question prioritaire de constitutionnalité* (*QPC)* was established. While the Belgian procedure was the first one to be questioned before the Luxembourg Court, the French one, launched through an urgent procedure, was the first one to be examined, in the *Melki* case. The third chapter examines these *Melki* criteria and discusses whether the Belgian and French coincidence procedures comply with them. In the fourth chapter, the focus is on what is actually at stake: the effectiveness, not of EU law, but of human rights protection. The final chapter aims at placing the EU effectiveness principle, developed in the sixties and seventies, in a framework which takes into account newer principles of EU law, such as the principles of constitutional identity, procedural autonomy and subsidiarity.

Judicial review of legislation in Belgium and France

Coincidence of centralized and diffuse human rights review in Belgium

In its judgment in the *Franco-Suisse Le Ski* case, the *Cour de Cassation* tacitly amended the Constitution by ruling that the judge must refuse the application of all legal provisions violating directly applicable international law.[1] It derived that obligation 'from the nature itself of treaty-based international law.' This so-called

[1] A company producing cream cheese. Cass. 27 May 1971, *Arr. Cass.*, 1971, 959. *See* for later applications Cass., 4 April 1984, *Pas.*, I, p. 920; Cass., 10 May 1989, *Pas.*, I, n° 514; Cass., 17 Dec. 2002, *Pas.*, I, n° 649; CE, *Crédit Communal de Belgique*, 26 June 1985, No. 25.520, *A.P.M.* 1985, 99; CE, *Lecocq and Taquin*, 17 Feb. 1989, *J.T.* 1989, 254. *See* J. Salmon, 'Le conflit entre le traité

'cream cheese doctrine' (*smeerkaasdoctrine*) was in later judgments called a general principle of law.[2] Despite the Prosecutor-General's suggestion,[3] the *Cour de cassation* refused to develop a constitutional review based on the same logic.[4]

This review of legislation's constitutionality only appeared in the 1980s, when Belgium was being transformed[5] into a federal State and was in need of an arbiter between the federal legislator and the legislators of the communities and the regions. The *Cour d'arbitrage* was formally installed on 1 October 1984 and it rendered its first judgments on 5 April 1985.[6] This Kelsenian organ could, however, only review a legal norm's respect for the rules dividing the competences between the legislative bodies. During the 1989 Third Reform of State, most aspects of education became community competences and in order to protect both Catholics and non-Catholics, their rights in this field were anchored in the Constitution. The Court of Arbitration was granted jurisdiction over guaranteeing these rights,[7] and at the same time, the special majority legislator added the principle of equality and non-discrimination enshrined in the Articles 6 and 6*bis* of the Constitution (now Articles 10 and 11), to the Court's reference provisions.

The *Cour d'Arbitrage* immediately used this principle of equality to largely extend its own jurisdiction. In its famous *Biorim*-judgment,[8] the Court stated that the Articles 10 and 11 of the Constitution prohibit all discrimination, regardless of its origin. Hence, 'in combination with' the Articles 10 and 11 of the Constitution, the Court examines whether a legal provision respects other constitutional rights,[9] international treaties[10] and general principles of law.[11] These interna-

international et la loi interne en Belgique à la suite de l'arrêt rendu le 27 mai 1971 par la Cour de cassation', *Journal des Tribunaux* (1971) p. 535.

[2] Cass., 5 Dec. 1994, *Arr. Cass.*, 1994, 1055; Cass., 3 Nov. 2000, *Arr. Cass.*, 2000, 170.

[3] Concl. W.J. Ganshof van der Meersch for Cass., 3 May 1974, *Arr. Cass.*, 1974, 975-978.

[4] Cass., 3 May 1974, *Arr. Cass.*, 1974, 978.

[5] Nevertheless, it was only the Fourth State Reform in 1993 which led to Art. 1 of the Constitution explicitly stating that Belgium is a federal State, composed of communities and regions.

[6] For further reading, *see* M.-F. Rigaux and B. Renauld, *La Cour constitutionnelle* (Bruylant 2008); P. Popelier, *Procederen voor het Grondwettelijk Hof* (Intersentia 2008).

[7] R. Leysen and J. Smets, *Toetsing van de wet aan de Grondwet in België, Preadvies voor de Vereniging voor de vergelijkende studie van het recht in België en Nederland* [Review of Statutes against the Constitution in Belgium, Preliminary Advice for the Association for the Comparative Study of Belgian and Dutch Law] (Tjeenk Willink 1991) p. 49-50.

[8] Const. Court, judgment 23/89, 13 Oct. 1989. All of the Court's judgments can be found on <www.const-court.be>.

[9] In its judgment 23/89, the Court examined whether the principle of equality and non-discrimination, read in combination with the freedom of association, was violated.

[10] E.g., Const. Court, judgment 18/90, 23 May 1990; Const. Court, judgment 57/93, 8 July 1993 (concerning art. 6 ECHR).

[11] E.g., Const. Court, judgment 49/96, 12 July 1996 (concerning legal certainty); Const. Court, judgment 46/2000, 3 May 2000 (concerning the professional secrecy of the lawyer); Const. Court, judgment 67/2007, 26 April 2007 (concerning *non bis in idem*).

tional treaties do not need to possess direct effect, because the Court merely ensures the legislator's non-discriminatory respect for his international obligations.[12] The Court's indirect review of international law also includes primary and secondary EU law.[13] It must be noted, however, that the link with the Articles 10 and 11 of the Constitution remains necessary.[14]

Since 21 April 2003, the Court is also competent for directly examining whether a legal provision respects the human rights laid down in Title II, entitled 'The Belgians and their rights' (Articles 8-32), and in the Articles 170, 172 and 191 of the Constitution.[15] In its first judgment based on these new reference provisions, the Court held that in its examination whether a legal provision respects a right laid down in Title II of the Constitution, it must *'take into account'* treaty provisions guaranteeing an analogous human right.[16] In this judgment, the Court considers all analogous constitutional and treaty rights to form an 'inextricable unity' (*ensemble indissociable*).[17] Nevertheless, the formal reference provision is still a constitutional right, because the Court cannot directly examine whether a provision of international or European law has been violated.[18] Examples of such analogous rights include the right to privacy,[19] the freedom of expression[20] and the protection of property.[21]

In these analogous human rights cases, the Constitutional Court maximizes the protection of human rights by requiring that a limitation to a human right guaranteed both by Title II of the Constitution and by an European Convention on Human Rights (ECHR) provision meets both the formal standards laid down in the Constitution and the material standards laid down in the ECHR. Most

[12] E.g., Const. Court, judgment 75/2003, 28 May 2003; Const. Court, judgment 106/2003, 22 July 2003.

[13] E.g., Const. Court, judgment 105/2000, 25 Oct. 2000; Const. Court, judgment 50/2011, 6 April 2011.

[14] E.g., Const. Court, judgment 56/95, 12 July 1995; Const Court, judgment 97/2006, 14 June 2006.

[15] Arts. 1 and 26 of the Constitutional Court Act. *See* J. Theunis, 'De toetsing door het Arbitragehof aan de grondrechten' [Review against Fundamental Rights by the Court of Arbitrage] in A. Alen and P. Lemmens (eds.), *Themis – Staatsrecht* (die Keure 2006) p. 28-46.

[16] Const. Court, judgment 136/2004, 22 July 2004.

[17] This reasoning has often been repeated (*see* Const. Court, judgment 195/2009, 3 Dec. 2009).

[18] Const. Court, judgment 159/2005, 26 Oct. 2005; Const. Court, judgment 91/2006, 7 June 2006.

[19] Art. 22 of the Constitution and Art. 8 ECHR: Const. Court, judgment 136/2004, 2 July 2004.

[20] Art. 19 of the Constitution and Art. 10 ECHR: Const. Court, judgment 167/2005, 23 Nov. 2005 (on academic freedom); Const. Court, judgment 91/2006, 7 June 2006 (on journalistic freedom); Const. Court, judgment 17/2009, 12 Feb. 2009 (on racially connoted expressions).

[21] Art. 16 of the Constitution and Art. 1 of the First Additional Protocol to the ECHR: Constitutional Court, judgment 33/2007, 7 March 2007.

Belgian constitutional rights only allow limitations by an Act of Parliament and most of these constitutional provisions contain a prohibition on 'preventive measures': while measures regulating the modalities of a human right's exercise ('regulating measures') and measures punishing crimes committed in the exercise of a human right ('repressive measures') are allowed, measures forbidding *ab ovo* the exercise of a human right may not be taken.[22] The Court combines these requirements with the Strasbourg jurisprudence on the limitation of human rights,[23] referring extensively to the Strasbourg jurisprudence.

After this 2003 reform, the name 'Court of Arbitration' became outdated and by constitutional revision of 7 May 2007, its name changed into *'Constitutional Court'* (*Grondwettelijk Hof/Cour constitutionnelle*).

Cases can be brought before the Court through an annulment procedure[24] or by raising a preliminary question.[25] If a constitutional issue is raised by one of the parties, the judge is in principle obliged to refer the question to the Constitutional Court.[26] The referral judgment suspends the case before the referring judge until he is informed of the Court's decision. The Court's preliminary judgment has a so-called '*extended* inter partes *effect*': if the provision is declared unconstitutional, neither the referring judge nor any other judge are allowed to apply it in the same case. Judges in subsequent cases should refrain from applying the same legal provision, although it is not formally annulled, provided their possibility to refer for a new preliminary ruling.[27]

It follows from the rather organic evolution of judicial review in Belgium that direct treaty review is an exclusive competence of the ordinary and administrative judges, whereas constitutional review is an exclusive competence of the Constitutional Court, even though the substance of many of their respective reference norms is similar. The Constitutional Court has therefore developed a technique to indirectly examine a legal provision's conformity with international law, i.e., the extensive reading of the principle of equality and non-discrimination, and it

[22] This system of human rights protection, dating back to 1831, must be understood as a reaction against the reign of the Dutch King Willem I. *See* A. Alen and K. Muylle, *Compendium van het Belgisch staatsrecht* (Kluwer 2008) p. 40-41, 272 and 372.

[23] Alen and Muylle, *supra* n. 22, p. 275-276.

[24] This procedure may only be launched within a six month delay after the Act's official publication. An annulment has an *ex tunc* and *erga omnes* effect: the annulled legal provision is deemed never to have existed. For further reading, *see* Popelier, *supra* n. 6, p. 167-215; Rigaux and Renauld, *supra* n. 6, p. 105-151.

[25] Arts. 26-30 Constitutional Court Act. For further reading, *see* Popelier, *supra* n. 6, p. 230-271; Rigaux and Renauld, *supra* n. 6, p. 173-195.

[26] Rigaux and Renauld, *supra* n. 6, p. 181-200. The refusal grounds are listed in Art. 26, paras. 2 and 3. The most important one to keep in mind is the case of an urgent procedure; even in this case, judges have to raise the question if they have strong doubts about the legal provision's constitutionality.

[27] Rigaux and Renauld, *supra* n. 6, p. 257-258.

adopted the analogous human rights doctrine in order to grant the constitutional rights, most of which date back to 1831, an evolving interpretation which takes into account the Strasbourg case-law.

Coincidence of centralized and diffuse human rights review in France

Paradoxically, the ordinary and administrative judges only left the *Matter* doctrine[28] on parliamentary sovereignty as a consequence of a *Conseil constitutionnel* decision.[29] After the *Conseil* had taken up constitutional rights review (see *infra* n. 40), the doctrine hoped that it would also, through the framework of Article 55 of the Constitution, start conducting treaty review of legislation.[30] The *Conseil* did not meet this hope, considering, in its *IVG* case, that 'une loi contraire à un traité ne serait pas, pour autant, contraire à la Constitution.'[31] Only a couple of months later, the *Cour de cassation* delivered its famous *Cafés Jacques Vabre* decision, accepting that the judge must apply treaty provisions over legislation contrary to them.[32] The *Conseil d'Etat* subscribed to that point of view fourteen years later.[33] This review does not amount to a constitutional review, for which only the *Conseil constitutionnel* remains competent.[34]

The *Conseil constitutionnel*'s instalment is the consequence of the *révolution juridique* in the 1958 Constitution concerning the position of the Executive. Because Article 37 of the Constitution states that law is in principle made through a *règlement*, whereas the legislator only possesses some enumerated powers, a new protective mechanism against legislative infringements in the domain of the *règlements* was necessary.[35] The *Conseil constitutionnel* is composed of all former presidents of the Republic (members *ex lege*) and nine appointed members.[36] The

[28] This doctrine is named after *Procureur général* Matter in his opinion leading to the judgment Cass. 22 Dec. 1931, *Clunet*, RDIP, 1933, 475.

[29] J. Gicquel and J.-E. Gicquel, *Droit constitutionnel et institutions politiques* (Montchrestien 2010) p. 113-114.

[30] B. Chantebout, *Droit constitutionnel* (Sirey 2007) p. 555.

[31] C.C. n° 74-54 DC, 15 Jan. 1975, *Rec.*, 1975, p. 19, *Avortement*: 'an Act contrary to a treaty is not for that reason alone contrary to the Constitution.' *See* J. Rivero, 'Des juges qui ne veulent pas gouverner', *AJDA* (1976) p. 134.

[32] Cass., 24 May 1975, *Société des Cafés Jacques Vabre*, *D.* 1975.497, concl. Touffait.

