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The Judicial Dynamics of the French and European Fundamental Rights Revolution

Mitchel de S.-O.-l'E. Lasser[*]

This chapter analyzes an important and complex development that is currently playing out at the intersection of the French and European judicial systems: a whole series of courts (and court-like institutions) that had little or nothing to do with "judicial review" are now in the midst of a mad scramble to master and direct the development of fundamental rights jurisprudence. This chapter traces this development and explains how the advent of the European Court of Justice and the European Court of Human Rights has led to an intense interinstitutional competition between the French and European High Courts, a competition in which fundamental rights have served both as the opportunity that triggered this competition and the preferred means to engage in it.

Part of the story of the dramatic rise of fundamental rights is undoubtedly social and intellectual in nature. At the domestic level, France has been increasingly fragmenting along pluralistic lines. This fragmentation has posed ever greater challenges to French republicanism, which has traditionally stressed the unitary nature of both "the general will" and "general interest." The result has been a marked rise in individual- and group-oriented pluralism increasingly expressed in fundamental rights terms.

This trajectory functions at the supranational or transnational level, as well. As political communities have become increasingly complicated cross-nationally as well as intranationally, fundamental rights have risen dramatically in importance. Fundamental rights have served in effect as a lingua franca across jurisdictions: they operate as a common legal denominator and pool of common legal terms transferable within and across the European polities. By focusing on individuals (including firms) and their fundamental rights, courts have found a cross-culturally operative technique for resolving disputes that ostensibly steers clear of bigger aggregation/polis-building enterprises.

[*] Jack G. Clarke Professor of Law, Director of Graduate Studies, Cornell Law School.

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This common social and intellectual momentum has likely been reinforced by the fall of the Berlin Wall and incorporation of ex-Soviet bloc and/or ex–totalitarian states into the Western European legal order. This liberalizing and anticommunist reaction has taken legal form not only via the constitutional process within these states, but also by their adherence to such symbolically charged rights-based institutions as the Council of Europe and the European Court of Human Rights.[1] In short, both the internal fragmentation and the external aggregation of political communities have contributed to the stunningly rapid rise of the fundamental rights idiom throughout Europe.

However, that is not the entire story. The fundamental rights revolution is also a matter of the complex – and often competitive – interinstitutional dynamics that increasingly define the judicial arena in our ever more globalized legal space. These judicial dynamics are particularly visible and pressing in contemporary Europe for two reasons. First, the European judicial arena possesses two layers of powerfully operational courts: the domestic and the European judiciaries. Second, almost all national judiciaries in Europe belong to the Civil Law tradition; as a result, they typically possess multiple and often quite distinct judicial hierarchies, each headed by its own "supreme court." In fact, even the European judiciary is led by two different courts: the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

The European domestic and supranational judicial orders therefore possess a distinctive structural feature: they deploy a plethora of high courts that operate in an overlapping and richly interactive judicial environment. As a result, all of these high courts are now scrambling to master and direct the high