[33] CE 20 Oct. 1989, *Nicolo*, *Rec.* 190, concl. P. Frydman. *See* P. Rambaud, 'La reconnaissance par le Conseil d'État de la supériorité des traités sur les lois', *AFDI* (1989), p. 91.

[34] B. Genevois, 'Le Conseil d'Etat n'est pas le censeur de la loi au regard de la Constitution', *RFDA* (2000) p. 717.

[35] *Ordonnance* n° 58-1067, 7 November 1958 *portant loi organique sur le Conseil constitutionnel* (hereninafter: *'the Loi organique'*). *See* G. Drago, *Contentieux constitutionnel français* (PUF 2011) p. 167-171; Chantebout, *supra* n. 14, p. 543; Gicquel and Gicquel, *supra* n. 18, p. 731; G. Lebreton, *Libertés publiques et droits de l'homme* (Dalloz 2009), p. 146-151.

[36] Art. 56 of the Constitution. Three members are appointed by the President, three by the President of the *Assemblée* and three by the President of the Senate.

adjudication before this organ has until recently been limited to an *a priori* control of draft legislation[37] and access to these procedures was limited to official bodies.[38]

Following the 1968 student protests, the freedom of movement, the freedom of assembly, and the freedom of press were restricted. In 1971, the *Assemblée nationale* adopted a law allowing the prefect to refuse the official recognition of associations. The President of the *Sénat* referred these provisions to the *Conseil constitutionnel*, which, in its 16 July 1971 judgment, invoked the attachment of the French people to human rights in order to install its jurisdiction to examine the adopted legal provisions' compliance with the principle of freedom of association.[39] From that judgment on, *'la loi n'exprime la volonté générale que dans le respect de la Constitution'* (the Act of Parliament only expresses the people's will in compliance with the Constitution).[40] Nevertheless, this constitutionality review may not amount to a policy review.[41]

The most recent *révolution juridique*, the creation of the *question prioritaire de constitutionnalité* (QPC) procedure,[42] finally opening the *Conseil*'s doors for individuals, was the result of a deliberate political choice.[43] The *loi constitutionnelle* of 23 July 2008 stipulates that, if during a judicial procedure, it is alleged that a legal provision violates a constitutional right, the *Conseil constitutionnel* can be questioned on this matter by the *Conseil d'Etat* or the *Cour de cassation*, who decide within a specific period of time.[44]

If a party raises a constitutional question,[45] the judge must decide *par priorité* on its referral,[46] examining whether three conditions are met: the legal provision concerned must be applicable to the case, it may not have been declared constitutional before, and the question may not lack seriousness.[47] If these conditions are met, the judge does not send the question directly to the *Conseil constitutionnel*, but to the *Cour de cassation* (ordinary judges) or to the *Conseil d'Etat* (admin-

[37] Arts. 41, 54 and 61 of the Constitution.

[38] I.e., the President, the Prime Minister, the Presidents of the legislative bodies, or sixty *deputés* or *sénateurs*.

[39] C.C., n° 74-44 DC, 16 July 1971, *Contrat d'association*, *Rec.*, 1971, p. 29.

[40] C.C. n° 85-197, 23 Aug. 1985, *Nouvelle-Calédonie*, *Rec.*, 1985, p. 70.

[41] C.C. n° 74-54 DC, 15 Jan. 1975, *Rec.*, 1975, p. 19.

[42] *See* C. Maugüé and J.-H. Stahl, *La question prioritaire de constitutionnalité* (Dalloz 2011) 259 p.

[43] *See* J. Benetti, 'La genèse de la réforme', *AJDA* (2010) p. 74; P. Bon, 'La Q.P.C. après la L.O. du 10 décembre 2009', *RFDA* (2009) p. 1107; Gicquel and Gicquel, *supra* n. 29, p. 747-748; Drago, *supra* n. 35, p. 420-427.

[44] *See* Drago, *supra* n. 35, p. 429-502.

[45] A judge may not *proprio motu* ask for a preliminary ruling (Maugüé and Stahl, *supra* n. 42, p. 35-36 and 46-47).

[46] Arts. 23-2 and 23-5 of the *Loi organique*.

[47] Drago, *supra* n. 35, p. 444-451.

istrative judges). The judge then refrains from passing a verdict on the merits until he receives a decision by the *Conseil constitutionnel* or a decision of non-referral by his superior judge.[48] The *Cour de cassation* or the *Conseil d'Etat* must decide within a three months delay whether it transmits the question to the *Conseil constitutionnel*, examining the same three criteria.[49] While examining this transferral, the *Cour de cassation* or the *Conseil d'Etat* may not examine the legal provision's treaty conformity. The *Conseil constitutionnel* itself must judge the constitutional question within a three month period, refraining from deciding upon the facts of the case before the *juge a quo*.[50] The *Conseil*'s decision is binding *erga omnes*: if it declares the examined legal provision unconstitutional, it is repealed from the date of the judgment's official publication or from a later date specified by the judgment.[51] If the *Conseil* renders a negative judgment, the referring judge remains competent for examining whether treaty provisions are violated.[52]

The *Conseil constitutionnel* thus examines whether legislation is in compliance with constitutional rights both *a priori* and *a posteriori*. It does not take into account treaty provisions, neither directly nor indirectly.[53] The separation of review competences between the judiciary and the *Conseil constitutionnel* is therefore more watertight than in Belgium.

Hierarchy of reference norms?

Both in Belgium and in France, problems of coincidence of human rights procedures have emerged as a consequence of the existence of distinct – albeit similar – sets of human rights provisions, the respect for which is guaranteed by distinct jurisdictions (see chapter 2). The question must then be answered whether conflicts of interpretation and even conflicts of jurisdiction can be solved by installing a hierarchy between these sets of human rights provisions or between those courts. For several reasons, this does, however, not seem to be the best solution.

[48] Art. 23-3 of the *Loi organique*, the exception being situations of deprivation of liberty. *See* Maugüé and Stahl, *supra* n. 42, p. 36-38.

[49] Art. 23-4 of the *Loi organique*. The third criterium is formulated differently: the question must be new or must have a serious character. Drago, *supra* n. 35, p. 469-473; Maugüé and Stahl, *supra* n. 42, p. 60-70.

[50] Art. 23-10 of the *Loi organique*. *See* Drago, *supra* n. 35, p. 476-479.

[51] Art. 62 of the Constitution; *see* C.C. n° 2010-6/7, 11 June 2010, *Artano* (repealed from the date of publication, 12 June 2010); C.C. n° 2010-1 QPC, 28 May 2010, *Cristallisation des pensions* (repealed as from 1 Jan. 2011, obliging the legislator to extend the scope of the annulled provisions). *See* Maugüé and Stahl, *supra* n. 42, p. 115-136.

[52] Gicquel and Gicquel, *supra* n. 29, p. 752: *'la priorité de la question de constitutionnalité n'équivaut pas son exclusivité'* (the procedure's priority does not imply its exclusiveness).

[53] C.C. n° 98-399 DC, 5 May 1998, *Loi Réséda*, *Rec.*, 1998, p. 245; C.C. n° 2010-605 DC, 12 May 2010, *Jeux de hasard en ligne*, *JO* 13 May 2010; CE, n° 312305, 14 May 2010, *Rujovic*; Drago, *supra* n. 35, p. 524-529; Maugüé and Stahl, *supra* n. 42, p. 217.

The first reason for this is that, in human rights matters, precedence is not the most pertinent issue, because the principle of the widest protection applies.[54] This principle, which underlies the Belgian Constitutional Court's analogous human rights doctrine (see *supra* n. 16), rather leads to maximisation of human rights protection than to opposition between texts.[55] On the other hand, this principle does not preclude the emergence of conflicts between a constitutional or treaty-based human right and a constitutional or treaty-based rule that is not a human right.

The second reason is that, despite the principle of universality, these sets of reference norms do not always have an identical scope of application. This is most evident for the Charter of Fundamental Rights of the European Union, which, according to its Article 51.1, is only addressed to the institutions, bodies, offices and agencies of the Union, as well as to the member states, insofar as they are implementing Union law.

The third and most important reason is that the hierarchy debate, which has been going on for decades, has not yet lead to a final answer. The Luxembourg Court's *Internationale Handelsgesellschaft* doctrine is very clear: 'even the most minor piece of technical EU legislation ranks above the most cherished constitutional norm'.[56] This absolute precedence can, presumably, not be maintained after the entry into force of the Lisbon Treaty, since Article 4.2 TEU anchors the respect for the national identity.[57]

Both in Belgium and in France, the precedence of EU law and other international law over the Constitution is not unequivocally accepted. In France, all high judicial organs and a vast majority of the doctrine are in favour of the precedence of the Constitution.[58] For secondary EU law, the *Conseil constitutionnel* derives from France's participation in the EU, which is anchored in Article 88-1 of the

[54] Art. 53 ECHR, Art. 5, para. 2, ICCPR, Art. 53 Charter. *See* J. Velaers, 'Artikel 26, § 4 van de bijzondere wet op het Grondwettelijk Hof: naar een nieuw evenwicht tussen de rechtscolleges bij samenloop van grondrechten' [Article 26, § 4 of the Extraordinary Statute on the Constitutional Court: Toward a New Balance between the Courts when Fundamental Rights Concur], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2010) p. 388.

[55] *See* C. Van de Heyning, 'No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights', in P. Popelier et al., *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia 2011) p. 71-78.

[56] M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006), p. 96; S. Weatherill, *Law and Integration in the European Union* (OUP 1995) p. 106.

[57] E.g., ECJ, 22 December 2010, *Sayn-Wittgenstein*, C-208/09; BverfG, 30 June 2009, 2 BvE 2/08, *Lissabon-Urteil*, BVerfGE 123, 267.

[58] C.C., n° 2007-560 DC, 20 Dec. 2007, *Traité de Lisbonne*, *Rec.*, 2007, p. 459; CE 3 July 1996, *Koné*, n° 169219; CE 30 Oct. 1998, *Sarran*; Cass. Fr., 2 June 2000, *Fraisse*, *chr.* N° 95, p. 192; *See* Chantebout, *supra* n. 30, p. 567; Gicquel and Gicquel, *supra* n. 29, p. 516 and 709; Lebreton, *supra* n. 35, p. 259; E. Zoller, *Droit des relations extérieures* (PUF 1992), p. 260; J.R. Abraham, 'Droit international, droit communautaire et droit interne', *Rapport public du Con-*

Constitution, that transposition of a directive into national law is a constitutional requirement, and hence that the Conseil is competent to examine whether the legal provision respects the directive it aims to transpose.[59] But, on the other hand, a directive may not run counter to *une règle ou un principe inherent à l'identité constitutionnelle de la France* (a rule or principle inherent to France's constitutional identity)[60] and may not infringe upon the essential conditions of the exercise of national sovereignty.[61]

In Belgium, the Cour de Cassation simply applies its cream cheese doctrine on the relationship between the Constitution and international law, which presumably includes primary EU law.[62] As to secondary EU law, it invokes the *Internationale Handelsgesellschaft* decision to conclude that the principles and human rights laid down in a member state's constitution cannot influence the validity or the domestic applicability of a norm of EU law.[63] The Constitutional Court refers to its competence to review the constitutionality of treaty approving laws to state the precedence of the Constitution over international law.[64] Its position on the relationship between the Constitution and secondary EU law is still unclear.[65] The

seil d'Etat (1989) p. 34; P. Mazeaud, 'Droit communautaire et droit interne', *Rapport AN n° 2630* (1996).

[59] C.C. n° 2004-496 DC, 10 june 2004, *Loi pour la confiance dans l'économie numérique*, *Rec.*, 2004, p. 101. The *Conseil d'Etat* recently adopted a similar jurisprudence (CE 30 Oct. 2009, *Perreux*, n° 298348), abandoning its *Cohn-Bendit* jurisprudence. By contrast, a legal provision is not examined in the light of directives it does not aim to implement (C.C., n° 2006-535 DC, 30 March 2006, para. 28).

[60] C.C., n° 2006-540, 27 July 2006, *Droit d'auteur et aux droits voisins dans la société de l'information*, *Rec.*, 2006, p. 88; C.C. n° 2010-79 QPC, 17 Dec. 2010, *Kamel Daoudi*, *JO* 19 Dec. 2010.

[61] C.C n° 70-39 DC, 19 June 1970, *Ressources propres des Communautés européennes*, *Rec.*, 1970; C. Richards, 'The Supremacy of Community Law before the French Constitutional Court', *ELR* (2006), p. 514.

[62] Cass., 9 Nov. 2004 (*Vlaams Blok*), P.04.0849.N/20, *Rev. dr. pén.* (2005) p. 789; *R.B.D.C.* (2005) p. 507; Cass., 16 Nov. 2004, P.04.0644.N/3 and Cass., 16 Nov. 2004, P.04.1127.N/3, *Rechtskundig Weekblad* (2005-06), p. 387; A. Vandaele, 'Het Hof van Cassatie tussen de hamer van de directe werking en het aambeeld van de prejudiciële vraagstelling' [The Court of Cassation between the Hammer of Direct Effect and the Anvil of the Preliminary Question Procedure], *Chroniques de droit public – Publiekrechtelijke kronieken* (2005), p. 611-624; J. Van Meerbeeck and M. Mahieu, 'Traité international et Constitution nationale', *Revue critique de jurisprudence belge* (2007) p. 45-46.

[63] Cass., 2 June 2003, S.02.0039.N, *Revue Critique de Jurisprudence belge* (2007), p. 24.

[64] Const. Court, judgment 26/91, 16 Oct. 1991; Const. Court, judgment 12/94, 3 Feb. 1994. *See also* implicitly Const. Court, judgment 20/2004, 4 Feb. 2004. The Court adds that the legislator may not do indirectly (by approving a treaty) what he cannot do directly, i.e., violate the Constitution.

[65] It has even been described as mysterious (E. Cloots, 'Het Grondwettelijk Hof en de toetsing van secundair unierecht aan fundamentele rechten', in A. Alen and J. Van Nieuwenhove, *Staatsrechtelijke Standpunten 1* (die Keure 2008) p. 50-52). This can be illustrated by the Court's judgment

Council of State, at least in the case of secondary EU law, refers to Article 34 of the Constitution to state that, once the transfer of powers towards the EU has taken place, the EU organs can produce legislation without being bound by the Belgian Constitution.[66] The recent legal doctrine seems to accept the precedence of the Constitution over international law,[67] but is more hesitant as to secondary EU law.[68]

Taking into account the many different points of view on the hierarchy between the Constitution and EU law, it seems impossible, on legal grounds, to identify one of them as the correct one.[69] Applying a rule of hierarchy is, however, only possible if it is sufficiently clear in which direction the hierarchy operates.

The fourth reason is that in recent years, a major part of the legal doctrine has argued that the ECHR, primary EU law and national constitutions must be regarded as being part of one multilevel constitution, in which it is up to the three

concerning the Flemish Care Insurance (Const. Court, judgment 11/2009, 21 January 2009), which is said by some to have stated the precedence of primary EU law over the Constitution (*see* S. Feyen, 'Zorgen voor morgen: implicaties van het arrest van het Grondwettelijk Hof over discriminaties in de Vlaamse zorgverzekering. Een juridische veldslag' [Worries for Tomorrow: Implications of the Decision of the Constitutional Court about Discriminations in Flemish Care Insurance. A Legal Battle], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2009) p. 173-174), while others derive the exact opposite from the same judgment (J. Velaers and J. Vanpraet, 'De materiële en territoriale bevoegdheidsverdeling inzake sociale zekerheid en sociale bijstand (II)' [The Substantive and Territorial Distribution of Authority with Regard to Social Security and Social Assistance (II)], *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2009) p. 207-208).

[66] CE, legislative division, opinion 37.954/AV, 37.970/AV, 37.977/AV and 37.978/AV, 15 Feb. 2005 (Constitution for Europe), *Doc. Parl.*, Senate, 2004-2005, nr. 3-1091/1, p. 526-546. This license of unconstitutionality is therefore granted by the Constitution itself (P. Vandernoot, 'Regards du Conseil d'Etat sur une disposition orpheline: l'article 34 de la Constitution', in *En hommage à Francis Delpérée* (Bruylant 2008) p. 1618).

[67] A. Alen, 'De Grondwet, hoogste rechtsnorm?' [The Constitution, Highest Legal Norm?] in *En hommage à Francis Delpérée. Itinéraires d'un constitutionnaliste* (Bruylant 2007) p. 105-113; F. Delpérée, 'Autour d'un sanctuaire', in *Mélanges J. Van Compernolle* (Bruylant 2004) p. 167-180; J.-S. Jamart, 'Observations sur l'argumentation: la primauté du droit international', *Revue Belge de Droit Constitutionnel* (1999) p. 128-129. *Contra*: P. Popelier, 'De verhouding tussen de Belgische grondwet en het internationale recht', in *En hommage à Francis Delpérée,* l.c., p. 1231-1254, who does not make a distinction between international law and EU law.

[68] D. Van Eeckhoutte, 'De relatie Grondwet – Europees recht: de positie van de Raad van State' [The Relationship Constitution – European Law: The Position of the Council of State], *Chroniques de droit public – Publiekrechtelijke kronieken* (2000) p. 282-300; K. Lenaerts and P. Van Nuffel, *Europees recht* (Intersentia 2011) p. 517; Popelier, *supra* n. 146, p. 1240; J. Velaers, *De Grondwet en de Raad van State, afdeling wetgeving* [The Constitution and the Council of State, Legislative Division] (Maklu 1999) p. 237-241.

[69] According to Feyen, it is impossible to end this discussion with legal or even philosophical arguments, and that in the end it comes down to the politics of power (S. Feyen, 'Verdragsrechtelijke inwerking' [The Effect of Treaty Law], *Chroniques de droit public – Publiekrechtelijke kronieken* (2008) p. 198-199).

types of constitutional courts, i.e., the Strasbourg Court, the Luxembourg Court and the national constitutional courts, to find, through judicial dialogue, an equilibrium whenever parts of this compound European constitution come into conflict.[70] In such a framework, there is no room for hierarchy between national and supranational constitutional law.

Conflicts of competence in Belgium and France

Hierarchy or not, the living apart together[71] of distinct types of human rights judges gives rise to conflicts of competence. While in Belgium, the priority rule was designed to resolve a dispute on human rights jurisdiction between domestic judges, the French domestic *guerre des juges* arose precisely as a consequence of the adoption of such a procedure.

The Belgian priority rule

The Belgian saga started in 2004, when the *Cour de Cassation* and the Constitutional Court produced clearly opposing judgments on jurisdiction for human rights review and on the hierarchy between the Constitution and international law. On the one hand, the Constitutional Court developed its analogous human rights doctrine (see *supra* n. 16), allowing it to perform an indirect treaty review, and repeated its doctrine on the precedence of the Constitution over international law (see *supra* n. 64). On the other hand, the *Cour de cassation* ruled in favour of the precedence of international law over the Constitution (see *supra* n. 62).[72] In these cases, the *Cour de Cassation* first examined whether legal provisions violated the ECHR, but found no violations. Subsequently, it considered it useless to ask the Constitutional Court whether the analogous human rights provisions in the Constitution were violated, arguing that the ECHR precedes the Constitution and that *in casu* the Constitution did not provide for a wider protection.

The latter judgments were heavily criticized, because the *Cour de cassation*, in stating that the Constitution did not provide for a wider human rights protection

[70] A. Torres Perez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP 2009) p. 10-17; Van Meerbeeck and Mahieu, *supra* n. 62, p. 79-88; R. Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism', *EuConst* (2009) p. 438-441; F. Ost and M. Van de Kerchove, *De la pyramide au réseau* (Saint-Louis 2002) p. 68-75.

[71] B. De Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice', in Popelier et al., *supra* n. 55, p. 17.

[72] Cass., 9 Nov. 2004 (*Vlaams Blok*), P.04.0849.N/20, *Rev. dr. pén.* (2005) p. 789; *R.B.D.C.* (2005) p. 507; Cass., 16 Nov. 2004, P.04.0644.N/3 and Cass., 16 Nov. 2004, P.04.1127.N/3, 6 *Rechtskundig Weekblad* (2005) p. 387.

than the Convention,[73] exercised a competence which exclusively belongs to the Constitutional Court, and because its reasoning could have the effect of undermining the Constitutional Court's human rights competence, since almost all constitutional rights have a sibling in a directly applicable treaty.[74] This judgment also ended the organically established *modus vivendi* between the highest courts, which, at least in cases of direct coincidence of human rights, consisted of the other courts' first allowing the Constitutional Court to pass judgment on a legal provision's constitutionality and of respecting the outcome of its examination.[75]

During and in the aftermath of a 2005 symposium held between the three highest courts, the law faculties and the bar associations, an agreement was reached on a compromise text written by professor Velaers,[76] which was, after many informal consultations, submitted to the special majority legislator.[77] After a hearing held in the Senate on 23 April 2008, during which the presidents of the three

[73] At least in the *Vlaams Blok* case, the latter statement is wrong: by requiring that limitations are only possible by a formal act of Parliament and by forbidding preventive measures, the Constitution does provide for a wider freedom of opinion and freedom of association protection than the ECHR (J. Vrielink, *Van haat gesproken? Een rechtsantropologisch onderzoek naar de bestrijding van rasgerelateerde uitingsdelicten in België* [Speaking of Hate? A Legal Anthropological Investigation into the Combatance of Race-related Crimes of Expression in Belgium] (Maklu 2010) p. 42-55; F. Meersschaut, 'De ondraaglijke lichtheid van de Grondwet', *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2005) p. 51-52). The Constitutional Court had, based on these constitutional provisions, already set limits to the interpretation of the Anti-Racism Act (Const. Court, judgment 157/2004, 6 Oct. 2004).

[74] Meersschaut, *supra* n. 73, p. 48-53; F. Parrein, 'It is not lonely enough at the top. De tegenstellingen tussen het Hof van Cassatie en het Arbitragehof', *Jura Falconis* (2005-2006) p. 314-316; J. Stevens, 'HvJ, EHRM, GwH, RvS, apologie van de zappende advocaat', in *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber Amicorum Michel Melchior* (Anthemis 2010) p. 837; Vandaele, *supra* n. 62, p. 610-624; Velaers, *supra* n. 54, p. 388.

[75] Cass., 26 Jan. 1990, *Arr. Cass.*, 1989-90, no 327; Cass., 14 Feb. 1995, *Arr. Cass.*, 1995, nº 88; Cass., 26 Oct. 1999; Cass., 24 June 2003, P.02.1685.N; Cass., 2 Dec. 2003, P.03.1292.N; CE, 1 Feb. 1999, *Vandenhende*, no. 78.468; CE, 28 Nov. 2001, *Lamete*, no. 101.222; CE, 13 March 2002, *D'Hondt*, no. 104.653; J. Velaers, 'De toetsing van wetten, decreten en ordonnanties aan titel II van de Grondwet en aan internationale mensenrechtenverdragen, bij samenloop van grondrechten', in A. Arts et al. (eds.), *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'Etat* (die Keure 2005) p. 112.

[76] J. Velaers, 'De toetsing van wetten, decreten en ordonnanties aan titel II van de Grondwet en aan internationale mensenrechtenverdragen, bij samenloop van grondrechten' [The Review of Statutes, Decrees and Ordinances against Title II of the Constitution and against International Human Rights Treaties, when Fundamental Rights Concur], in A. Arts et al., (eds.), *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'Etat* (die Keure 2005) p. 101-123 (Dutch) and p. 125-149 (French).

[77] *Doc. Parl.*, Senate, 2007-2008, No. 4-12, submitted by senators Francis Delpérée and Hugo Vandenberghe.

highest courts expressed their views on the new arrangement,[78] the priority rule was anchored in Article 26, § 4, of the special majority act on the Constitutional Court on 12 July 2009. The text of this new provision reads as follows:

> If before a jurisdiction it is alleged that a [legal provision] violates a fundamental right which is guaranteed in a totally or partially analogous way in a provision of Title II of the Constitution and in a provision of European or international law, the jurisdiction first asks for a preliminary ruling to the Constitutional Court concerning the conformity with the provision of Title II of the Constitution.[79]

This new provision clearly aims at pragmatically reconciling the centralized constitutional review installed by Article 142 of the Constitution, and the diffuse treaty review installed by the 'cream cheese' judgment, because it applies in case of coincidence of constitutional and international human rights.[80] In order to consolidate the centralized constitutional review, it is, by nature, necessary to guarantee the Constitutional Court's supply of original cases, and to avoid that the ordinary and administrative judges would refuse to ask for a preliminary ruling for the sole reason that an international human right is also at stake. In order to guarantee the judge's treaty review, it is necessary to grant him the right to examine whether the legal provision *sub iudice* respects international law.

Both procedures might be construed as parallel or as sequential, but in a preliminary reference procedure, which suspends the handling of the case by the referring judge, the latter option is the most logical one,[81] because contradictory judgments on the same legal provision's conformity with the same human right, albeit guaranteed by two distinct texts, should be avoided.[82] This procedural element also explains why constitutional review should have priority. Priority in favour of the Constitutional Court was also justified on another basis: the special major-

[78] Ibid., 9-24. All chiefs of the three highest courts declared to agree to the 'compromise' reached in the working group (Velaers, *supra* n. 54, p. 389).

[79] In French, it reads: 'Lorsqu'il est invoqué devant une juridiction qu'une loi, un décret ou une règle visée à l'article 134 de la Constitution viole un droit fondamental garanti de manière totalement ou partiellement analogue par une disposition du titre II de la Constitution ainsi que par une disposition de droit européen ou de droit international, la juridiction est tenue de poser d'abord à la Cour constitutionnelle la question préjudicielle sur la compatibilité avec la disposition du titre II de la Constitution.'

[80] P. Gérard, 'De hoeder van de meerlagige Europese Constitutie tussen unierecht en grondwet in Frankrijk en België' [The Guardian of the Multi-Layered European Constitution between Union Law and Constitution in France and Belgium], *S.E.W.* (2011) p. 161; Velaers, *supra* n. 54, p. 389-390; W. Verrijdt, 'Should the EU Effectiveness Principle Be Applied to Judge National Constitutional Review Procedures', in *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber Amicorum Michel Melchior* (Anthemis 2010) p. 556.

[81] *Doc. Parl.*, Senate, 2007-2008, No. 4-12/1, p. 6; Velaers, *supra* n. 76, p. 119-123.

[82] Velaers, *supra* n. 76, p. 120.

ity legislator took into account the Court's composition, its procedure and the effect of its judgments, in other words features the procedure before the ordinary and administrative judge does not offer.[83] The Constitutional Court's composition reflects a double parity: it consists of six Dutch-speaking and six French-speaking judges, and each linguistic group consists of three law professors or high judges and of three former politicians with a five year experience in a legislative assembly. Its deliberations take place in a bench of seven or twelve judges. The executive organ under the legislator that has adopted the legal provision under scrutiny is always a party in the procedure before the Court and can explain all circumstances relevant for conducting a proper necessity and proportionality test, or even propose a specific interpretation respecting the human rights.[84] The procedure is accessible for third party interveners arguing their stake in the debate is significant.[85] The *erga omnes* effect of an annulment (see *supra* n. 24) and the enhanced *inter partes* effect of the statement of a violation in a preliminary reference case (see *supra* n. 27) protect the whole of the legal order against further infringements of fundamental rights by the same legal provision.[86]

After the entry into force of the priority rule, three hypotheses can occur. If the human right invoked is only guaranteed in international or European law, the judge must not refer the case to the Constitutional Court, as he remains fully competent to examine the legal provision's respecting international law.[87] If this human right is guaranteed both by Title II of the Constitution and by international or European law, the judge must refer the case to the Constitutional Court and refrain from deciding it until he receives the Court's answer.[88] If this human right is only guaranteed by Title II of the Constitution, he is *a fortiori* obliged to refer the case to the Constitutional Court, bearing in mind that the refusal grounds in Article 26, paragraph 4, of the Constitutional Court Act are not applicable (see *infra* n. 94).[89]

The priority rule applies as soon as the human right guaranteed by the Constitution and the one guaranteed by international or European law are *'partially analogous'*. It must be applied as soon as the rights' substance is similar, regardless of differences in their respective scope or limitation grounds.[90] It is not up to the parties invoking the human right to choose their forum: even if they only mention

[83] *Doc. Parl.*, Senate, 2007-2008, No. 4-12/4, p. 32 (senator Vandenberghe); Velaers, *supra* n. 54, p. 391-392.

[84] *See* Verrijdt, *supra* n. 80, p. 567-568.

[85] Art. 87 of the Constitutional Court Act; *see* judgment 149/2010, 22 Dec. 2010, B.2.2.

[86] Velaers, *supra* n. 54, p. 391; Verrijdt, *supra* n. 80, p. 567.

[87] Alen, *supra* n. 67, p. 109; Velaers, *supra* n. 54, p. 392.

[88] Velaers, *supra* n. 54, p. 392.

[89] *Doc. Parl.*, Senate, 2007, No. 4-12/1, p. 7; Velaers, *supra* n. 54, p. 392.

[90] *Doc. Parl.*, Senate, 2007, No. 4-12/1, p. 4 and 6; Velaers, *supra* n. 54, p. 392.

the treaty provision, the judge is to examine *ex officio* whether the same human right is guaranteed by Title II of the Constitution.[91]

It is evident that, if the Constitutional Court states a violation of the Constitution, there is no point in a further treaty review by the referring judge, who is to refuse the application of the legal provision concerned.[92] If, however, the Constitutional Court does not find a violation of the Constitution, the referring judge remains competent for conducting a treaty review and for refusing the application of the legal provision on that basis. The mere fact that the Constitutional Court uses analogous treaty provisions in order to give an evolving interpretation of constitutional rights (see *supra* n. 72), does not influence this competence.[93]

Although the priority rule goes in favour of the centralized review by the Constitutional Court, its scope is mitigated by the second branch of Article 26, paragraph 4, of the Constitutional Court Act. Because of process economy,[94] this provision completes the reasons why all ordinary and administrative courts, including the highest ones,[95] can decide not to raise a preliminary question. Whereas the other refusal grounds also apply in case of coincidence of human rights, the new refusal grounds only apply in this case. The new *acte clair* exception holds that a judge must not refer for a preliminary ruling if Title II of the Constitution is manifestly not violated. The *acte éclairé* exception means that the obligation to refer does not apply if a judgment by a supranational or international Court already proves that the legal provision concerned violates European or international law,[96] or if a Constitutional Court judgment already has determined that it violates the Constitution.[97] In the legal doctrine, some concern was expressed on the courts' possibility to abuse these refusal grounds, but any refusal to refer for a preliminary ruling needs to be duly motivated.[98]

[91] *Doc. Parl.*, Chamber, 2008-2009, DOC 1283/4, p. 4; M.-F. Rigaux, 'Le contentieux préjudiciel et la protection des droits fondamentaux', *Journal des Tribunaux* (2009) p. 650; Velaers, *supra* n. 54, p. 395-397.

[92] Ibid., p. 401.

[93] Art. 26, para. 4, of the Constitutional Court Act cannot be read as prohibiting this subsequent treaty review, because it has to be interpreted in the light of the *cream cheese doctrine*, which is a principle of constitutional law (Cass., 5 Dec. 1994, *Arr. Cass.*, 1994, p. 1055; Cass., 3 Nov. 2000, *Arr. Cass.*, 2000, p. 1700); *see* Verrijdt, *supra* n. 203, p. 558.

[94] *Doc. Parl.*, Senate, 2007-2008, No. 4-12/4, p. 9.

[95] Comp. Art. 26, para. 2, of the Constitutional Court Act, in which some exceptions only apply to judges against whose judgments higher appeal or a cassation procedure is possible.

[96] This judgment does not have to concern the Belgian legal provision concerned: it may also be invoked if it concerns a similar foreign provision (*Doc. Parl.*, Senate, BZ 2007, 4-12/1, p. 7; Velaers, *supra* n. 156, p. 398).

[97] Art. 26, para. 4, second branch, 4°, of the Constitutional Court Act.

[98] A standard formulation does not suffice (*Doc. Parl.*, Senate, 2007-2008, No. 4-12/4, p. 24 (senator Vandenberghe); Velaers, *supra* n. 156, p. 399).

The Belgian priority rule was thus intended to solve a purely internal conflict between two jurisdictions. Nevertheless, it was questioned from the point of view of EU law. It was said to violate the immediacy requirement, as developed in the *Simmenthal* judgment,[99] and the principle of the widest discretion the *Rheinmühlen* judgment[100] conferred to all domestic judges who may – even in cases where they are not obliged to do so – refer a case for a preliminary ruling to the Luxembourg Court.[101]

In its legal opinion on the draft provision which became Article 26, § 4, of the Constitutional Court Act, the legislative division of the *Conseil d'Etat* had considered the priority rule not to violate EU law, because it does not intend to transform each treaty review into a constitutional review, but simply installs a sequence for the examination of both separate questions.[102] It stated that the priority rule does not prohibit the national judge to apply EU law directly.

This explanation did, however, not convince the judge of the fiscal chamber in the Liège Tribunal of First Instance, which referred a preliminary question on the priority rule's EU conformity to the Luxembourg Court.[103] Contextualizing this question requires mentioning that in 2002, the *Cour de cassation* had suddenly altered its jurisprudence on the limitation of tax debts,[104] causing many pending tax disputes to suddenly reach limitation. This would cost the Treasury approximately one billion euros. In order to save these cases, the Legislator retroactively[105] adopted Article 2244 of the Civil Code. This provision was challenged before the Constitutional Court, which had to apply strict scrutiny: since the retroactivity influenced the outcome of pending cases, it could only be considered constitutional if 'compelling grounds of general interest' were present.[106] According to the Court, this was the case, because of the exceptional character of the 2002 Cassation judgment, which had liberated a category of persons from its tax debts, although they could never have reasonably presumed that they would not have to

[99] ECJ, 9 March 1978, *Simmenthal*, 106/77, paras. 21 and 24. *See* on the *Simmenthal* mandate, Claes, *supra* n. 56, p. 69-118.

[100] ECJ, 16 Jan. 1974, *Rheinmühlen*, 166/73, para. 2.

[101] P. Van Nuffel, 'Prejudiciële vragen aan het Hof van Justitie van de Europese Unie: leidraad voor de rechtspraktijk na het Verdrag van Lissabon' [Preliminary Questions to the Court of Justice of the European Union: A Guide for Legal Practitioners after the Lisbon Treaty], *Rechtskundig Weekblad* (2009-2010) p. 1170-1172.

[102] Conseil d'Etat, legislative division, Opinion No. 45.905/AV, 3 March 2009, *Doc. Parl.*, Chamber, 2008-2009, No. 1283/002.

[103] Trib. Liège, 23 Nov. 2009, *Claude Chartry* v. *Belgian State*, *OJ* 13 Feb. 2010, C-37/3.

[104] Cass., 10 Oct. 2002, *Pas.*, 2002, No. 526; Cass., 21 Feb. 2003, *Pas.*, 2003, No. 124; Cass., 12 March 2004, *F.J.F.*, No. 2005/195.

[105] *See* Const. Court, judgment 177/2005, 7 Dec. 2005, B.16.1-B.17.4.

[106] *See*, for instance, ECHR (GC), 28 Oct. 1999, *Zielinski and Pradal e.a.* v. *France*, para. 57.

pay them, and because the most important cases of major tax fraud would also perish because of the new jurisprudence.[107]

As a consequence of this Constitutional Court judgment, this retroactive legal provision had to be applied on pending tax disputes, which had, accordingly, not reached limitation. Some tax judges simply applied this provision,[108] while others used Article 1 of the First Additional Protocol to the ECHR[109] or Article 6.1 ECHR[110] in order to examine *in concreto* whether the legislation's retroactive effect had struck a fair balance between public and private interests.

In the *Chartry* case, the Liège fiscal judge could have opted for a similar path. Instead, she formulated the previously mentioned preliminary question on the validity of the priority rule, although that rule did not apply in the *Chartry* case: on the one hand, the Constitutional Court had already passed a judgment on the retroactive legal provision she had to apply,[111] on the other hand, Mr Chartry only alleged that his case had surpassed the reasonable delay, because his debts dated back to 1994-1996. The Constitutional Court does not possess jurisdiction to examine such a question, because, in the absence of a procedure comparable to the *Verfassungsbeschwerde* or the *recurso de amparo*, it cannot examine the constitutionality or conformity with international law of a specific case. In the case at hand, there was therefore no coincidence of human rights, and thus no possibility to apply the priority rule about which the Luxembourg Court was interrogated.

The French priority rule

In France, the coincidence procedure was installed together with the *QPC*. Priority was given to constitutional review, because the French Constitution was considered to be the ultimate reference norm[112] and because of the *erga omnes* effect

[107] Const. Court, judgment 177/2005, 7 Dec. 2005, B.19.1-B.19.11.

[108] Trib. Leuven, 2 June 2006; Trib. Namur, 21 June 2006; Trib. Antwerpen, 3 Nov. 2006; Trib. Brussel, 13 June 2007; Brussel, 8 Feb. 2007; Brussel, 10 Oct. 2007.

[109] Trib. Brussel, 2 May 2007, *Revue Générale de Contentieux Fiscal* (2007), p. 285; Trib. Namur, 27 June 2007, *www.monkey.be*.

[110] Some judges found that the principle of equality of arms offered the tax payer the right to have favourable cassation jurisprudence applied (Trib. Liège, 7 June 2007, *Revue Générale de Contentieux Fiscal* (2008); p. 71-75; Trib. Namur, 23 May 2007, ibid., p. 76-85); some others found the right to a judgment within a reasonable delay to be violated (Trib. Gent, 24 June 2008, ibid., p. 480-483, commented by N. Pirotte).

[111] Art. 26, para. 2, second branch, 2°, of the Constitutional Court Act thus allowed her to abstain from a new referral.

[112] Drago, *supra* n. 35, p. 457. This was also stated by the Conseil constitutionnel in its *a priori* review on the loi organique implementing the new QPC procedure: C.C., n° 2009-595 DC, 3 Dec. 2009, *Question prioritaire de constitutionnalité*, *Rec.*, 2009, p. 206, para. 14.

of the *Conseil constitutionnel*'s judgments.[113] The reform's aim is not to exclude treaty review by the ordinary and administrative judges, but to set a sequence for the examination.[114] After the examination of the *QPC* has ended, the referring judge remains fully competent to examine the legal provision's conformity with international law and EU law.[115]

Like in Belgium, the legal doctrine had suggested that the priority rule's priority might come into conflict with the EU immediacy principle.[116] The legislator first intended to make an exception to the priority as far as a coincidence between a constitutional right and EU law was concerned, but in the end, this exception was not adopted.[117] Both the *Conseil d'Etat* and the *Conseil constitutionnel* stated that, interpreted strictly, the priority rule did not violate EU law (see *infra* n. 125).

The *Cour de cassation*, however, opposed to the *QPC,* sought the help of the Luxembourg Court with the aim of undermining the new procedure.[118] The case at hand concerned two Algerians who stayed illegally on French soil and were arrested within 20 kilometers of the Belgian border during a random identity check.[119] Before the *juge des libertés et de la détention*, they alleged that Article 78-2 of the *Code de Procédure pénale*, the basis for the identity check, violated some constitutional rights and some provisions of EU law. The judge applied the *QPC* procedure and referred the case to the *Cour de cassation*. The *Cour de cassation*, however, did not transmit the question to the *Conseil constitutionnel*, because it believed the priority rule to violate EU law. It argued that it would not be able to refer a case to the Luxembourg Court after the *Conseil constitutionnel*'s answer, if the latter were to state that international law had not been violated. It therefore referred the case to the Luxembourg Court through an urgent preliminary reference, asking whether the priority rule violated EU law.[120]

[113] Drago, *supra* n. 35, p. 459. The *Conseil d'Etat* indeed argumented that by conducting a treaty review, it could not lift the legal provision from the legal order, before referring to the *Conseil Constitutionnel* (CE 14 April 2010, *Labane*, n° 336753; *see* Gérard, *supra* n. 80, p. 156).

[114] Drago, *supra* n. 35, p. 458; Gicquel and Gicquel, *supra* n. 29, p. 752.

[115] This leads the *Conseil Constitutionnel* to state that the *QPC* procedure does not violate the Arts. 55 and 88-1 of the Constitution (C.C., n° 2009-595 DC, 3 Dec. 2009, paras. 14 and 22).

[116] P. Cassia, 'Question sur le caractère prioritaire de la question de constitutionnalité', *AJDA* (2009) p. 2193.

[117] D. Chauvaux, 'L'exception d'inconstitutionnalité 1990-2009: réflexions sur un retard', *RDP* (2009), p. 574.

[118] Gérard, *supra* n. 80, p. 156; B. Mathieu, 'La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg', *La Semaine Juridique* (2010) p. 866-867; D. Simon and A. Rigaux, 'Le feuilleton de la question prioritaire de constitutionnalité: drôle de drame, Quai des brumes, Le jour se lève?', *Europe* (June 2010) p. 2.

[119] For further details, *see* X. Magnon, 'La QPC face au droit de l'Union: la brute, les bons et le truand', *RFDC* (2010) p. 764-765.

[120] Cass., 16 April 2010, n° N 10-40.002, concl. Domingo, *Gazette du Palais*, 23-27 May 2010, p. 8-16.

This decision was heavily criticized in the legal doctrine and in the press,[121] because it interpreted Article 88-1 of the Constitution too extensively as if it absorbs and incorporates all EU review into constitutional review.[122] It anticipates the *Conseil constitutionnel*'s leaving its 1975 *IVG-jurisprudence* (see *supra* n. 31) and its directly examining a legal provision's conformity with international law.[123] Furthermore, its conviction that it would lose, as a consequence of such a jurisprudence, its jurisdiction to refer the case to the Luxembourg Court, seems incorrect and is in contrast to the unanimous legal doctrine.[124]

Both the *Conseil constitutionnel* and the *Conseil d'Etat* have stressed, immediately after the referring Cassation judgment, that constitutional review does not absorb treaty review.[125] From this lack of jurisdiction, the *Conseil* derives that its judgments' binding authority only concerns a legal provision's conformity with constitutional norms, and does not limit the ordinary and administrative judges' competence to make France's international obligations prevail.[126] Next to that statement, the Court also stressed two other procedural aspects of the priority rule. The first statement read that Article 23-3 of the *Loi organique* allows the referring judge, before sending the case file to his superior judge, to take all provisional measures necessary in order to guarantee the full effect of EU law.[127] The second remark, in answer to the *Cour de cassation*'s allegation, was that asking the *Conseil constitutionnel* for a preliminary ruling does not limit the power the judge is granted by Article 267 TFEU of equally referring the same case to the Luxembourg

[121] B. Mathieu, 'La Cour de cassation tente de faire invalider la QPC par la Cour de Luxembourg', *JCP G* (2010), n° 17, p. 464; D. Rousseau et D. Lévy, 'La Cour de cassation et la QPC: pourquoi tant de méfiance?', *Gaz. Pal.* (April 25-27, 2010), p. 20; A. Levade, 'A. Levade, 'note sous CE 14 avr. 2010', *D.* (2010) *Jur.* 1061; G. Carcassonne and M. Molfessis, 'La Cour de cassation à l'assaut de la question prioritaire de constitutionnalité', *Le Monde*, 22 April 2010.

[122] D. Simon and A. Rigaux, 'Drôle de drame: la Cour de cassation et la question prioritaire de constitutionnalité', *Europe* (May 2010) p. 5-10; P. Cassia and E. Saulnier-Cassia, 'Imbroglio autour de la question prioritaire de constitutionnalité', *Recueil Dalloz* (2010) p. 1236; Gérard, *supra* n. 80, p. 157; Magnon, *supra* n. 119, p. 766.

[123] P. Gérard, ibid., p. 157.

[124] D. De Béchillon, 'La question de constitutionnalité peut-elle être prioritaire? Un arrière-plan à ne pas perdre de vue', *La Semaine Juridique* (2010) p. 1042; P. Fombeur, 'Question prioritaire de constitutionnalité, droit constitutionnel et droit de l'Union européenne', *Recueil Dalloz* (2010) p. 1233; Gérard, *supra* n. 80, p. 157.

[125] C.C., n° 2010-605 DC, 12 May 2010, *Jeux en ligne*, cons. 11; CE 14 May 2010, *Rujovic*, n° 312305; S. Lavric, 'Jeux en ligne: le Conseil Constitutionnel répond à la Cour de cassation sur la QPC', *Recueil Dalloz* (2010) p. 1205: Magnon, *supra* n. 119, p. 767.

[126] C.C., n° 2010-605 DC, 12 May 2010, *Jeux en ligne*, cons. 13. This was already implicitly clear from *déc.* n° 2009-595, 3 Dec. 2009, cons. 14.

[127] C.C., n° 2010-605 DC, 12 May 2010, *Jeux en ligne*, cons. 14.

Court.[128] Furthermore, the *Conseil constitutionnel* recalled its jurisprudence on the constitutional review of directives, repeating that directives violating France's constitutional identity would be sanctioned.[129]

The Belgian and French procedure's conformity with EU law

The Melki *judgment*[130]

Although the Belgian *Chartry* case was the first one to be submitted to the Luxembourg Court, the French *Cour de cassation*'s questions, launched through an urgent procedure, were the first ones to be ruled upon.[131] In the *Melki* judgment, the Luxembourg Court recalls its *Rheinmühlen*, *Simmenthal* and *Mecanarte* decisions, which are said – although no other treaty basis than Article 267 TFEU can be pointed out – to install principles which are 'inherent to the nature itself of EU law.'[132] This principle of full effect of EU law implies that any gap in the national judge's *'widest discretion'* to refer to the Luxembourg Court for a preliminary ruling may be overcome by the national judge, who even is to refuse the application of contrary national rules, among which the rules binding him to the rulings of a superior court.[133] The same principle obliges the national judge to immediately set aside legislation requiring him to ask a constitutional court's consent before examining whether a national measure violates EU law, even if this only causes a temporal hindrance to the full effect of EU law.[134] The judge also has to set aside the authority of a constitutional court decision if this is necessary for him to exercise his right to refer a case to the Luxembourg Court.[135] The rationale behind this jurisprudence, as explained in the *Mecanarte* judgment, is the Luxembourg

[128] Ibid., cons. 15. This was less clear from *déc.* n° 2009-595, in which, rather on the contrary, emphasis was put on the *effet utile* of the constitutional judgment (cons. 17) and the need to allow the *Conseil constitutionnel* to render its opinion on original constitutional issues (cons. 21).

[129] C.C., n° 2010-605, 12 May 2010, *Jeux en ligne*, cons. 18; *see* A. Levade, 'Le Conseil constitutionnel et l'Union européenne', *Cah. Cons. Const.* (2009) p. 63; Drago, *supra* n. 35, p. 464. Meanwhile, it is clear that not all constitutional rights constitute part of the *identité constitutionnelle* de la France (Cons. Const., n° 2010-79 QPC, 17 Dec. 2010, *Kamel*, *AJDA* 2011, p. 638).

[130] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10.

[131] D. Simon, 'note sous CJUE, ord. 1er mars 2011, C-457/09, Chartry', *Europe* (May 2011) p. 16.

[132] Ibid., para. 44.

[133] ECJ, 16 Jan. 1974, *Rheinmühlen*, 166/73, para. 2; ECJ, 16 Dec. 2008, C-210/06, *Cartesio*, par. 88; ECJ, 9 March 2010, *ERG*, C-378/08, para. 32.

[134] ECJ, 9 March 1978, *Simmenthal*, 106/77, para. 21-24; ECJ, 19 Nov. 2009, *Filipiak*, C-314/08, para. 81.

[135] ECJ, 27 June 1991, *Mecanarte*, C-348/89, para. 46.

Court's ambition to guarantee its supply of original preliminary references, e.g., in order to be able to examine the validity of secondary EU law.[136]

The *Melki* judgment then distinguishes between two possible interpretations of the French priority rule, i.e., the one advanced by the *Cour de cassation* and the one advanced by the *Conseil constitutionnel* and the *Conseil d'Etat*.[137] In the first interpretation, a *Conseil constitutionnel* judgment answering a *QPC* deals with both the constitutionality and the EU conformity, imposing its finding on both aspects on the ordinary and administrative judge, and leaving him no room to conduct any further treaty review, nor to refer the case to Luxembourg. In this interpretation, the priority rule violates the full effect principle.[138]

The Luxembourg Court stresses, however, that all judges have the obligation to interpret as much as possible legislation as being conform to EU law.[139] It leaves it to the referring judge to examine whether the priority rule's phrasing is open for such an EU conform interpretation,[140] but implicitly, it grounds its further reasoning on the interpretation advanced by the *Conseil constitutionnel*. In that interpretation, the Court finds it acceptable that the obligation to ask for a preliminary ruling causes some delay for the national judge in leaving non-EU-conform legislation unapplied, provided that four conditions are met.[141]

The first condition is that, at any stage of the proceedings, the ordinary or administrative judge remains free to refer a case to the Luxembourg Court, even while examining the need to ask for a *QPC*. The second condition is that, before launching the *QPC* procedure, the judge may take all provisional measures necessary to ensure his final judgment's effectiveness in protecting the rights the legal subjects derive from EU law. The third condition is that, even after a negative answer on the *QPC*, the ordinary and administrative judge remains fully competent to refuse the application of all national legal provisions he considers to violate EU law. The fourth condition, recalling the Luxembourg Court's exclusive jurisdiction over secondary EU law's validity,[142] is that the priority rule may not apply to legal provisions literally transposing directives: the annulment of such a norm by the *Conseil constitutionnel* would prohibit the directive's validity check by the Luxembourg Court.

[136] ECJ, 27 June 1991, *Mecanarte*, C-348/89, para. 45; Verrijdt, *supra*, n. 203, p. 547.

[137] Verrijdt, *supra* n. 203, p. 552.

[138] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, paras. 44-47.

[139] Ibid., para. 50, recalling ECJ, 26 Sept. 2000, *Engelbrecht*, C-262/97, para. 39; ECJ, 27 Oct. 2009, *ČEZ*, C-115/08, para. 138; ECJ, 13 April 2010, *Wall*, C-91/08.

[140] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, para. 49.

[141] Ibid., paras. 51-57.

[142] ECJ, 22 Oct. 1987, *Foto-Frost*, 314/85, paras. 15-20; ECJ, 10 Jan. 2006, *IATA and ELFAA*, C-344/04, para. 27; ECJ, 18 July 2007, *Lucchini*, C-119/05, para. 53.

It should be noted that in the *Melki* judgment, the Luxembourg Court has attenuated its *Simmenthal* jurisprudence by accepting that a constitutional review causes some delay in the immediacy of EU review by the ordinary or administrative judge. The Court allows an alternative guarantee for EU law's full effect, i.e., the possibility the *Factortame* judgment offers to all judges to take provisional measures – despite contrasting legislation – in order to guarantee the full effect of their judgment to be rendered on the merits.[143] Leaving, in such circumstances, the immediacy principle, the Court does not specify how long the delay may last, despite the Commission's suggestion to impose the principle that the priority rule not cause an excessive suspension of the procedure.[144]

The similarity between the conditions the *Melki* judgment sets out and the interpretation given to the priority rule by the *Conseil constitutionnel* is striking. It has therefore been stated that the Luxembourg Court has taken up judicial dialogue,[145] leaving room for the existence of two parallel human rights jurisdictions, competent to examine a legal provision's conformity with the human rights enshrined in a national and a supranational text respectively.

The French priority rule's conformity with the Melki *judgment*

It is important to stress that the *Melki* judgment cannot lead to questioning the *QPC* procedure itself, which is indifferent to EU law.[146] It can only concern the priority rule, for which the Luxembourg Court gives the criteria, but leaves it to the *Cour de cassation* to examine whether they are met,[147] albeit under the obligation to explain national law EU conform as much as possible.[148] Given the similarity between the *Melki* judgment's criteria and the features the *Conseil constitutionnel* had already set out, problems were not to be expected. On the contrary, if a domestic provision is open for more then one interpretation, it must not be given the most likely interpretation, even if it finds support in the parliamentary pro-

[143] Verrijdt, *supra* n. 80, p. 554; F.-X. Millet, 'Le dialogue des juges à l'épreuve de la QPC', *R.D.P.* (2010) p. 1735-1737.

[144] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, para. 39. This might be explained by the Luxembourg Court's preliminary procedure lasting longer than the preliminary proceedings before European constitutional courts (Verrijdt, *supra* n. 80, p. 554).

[145] Millet, *supra* n. 143, p. 1740; D. Sarmiento, 'L'affaire Melki: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française', *R.T.D.E.* (2010), p. 591; Magnon, *supra* n. 119, p. 768-769; D. Simon and A. Rigaux, 'Solange, le mot magique du dialogue des juges…', *Europe* (July 2010) p. 7; Gérard, *supra* n. 80, p. 158-161; Verrijdt, *supra* n. 80, p. 554.

[146] Magnon, *supra* n. 119, p. 784.

[147] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, para. 49.

[148] Ibid., para. 50.

ceedings: all judges must grant it the EU-conform interpretation, even if it is not the most likely one, as long as it is a possible interpretation.[149]

Such an interpretation is certainly possible for the French priority rule.[150] As to the first criterion, the referring judge's asking for parallel preliminary rulings to the *Conseil constitutionnel* and to the Luxembourg Court seems perfectly possible.[151] The *Factortame* condition seems unproblematic, since it is anchored in Article 23-3 of the *loi organique*. In all other circumstances, the judge can directly apply the *Factortame* jurisprudence.[152] The third criterion is unproblematic in France, because of the clear separation of constitutional review and treaty review.

As to the fourth criterion, it seems that the Luxembourg Court's extensive reading of its own *Foto-Frost* jurisprudence, which trumps the priority rule for this type of legislation,[153] does not hinder the *Conseil constitutionnel*'s examining whether directive provisions have been correctly transposed, because it can only do this in its *a priori* control, the *QPC* being limited to constitutional rights. It is the referring judge's task, and not the *Conseil*'s, to skip the priority rule as far as legal provisions literally transposing EU law are concerned. The *Conseil* has, however, recently proven its willingness to play the cooperation game correctly, by recognising itself the Luxembourg Court's exclusive competence. It stated that, in the absence of a constitutional provision at play which touches upon the *identité constitutionnelle de la France*, the *Conseil constitutionnel* was incompetent to judge the constitutionality of such transposition acts, and therefore sent the case back to the referring judge, the *Conseil d'Etat*.[154] The latter had considered the question to be 'new', justifying a *QPC*, but not 'serious', hence not requiring a preliminary question to the Luxembourg Court.[155] It has also been suggested that, since only Article 23-10 of the *loi organique*, and not Article 61-1 of the Constitution, imposes the *Conseil constitutionnel* a three month delay, it can easily interrogate

[149] D. Rousseau, 'La QPC, évidemment eurocompatible, évidemment utile', *Gazette du Palais* (27-29 June 2010) p. 20; Verrijdt, *supra* n. 80, p. 552 and 557.

[150] Rousseau, *supra* n. 149, p. 19-21.

[151] B. Mathieu, 'La QPC : une nouvelle voie de droit', *JCP G* (2009) p. 602, para. 21; J. Velaers, 'Het arrest Melki-Abdeli van het Hof van Justitie van de Europese Unie : een voorwaardelijk "fiat" voor de voorrang van de toetsing aan de Grondwet op de toetsing aan het internationaal en het Europees recht', 11 *Rechtskundig Weekblad* (2010) p. 786. This was confirmed by Secretary-General M. Guillaume during a hearing on 28 Feb. 2010: 'Le caractère "prioritaire" de la question prioritaire de constitutionnalité est ainsi une question d'ordre d'examen procédural. Il n'empêche en rien q'une question préjudicielle à la Cour de justice de l'Union européenne (CJUE) soit posée en même temps ou dans un second temps.'

[152] Velaers, *supra* n. 151, p. 788; B. Mathieu, 'La guerre des juges n'aura pas lieu. A propos de la décision n° 2010-605 du Conseil constitutionnel', *La Semaine Juridique* (24 May 2010) p. 1078.

[153] Magnon, *supra* n. 119, p. 769.

[154] Cons. const., n° 2010-79 QPC, *Kamel Daoudi*, 17 Dec. 2010.

[155] CE, 8 Oct. 2010, n° 338505, *Daoudi*, *AJDA* (2010) p. 1911.

the Luxembourg Court itself in order to respect France's obligations under EU law.[156]

The *QPC* procedure being EU-conform, its functioning is conditioned by a loyal cooperation between judges.[157] The French *Cour de cassation* has, however, refused to play the game of loyal cooperation. In its 29 June 2010 judgment in the *Melki* case, it founded its reasoning entirely on the *Simmenthal* judgment, although the Luxembourg Court had precisely attenuated that jurisprudence in the field of coincidence of human rights.[158] It denied the *Factortame* alternative, because Article 23-3 of the *loi organique* only allows the referring judge, but not the *Cour de cassation* or the *Conseil d'Etat*, to take provisional measures,[159] and therefore refused to apply the *QPC* procedure. This statement is incorrect, because even if a literal reading of the *loi organique* would lead to such a conclusion, the *Factortame* judgment itself constitutes a sufficient foundation for the *Cour de cassation* to take all necessary provisional or conservatory measures.[160] The *Conseil d'Etat* had already, for its part, stated that it could provide for the immediate application of EU law pending the case before the *Conseil constitutionnel*, whenever that is necessary.[161] It has also been stated that the *Cour de cassation*'s judgment ignored the three arguments of auto-limitation in the *Conseil constitutionnel*'s judgment of 12 May 2010, and that it did not even have to refer the case to the *Conseil constitutionnel*, even without questioning the priority rule, because there was not a constitutional right at stake, and because the *Conseil* had already exercised its *a priori* review.[162] Furthermore, this judgment violates the obligation the domestic judge has, and which was recalled in the *Melki* judgment, to interpret domestic legislation as much as possible as being EU conform.

Doubts have therefore been casted on the *Cour de cassation*'s constitutional loyalty.[163] The French legislator has also taken a position in this debate, by abolish-

[156] F. Donnat, 'La Cour de Justice et la QPC: chronique d'un arrêt prévisible et imprévu', *Rec. Dall.* (8 July 2010) p. 1645-1646.

[157] Gicquel and Gicquel, *supra* n. 29, p. 750.

[158] Millet, *supra* n. 143, p. 1743.

[159] Cass., 29 June 2010, *Melki and Abdeli*, n° 10-40.001. One might wonder which provisional measures could still be taken, since Melki and Abdeli had already been released on 9 April 2010.

[160] D. Simon, 'Les juges et la priorité de la question prioritaire de constitutionnalité : discordance provisoire ou cacaphonie durable', *R.C.D.I.P.* (2011) p. 6. This author adds that the First President of the Cour de cassation had opposed, during the preparation of the *Loi organique*, against extending the possibility to take provisional or conservatory measures to the *Cour de cassation* and the *Conseil d'Etat* (Rapport d'information n° 2838, *préc.*, spéc. p. 81).

[161] CE, n° 312.305, 14 May 2010, *Rujovic*.

[162] Cons. const., déc. N° 93-323 DC, 5 August 1993, *Loi relative aux contrôles et vérifications d'identité*, *Rec.*, 213. *See* Millet, *supra* n. 143, p. 1744-1745.

[163] L. Coutron, 'Priorité à la question de ... conventionnalité!', *R.A.E. – L.E.A.* (2009-2010) p. 574. *See also* D. Simon and A. Rigaux, '*Perseverare autem diabolicum*? La Cour de cassation refuse définitivement de donner effet à la question prioritaire de constitutionnalité …', *Europe* (August

ing the special formation within the *Cour de cassation*, presided over by the First President, which originally was the only organ competent to examine transferrals.[164]

The Belgian priority rule's conformity with the Melki *judgment*

After the *Melki* judgment, the question arose whether the Belgian priority rule respects the criteria set out by the Luxembourg Court.[165] This answer was not delivered in the *Chartry* case: next to being a wrong example for domestic reasons (see *supra* n. 111), this case was also inadmissible because – although it concerned Article 6.1 ECHR – it proved to possess no link with the scope of application of EU law.[166] Indeed, this case concerned a Belgian tax rule which was not a transposition of secondary EU law, and the applicant was a Belgian resident earning his income in Belgium. It is important to stress that the Court refused to derive its competence from the entry into force of the Charter, which comprises an Article 47 on due process with the same content as Article 6.1 ECHR. It pointed out that, as stated by its Article 51.1, the Charter only applies to the member states insofar they apply or transpose EU law, and that the entry into force of the Charter does not extend the EU's material competences.

This was certainly the correct decision. If it had sufficed to refer to a Charter provision while questioning purely domestic law, all cases could be brought before the Luxembourg Court on human rights arguments. It would also have extended the scope of application of EU law to the whole of national legislation, because all legislators have to obey human rights. The Luxembourg Court's focus would shift from interpreting and judging EU law to judging national legislation's conformity with human rights, in the long run possibly leading to backlog problems comparable to the Strasbourg Court's.

It must therefore be examined whether the Belgian priority rule meets the *Melki* requirements. Concerning the *Rheinmühlen* condition, the priority rule's *ratio legis* must be considered: this was reconciling centralized constitutional review by the Constitutional Court, guaranteeing its supply of cases, with diffuse treaty review by the ordinary and administrative judges (see *supra* n. 80). It was never

2010) p. 1-2; Donnat, *supra* n. 156, p. 1645-1646; O. Duhamel, 'La Cour de cassation veut à tout prix casser la QPC', *France culture* (5 July 2010); H. Labayle, 'Question prioritaire de constitutionnalité et question préjudicielle: ordonner le dialogue des juges?', *R.F.D.A.* (2010) p. 675-676; Millet, *supra* n. 12, p. 1743-1749.

[164] Art. 12 of the *Loi organique* n° 2010-830 (22 July 2010) *relative à l'application de l'article 65 de la Constitution* (*JORF* 23 July 2010); although the official reason was the First President's overload, the doctrine reads this as an implicit reprimand (Simon, *supra* n. 160, p. 7, Magnon, *supra* n. 119, p. 769-770).

[165] Gérard, *supra* n. 80, p. 161-165; Van Nuffel, *supra* n. 101, p. 1170-1172; Velaers, *supra* n. 151, p. 785-793; Verrijdt, *supra* n. 80, p. 556-559.

[166] ECJ (order), 1 March 2011, *Chartry*, C-457/09, paras. 21-25.

the intention to create an impediment of the judge's duty to apply the rights derived from EU law.[167] The priority rule only obliges the judge to refrain from conducting his EU review until the constitutional review has been finalized. It does not forbid him to prepare this later review by sending a preliminary question to Luxembourg; hence, parallel preliminary questions are possible.[168] Parallel preliminary questions are even to be preferred above sequential preliminary questions, because, even though referrals to the Luxembourg Court are generally not taken into account for calculating the reasonableness of a domestic procedure's delay,[169] a double suspension of the procedure should be avoided. Whereas a preliminary procedure before the Constitutional Court generally takes some nine to ten months,[170] the delay for a preliminary question to the Luxembourg Court is some seventeen months.[171] In case of parallel preliminary questions, there is therefore no actual impediment to the immediateness of EU law.[172]

Concerning the *Factortame* alternative, there is no rule forbidding judges to take provisional or conservatory measures before referring a case to the Constitutional Court and, if there would be one, a judge would be allowed to set it aside because of the *Factortame* jurisprudence. The *Conseil d'Etat* has already suspended the application in casu of legal provisions about which it referred preliminary questions to the Constitutional Court, even in cases not involving EU law.[173] Article 19 of the Judicial Code allows the ordinary judge to do the same.[174] Recently, the Constitutional Court has also indicated that it could, in any phase of the proceedings, take provisional measures.[175] Furthermore, judges are not obliged to refer a case to the Constitutional Court for a preliminary ruling if the case has an urgent character and the judgment only has a provisional effect.[176]

Concerning the constitutional judgment's binding effect, there seems to be, at first sight, a difference between the Belgian and the French procedure, because of the Constitutional Court's jurisprudence regarding analogous human rights provi-

[167] Velaers, *supra* n. 151, p. 785-786.

[168] Ibid., p. 786. The *Conseil d'Etat* has already, before the priority rule existed, referred a case both to the Constitutional Court and to the Luxembourg Court (CE, 27 March 2009, No. 191.950, *Roxus and Roua*).

[169] ECtHR, 24 April 2008, *Mathy* v. *Belgium*.

[170] P. Martens et al., *Grondwettelijk Hof: Verslag 2007* (Vandenbroele 2008) p. 140.

[171] Van Nuffel, *supra* n. 101, p. 1154.

[172] Verrijdt, *supra* n. 80, p. 566-567.

[173] CE, No. 119.261, 12 May 2003, *Brouillard*; CE, No. 127.040, 13 Jan. 2004, *Servais*; CE, No. 202.039, 18 March 2010, *X* v. *Gemeenschapsonderwijs*.

[174] This is the general provision which allows the judge, in all phases of the procedure, to take a measure in order to provisionally settle the parties' situation (D. Lindemans, 'Voorlopige maatregelen door de rechter ten gronde: artikel 19 Ger.W', *T.B.H.* (1989) p. 223-224).

[175] Const. Court, judgment 96/2010, 29 July 2010, B.29.

[176] Art. 26, para. 3, of the Constitutional Court Act. *See* Velaers, *supra* n. 151, p. 789-790.

sions (see *supra* n. 16). It must be stressed, however, that this interpretation does not imply that the Court becomes competent for treaty review.[177] The Court formally only examines whether the constitutional provisions at play are violated, but it uses analogous treaty provisions in order to grant an evolving interpretation to these constitutional rights, most of which date back to 1831.[178]

The *Conseil d'Etat*'s ninth chamber has even gone one step further. In a 2 July 2010 judgment, it found that a constitutional judgment's authority is always limited to constitutionality issues, also in matters falling outside the scope of EU law.[179] In that case, an annulment procedure against the legal provision invoked before the *Conseil d'Etat* had already been rejected by the Constitutional Court, which had applied its analogous provisions doctrine. The *Conseil d'Etat* examined the provision's conformity with the same ECHR provisions, and came to the same conclusions. This new examination cannot find ground in the *Melki* judgment, which only concerns situations within the scope of EU law. The *Conseil d'Etat* bases its reasoning on Article 9, paragraph 2, of the Constitutional Court Act, which stipulates that a judgment rejecting an action for annulment is binding for all judges. The *Conseil* states that this binding effect concerns the constitutional provision and, in case of an interpretation in conformity with the Constitution, also the legal provision under scrutiny, but it adds that this provision cannot be considered downsizing the judge's possibility to examine a legal provision's conformity with international law, even not if the Constitutional Court has applied its analogous provisions doctrine.[180] It is, however, paradoxical that the *Conseil d'Etat* accepts the ordinary and administrative judge's authoritative interpretation of international law while denying it for the Constitutional Court. The only organ competent for authoritatively interpreting the ECHR is the Strasbourg Court. The Constitutional Court's practise does precisely consist of examining these Strasbourg interpretations in order to guarantee a uniform interpretation of distinct human rights provisions, provided the application of the principle of the widest protection, safeguarding the strengths of the Kelsenian system. If, on the merits, the *Conseil d'Etat* would have come to a different conclusion than the Constitutional Court, it would have been because of a non-Strasbourg-conform reading of the relevant ECHR provisions.

[177] *Doc. Parl.*, Senate, B.Z. 2007, No. 4-12/1, p. 3-5, 17 and 21; *Doc. Parl.*, Chamber, 2008-2009, No. 1283/4, p. 4. The diffuse treaty review is, moreover, a *'general principle of constitutional law'*, which cannot be amended by a legal provision of a Special Majority Act (Cass., 5 Dec. 1994, *Arr.Cass.*, 1994, p. 1055; Cass., 3 Nov. 2000, *Arr.Cass.*, 2000, p. 1700).

[178] Velaers, *supra* n. 151, p. 791; Verrijdt, *supra* n. 80, p. 558.

[179] CE, 2 July 2010, *Orde van Vlaamse Balies*, n. 206.397, paras. 11.1 and 11.2.

[180] Presumably, a similar argument could be set up concerning the Constitutional Court's answering a preliminary question, replacing Art. 9, para. 2, of the Constitutional Court Act by its Art. 28. A counterargument might be this provision's phrasing being more severe: it stipulates that all judges are to act in conformity with the preliminary ruling.

Concerning the *Foto-Frost* condition, the Belgian position seems unproblematic. The priority rule not prohibiting parallel preliminary questions, the judge can interrogate the Constitutional Court about the transposing provision's constitutionality and the Court of Justice about the directive's conformity with primary EU law.[181] The Constitutional Court will then most likely not pass a judgment before the Luxembourg Court's answer to the referring judge. In addition to that, the Constitutional Court has already, in cases concerning legal provisions plainly transposing secondary EU law, applied the *Foto-Frost* jurisprudence itself.[182]

What is at stake: the effectiveness of human rights

Now that the EU conformity of both the Belgian and the French priority rules has been confirmed, it is time to focus on these criteria themselves. One might indeed wonder whether the Luxembourg Court's application of its full effect doctrine to human rights, although it was designed several decades ago in a framework consisting of merely economic principles, is the most balanced option in a multi-layered system of human rights protection.

Effectiveness versus effectiveness: safeguarding constitutional review

In order to examine this, it is important to stress what are the stakes at play. For EU law, this is the full effect doctrine, which underlies all four criteria the Court set out.[183] Developed in the *Rheinmühlen* case as a procedural principle allowing the domestic judge to disobey any domestic rule standing between him and his *'widest discretion'* to refer preliminary questions to the Luxembourg Court,[184] its implications stretch well beyond the preliminary reference procedure. The Court obliges all domestic judges to immediately take all action required in order to guarantee EU law's full effect,[185] and it stresses that the binding effect of a consti-

[181] Velaers, *supra* n. 151, p. 787.

[182] This happened for the first time in judgment No. 124/2005, 29 Nov. 2005. A more recent example is the judgment No. 103/2009, 18 June 2009, which led the Luxembourg Court to annul Art. 5.2 of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (ECJ, 1 March 2011, *Test-Achats*, C-239/09). The Constitutional Court has subsequently annulled the transposition (Const. Court, judgment 116/2011, 30 June 2011).

[183] This doctrine has been called a general principle of EU law (ECJ, 13 March 2007, *Unibet*, C-432/05, para. 37; ECJ, 15 April 2008, *Impact*, C-268/06, para. 43). *See* Claes, *supra* n. 56, p. 124-140.

[184] ECJ, 16 Jan. 1974, *Rheinmühlen*, 166/73, para. 2. *See also* ECJ, 16 Dec. 2008, *Cartesio*, C-210/06, para. 88; ECJ, 9 March 2010, *ERG*, C-378/08, para. 32.

[185] ECJ, 9 March 1978, *Simmenthal*, 106/77, paras. 21 and 24; ECJ, 19 Nov. 2009, *Filipiak*, C-314/08, para. 81.

tutional judgment does not alter this obligation.[186] This full effect doctrine guarantees two of the Court's main interests. In the *Foto-Frost* judgment, it stressed the necessity of the uniform application of EU law in all member states.[187] In the *Mecanarte* judgment, it explained its need for original preliminary questions on the validity and the interpretation of EU law.[188]

It is important, however, to note that both interests equally apply at the domestic level. If a constitutional court would be deprived of original questions on legal provisions' constitutionality, it cannot develop its jurisprudence and cannot perform its protective task, essential to the rule of law, of filtering unconstitutional norms from the legal order. Guaranteeing this supply of cases was one of the main reasons behind the Belgian priority rule (see *supra* n. 81). Originality is also the main criterion for transferring a *QPC* to the *Conseil constitutionnel* (see *supra* n. 49). The coherence of the domestic legal order, which is said to be a more important interest than the dogmatic question on precedence,[189] is also essential. This coherence would be in jeopardy if a constitutional court could only fully exercise its tasks insofar as legal provisions do not possess a link with EU law.

The full effect of constitutional law and the full effect of EU law are thus of equal importance. None of both main actors, the Court of Justice and national constitutional courts, should undermine each other's effectiveness.[190] However, in systematically stressing the full effect of EU law, allowing[191] domestic judges to escape domestic preliminary rulings procedures and to disobey constitutional judgments, the Luxembourg Court allows the stakes it demands for EU review to be undermined for constitutional review. Some recent judgments prove that the Luxembourg Court still sees its full effect doctrine as an absolute one.

In the *Elchinov* case, Advocate General Cruz Villalon had suggested that the Court should modify its effectiveness jurisprudence, since several developments in EU law render it less necessary to turn the national judicial hierarchy upside down,[192] mentioning alternatives such as a civil damages claim based on the judge's erroneous application of EU law[193] or the Commission introducing infringement

[186] ECJ, 27 June 1991, *Mecanarte*, C-348/89, para. 46.

[187] ECJ, 22 Oct. 1987, *Foto-Frost*, C-314/85, paras. 15-20; ECJ, 10 Jan. 2006, *IATA and ELFAA*, C-344/04, para. 27; ECJ, 18 July 2007, *Lucchini*, C-119/05, para. 53.

[188] ECJ, 27 June 1991, *Mecanarte*, C-348/89, para. 45.

[189] Alen, *supra* n. 67, p. 109; F. Delpérée, 'Les rapports de cohérence entre le droit constitutionnel et le droit international public. Développements récents en Belgique', *Revue française de droit constitutionnel* (1999) p. 734.

[190] Verrijdt, *supra* n. 80, p. 555.

[191] This possibility cannot be turned into an obligation (ECJ, 19 Jan. 2010, *Kücükdeveci*, C-555/07, paras. 54-55; ECJ, 5 Oct. 2010, *Elchinov*, C-173/09).

[192] Concl. Adv.-Gen. P. Cruz Villalon in C-173/09, *Elchinov*, 10 June 2010, para. 27.

[193] ECJ, 30 Sept. 2003, *Köbler*, C-224/01; ECJ, 12 Nov. 2009, *Commission* v. *Spain*, C-154/08, paras. 64-65.

procedures against member states for non-compliance caused by the Judiciary.[194] He stated that the full effect doctrine is less proportional than the alternatives, and suggests the Court, pointing at its increasing workload and at the national procedures' equivalence, to reconsider the *Rheinmühlen* case-law. His *a posteriori* interpretation of effectiveness is a pluralist one, because it allows all national instances to effectively perform their review.[195] The Court, however, did not even mention this suggestion in its judgment in the same case, which recalls its *Rheinmühlen* case-law and other aspects of its full effect doctrine,[196] concluding that a lower judge may never be bound by the judgment of a higher court which refers the case back to it if that higher court has violated EU law.

In the *Winner-Wetten* case, the *Bundesverfassungsgericht* had annulled a public monopoly on sports betting because of a violation of Article 12 *Grundgesetz,* but it maintained the effects of the annulled provision in order to grant the legislature sufficient time to take other, constitutional, measures against gambling.[197] The Luxembourg Court, however, found that such rules, although they are of a constitutional nature, may not undermine the unity and effectiveness of EU law, and requested the referring judge to ignore the maintaining of effects ordered by the Constitutional Court.[198]

In the *Kücükdeveci* case, the Court used the principle of the domestic judge's 'widest discretion' to refer a case to Luxembourg for allowing a domestic judge to set aside *proprio motu* a constitutional judgment which had stated that the domestic legislation did not violate the prohibition of discrimination on grounds of age.[199]

The *Melki* judgment does not downsize this full effect doctrine: it only states that one of its features, the immediacy rule, can be replaced by another feature, i.e., provisional measures, as long as the full effect of EU law remains guaranteed. This judgment has, moreover, granted the domestic judge a pretext to declare the *QPC* procedure contrary to EU law and to avoid mandatory constitutional review, and this pretext has indeed been used by the referring judge.

Effectiveness versus effectiveness: safeguarding human rights protection

The balance between the effectiveness of EU review and the effectiveness of constitutional review thus seems to be lost. There is, however, a third stake at play, next to the full effect of EU review and of constitutional review. This stake, the

[194] ECJ, 9 Dec. 2003, *Commission* v. *Italy*, C-129/00.
[195] Verrijdt, *supra* n. 80, p. 571.
[196] ECJ, 5 Oct. 2010, *Elchinov*, C-173/09, paras. 26-31.
[197] BVerfGE 28 March 2006, n° 1 BvR 1054/01.
[198] ECJ, 8 Sept. 2010, *Winner-Wetten*, C-409/06, para. 61.
[199] ECJ, 19 Jan. 2010, *Kücükdeveci*, C-555/07, paras. 52-55.

effectiveness of human rights, encompasses both others, but it also has broader aspects, both procedural and material, which can be read in the Strasbourg jurisprudence. The first aspect is that the European Convention on human rights guarantees rights which are not 'theoretical or illusory', but 'practical and effective.'[200] This general rule of effectiveness applies to all human rights provisions, also the ones guaranteed in most national constitutions and in the Charter of Fundamental Rights of the EU.[201] It is also linked to the obligation to exhaust domestic remedies before addressing the Strasbourg Court,[202] because this obligation only applies for effective remedies.[203]

The second aspect of the Strasbourg effectiveness criterion is the right of access to court, which the Strasbourg Court implicitly read in Article 6 of the Convention and promoted to be an essential feature of the rule of law.[204] This essential right comprises both the procedure itself and the judgment's execution.[205] It implies a right of recourse to a court or tribunal in the substantive sense of the judicial function for all claims concerning civil rights and obligations.[206] The effective right to access to court includes the right to obtain a determination of the dispute by the competent court.[207] Although the Convention does not oblige its member states to install constitutional review,[208] the right of access to court implies that, if constitutional review does exist, access to it may not be hindered.

The third aspect is to be read in Article 13 of the Convention, which guarantees the right to an effective remedy for all arguable claims about a human rights violation. This principle requires either the prevention of the violation or an adequate redress.[209] The Strasbourg Court has also repeatedly stressed that the exercise of domestic remedies may not be unjustifiably hindered.[210] In its *Kudla* judgment, the Court stated that domestic human rights mechanisms must attain a high standard of effectiveness because of the subsidiarity principle: according to the

[200] E.g., ECHR, 25 April 1978, *Tyrer* v. *United Kingdom*; ECHR, 18 Feb. 1999, *Matthews* v. *United Kingdom*; ECHR, GC, 4 Feb. 2005, *Mamatkulov and Askarov* v. *Turkey*; ECHR, 10 Feb. 2009, *Sergey Zolotukhin* v. *Russia*.

[201] ECJ, 13 March 2007, *Unibet*, C-432/05, para. 37; ECJ, 15 April 2008, *Impact*, C-268/06, para. 43.

[202] P. Leach, *Taking a Case to the European Court of Human Rights* (OUP 2005) p. 165.

[203] ECHR, 16 Sept. 1996, *Akdivar* v. *Turkey*, para. 69.

[204] ECHR, 21 Feb. 1975, *Golder* v. *United Kingdom*, paras. 34-35.

[205] ECHR, 22 May 2003, *Kyrtatos*, para. 30; ECHR, 23 Oct. 2003, *Timofeyev*, para. 40.

[206] ECHR, 16 Dec. 1992, *Geouffre de la Pradelle* v. *France*, paras. 36-37; ECHR, 22 May 2001, *Baumann* v. *Germany*, para. 39.

[207] ECHR, 10 July 2003, *Multiplex* v. *Croatia*, para. 45.

[208] ECHR, 21 Feb. 1986, *James and others* v. *United Kingdom*.

[209] ECHR, 26 Oct. 2000, *Kudla* v. *Poland*, para. 158.

[210] ECHR, 18 Dec. 1996, *Aksoy* v. *Turkey*, par. 95; ECHR, 27 June 2000, *Ilhan* v. *Turkey*, para. 97; ECHR, 26 Oct. 2000, *Kudla* v. *Poland*, para. 157; ECHR, 1 June 2004, *Altun* v. *Turkey*, para. 70.

Court, the Articles 1, 13 and 35 of the Convention enshrine the principle that national institutions must have the opportunity to redress human rights violations before a case is taken to the supranational judge.[211]

Strasbourg's effectiveness criterion is clearly distinct from Luxembourg's. But apart from being distinct, both effectiveness criteria might also be conflicting. The Luxembourg Court's applying a procedural logic in which the case's judge is the natural judge of EU law, might indeed weaken a member state's remedial powers in the light of the ECHR, as required by the Strasbourg Court. This is mainly because the Luxembourg reasoning ignores the specific features of centralized constitutional review,[212] such as its *erga omnes* effect,[213] its accessibility for complainants, third party interveners and the responsible government, its expertise and, as far as Belgium is concerned, its systematically taking into account Strasbourg case-law through its analogous human rights jurisprudence. One might wonder whether, after the EU's accession to the ECHR (which is currently being prepared), the Luxembourg Court can still maintain its full effect doctrine against these characteristics of constitutional review. It is to be regretted that the *Melki* judgment does not contain a single reference to these characteristics, nor to the Strasbourg effectiveness principle. Nevertheless, any hindrance to the effectiveness of constitutional control, apart from touching upon the right of access to court, constitutes a hindrance to the effectiveness of human rights protection. It should not be the Luxembourg Court's call to sacrifice that effectiveness for the sake of the merely procedural effectiveness of EU law.[214]

Furthermore, one might wonder why it is so important for the Court of Justice to receive preliminary questions in case of coincidence of human rights. Since it may not examine a national legal provision's conformity with EU law,[215] its only job is to interpret or invalidate EU law. In case of human rights, this interpretation is, however, already sufficiently clear from the Strasbourg Court's case-law, which must be implemented by all national judges, including the Constitutional Court, and by the Luxembourg Court.

[211] ECHR, 26 Oct. 2000, *Kudla* v. *Poland*, para. 155; *see also* ECHR, 15 Jan. 2009, *Burdov* v. *Russia*.

[212] On the effectiveness of French constitutional review, *see* Drago, *supra* n. 35, p. 591-671.

[213] Paradoxically, the *Melki* judgment even turns the *erga omnes* effect of constitutional review into a counterargument, by stressing that the annulment of legal provisions transposing secondary EU law would have the effect that a judge in that country cannot question the Luxembourg Court on the secondary EU law's validity (ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, para. 55; Verrijdt, *supra* n. 80, p. 561).

[214] Ibid., p. 561.

[215] ECJ 23 Jan. 1975, *Van der Hulst*, C-51/74; ECJ 22 Oct. 1998, *IN.CO.GE '90 Srl*, C-10/97.

Full effect can still be effective

The Luxembourg Court developed its doctrines on primacy and full effect in the 1960s and 1970s, when the European Community's only competences concerned economic law. In those days, it was necessary to develop these techniques, urging national judges to fully cooperate, because other enforcement options were absent. In those days, most member states did not possess a constitutional court, *a fortiori* not a fully effective one, and this situation explains the Luxembourg Court's choice for the ordinary and administrative judge.

The Luxembourg Court's human rights competence was developed later,[216] alongside or even after a new wave of constitutionalism leading to the establishment or improvement of constitutional review. Therefore, it is not necessary to apply the *Rheinmühlen* and *Simmenthal* logic in the field of human rights. The full effect of human rights is indeed, both within and outside the scope of application of EU law, already guaranteed by three distinct mechanisms, i.e., constitutional review, treaty review and the Strasbourg Court's supervision.

Furthermore, the Luxembourg Court has always refused to balance its doctrines on the full effect and uniform application of EU law, which find no treaty basis other than Article 267 TFEU, with other constitutional principles of EU law, most of which are enshrined in primary EU law.[217] Today, 25 out of 27 EU member states possess some form of constitutional review, 21 of which have opted for exclusive centralized review.[218] The concept of constitutionalism is, by nature, the most fundamental 'common constitutional tradition' (Article 6.3 TEU and Article 52.4 Charter). The organisation and functioning of constitutional review is also part of the hard core of the exclusive national competences, since nothing is closer linked to the member states' national history, culture and traditions than their own institutions and the way in which legal protection against the government is offered. These choices are thus protected under the principle of institutional autonomy and respect for national identity, enshrined in Article 4.2 TEU and in Article 52.6 of the Charter, by the principle of conferral, laid down in Article 5.2 TEU and Articles 51.1 and 51.2 of the Charter, by the subsidiarity principle in Article 5.3 TEU, and by the principle of procedural autonomy.

[216] ECJ, 12 Nov. 1969, *Stauder*, 29/69, para. 6; ECJ, 14 May 1974, *Nold* v. *Commission*, 4/73, para. 13; Declaration 5 April 1977 by the Parliament, the Council and the Commission (Pb. 1977, C-103/1). The EU Treaty only anchors the ECHR in its Art. 6.2 since 1992. The Charter of Fundamental Rights of the European Union was only proclaimed in 2000 and it only possesses binding effect since 2009.

[217] Verrijdt, *supra* n. 80, p. 562-570.

[218] In eighteen of these countries, this task is conferred upon a separate constitutional court, whereas in Cyprus, Estonia and Ireland, the Supreme Court fulfills this function.

Taking into account these principles does not have to lead to abandoning the full effect doctrine. As stated by Advocate-General Cruz Villalon, and as the Court proved in the *Melki* judgment, effectiveness can be obtained using several techniques. The techniques Advocate-General Cruz Villalon proposed[219] are indeed less intrusive into national constitutional and procedural autonomy and into the effectiveness of human rights protection. Another asset of his solution is that it obtains full effect of EU law by techniques familiar to the member states. This approach seems to be much more in accordance with the aforementioned constitutional principles of EU law.

Nevertheless, the Luxembourg Court's aim of being able to perform a human rights review of secondary EU law still is a legitimate one. It only needs to be restated in a framework which takes into account parallel legitimate concerns for the constitutional courts and the Strasbourg Court.[220] As long as both the Luxembourg Court's review over secondary EU law and the constitutional courts' review over their transposition proceed after these norms are adopted, the risk of collision remains.

It might therefore be recommendable to install, before the Luxembourg Court, a binding *a priori* human rights review of secondary EU law. Such an *a priori* review is familiar to certain member states, the *Conseil constitutionnel* being the best example. Its *a priori* review of legislation has already been mentioned (see *supra* n. 35). Apart from that, Article 54 of the French Constitution grants the President, the Prime Minister, the Presidents of the *Assemblée* and the *Sénat*, and sixty members of one of the chambers of parliament, the right to refer a treaty, before its approval,[221] to the *Conseil constitutionnel*.[222] If the *Conseil* considers the treaty to be unconstitutional, it cannot be approved or ratified without amending the Constitution. If, however, the *a priori* constitutional control is not asked for, the treaty is *iuris et de iure* considered to be in accordance to the Constitution.[223]

The *a priori* review of secondary EU law we propose,[224] would, however, not depend from an optional referral, but would constitute a mandatory step in their adoption process. All legal instruments binding the member states would be sub-

[219] Concl. Adv.-Gen. P. Cruz Villalon in C-173/09, *Elchinov*, 10 June 2010, para. 27.

[220] Verrijdt, *supra* n. 80, p. 571-572.

[221] C.C., n° 92-312, 2 Sept. 1992, *Traité sur l'Union européenne*, *Rec.*, 1992, p. 76.

[222] Claes, *supra* n. 56, p. 469-476; Gicquel and Gicquel, *supra* n. 29, p. 516-517; Drago, *supra* n. 35, p. 552-524. In its constitutional review, the *Conseil* does, however, take into account France's prior international obligations, especially in the field of EU law (C.C. n° 92-308 DC, 9 April 1992, *Maastricht*, *Rec.*, 1992, p. 55; C.C., n° 2007-560 DC, 20 Dec. 2007, *Lisbon*, *Rec.*, 2007, p. 459).

[223] C.C., n° 77-90 DC, 30 Dec. 1977, *Rec.*, p. 44; Chantebout, *supra* n. 30, p. 569; Drago, *supra* n. 35, p. 520-522.

[224] Such a procedure would require a treaty amendment (Claes, *supra* n. 56, p. 538-541). It is not certain if the Luxembourg Court would be interested in such a procedure (H. Schepel and E. Blankenburg, 'Mobilizing the European Court of Justice', in G. De Búrca and J. Weiler (eds.), *The European Court of Justice* (OUP 2001) p. 41.

ject to this procedure, regardless of whether they possess direct effect. The most likely set of reference norms is the Charter of Fundamental Rights, but for the human rights which correspond to an ECHR provision, the actual state of the Strasbourg jurisprudence should constitute the minimum level of protection. The respect for the constitutional principles common to the member states and the general principles of EU law should also be part of this *a priori* review. If the Court disallows a draft or parts of it, it or they may not be adopted.

Some issues do, however, emerge with this proposal. A first one concerns the possibilities left for *a posteriori* review by the Luxembourg Court. It is evident that a general human rights conformity check will be less profound, because it lacks focus: some specific problems will only be noticed after they rise in a specific setting. The Luxembourg Court's preliminary jurisdiction on the same provisions of secondary EU law should therefore not be excluded, but it might be made subject to an originality check by the referring judge, who can examine whether the question which has risen, was sufficiently dealt with during the *a priori* control, or whether the circumstances have changed since that control.

A second issue concerns the possibilities left open for review by the constitutional courts on transposition acts. Both the *Conseil constitutionnel* (see *supra* n. 60 and 61) and the *Bundesverfassungsgericht*[225] have announced that, although they will in principle not examine a transposition act's constitutionality, they will censure parts of secondary EU law which are *ultra vires* or which violate the national constitutional identity. In a multilevel setting, the latter option is recommendable: opposing all constitutional norms to secondary EU law would be too large a hindrance to the unity of EU law, but EU law may not run counter to the fundamentals of national constitutional law. Such an *a posteriori* constitutional review of EU law must, however, be conducted *europarechtsfreundlich* and *zurückhaltend* (with restraint): the constitutional judge should first set up a preliminary dialogue with the Luxembourg Court and, after a negative answer by that Court, it should only disallow parts of secondary EU law if the violation of the constitutional identity or the principle of conferral is 'sufficiently qualified.'[226]

Apart from competence and national identity issues, and apart from the emergence of original questions, the constitutional courts cannot call into question the result of the Luxembourg Court's *a priori* review. If the norm of secondary EU law leaves the member states some margin, the choice made by the legislator must nevertheless respect the constitutional rights.

[225] BverfG 30 June 2009, 2 BvE 2/08, *Lissabon-Urteil*, *BVerfGE*, band 123, p. 267; BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell*.

[226] A. Vosskuhle, 'Multilevel Cooperation of the European Constitutional Courts – Der Europäische Verfassungsgerichtsverbund', *EuConst* (2010) p. 175-198. The criterion of the 'sufficiently qualified violation" was developed by the Luxembourg Court in the *Francovich* jurisprudence.

Conclusion

The rhetorical question by W. J. Ganshof van der Meersch, when he was still Prosecutor-General before the *Cour de cassation*, still applies today:

> Is it acceptable and in conformity with the necessary logic of the law, that an individual complaining about the violation of one of his rights, is forced to use the detour of international law, while the Constitution grants him the same right, but the judge cannot guarantee the respect of those rights?[227]

When he wrote these words, constitutional review was non-existent in Belgium and was inaccessible in France. Today, a full-fledged constitutional review procedure exists in both countries, but judges have tried to avoid it by taking the turn of international law.

The Court of Justice has not invalidated the Belgian and French constitutional review procedure, pointing at the obligation each judge has to interpret national legislation as much as possible in conformity with EU law. But nor has it closed the door, leaving them a pretext to declare the priority rule non-compliant to EU law. It has accepted the parallel existence of two human rights mechanisms, but in stressing the absolute character of its full effect doctrine, safeguarding its own interests, it has endangered the same interests for the other mechanism. This other mechanism, however, seems to be able to provide for the strongest and most effective human rights protection, as required by the ECtHR. The Luxembourg Court should not apply its full effect doctrine to the same extent in human rights matters, but should accept and sustain the effectiveness of domestic human rights protection by constitutional courts. In human rights cases, a distinction needs to be made between its task of interpreting EU law and its task of invalidating secondary EU law. In the first hypothesis, its *Rheinmühlen* and *Simmenthal* case-law should be replaced by *a posteriori* techniques guaranteeing the same effectiveness of EU law. In the second hypothesis, its aim of receiving a fresh supply of cases enabling it to conduct human rights review of secondary EU law can be obtained by a mandatory *a priori* review.

These remarks should not deflect the attention from the statement that the *Melki* judgment shows a strong willingness for judicial dialogue. This, however, leads to the first peril mentioned in the introduction, i.e., the possibility of divergent views on analogous human rights. It can only be hoped that, with the guidance of the Strasbourg Court, these divergences will be resolved through yet another judicial dialogue.

[227] Concl. W. Ganshof van der Meersch for Cass., 3 May 1974, *Arr. Cass.*, 1974, 976.

https://doi.org/10.1017/S1574019611300028 Published online by Cambridge University Press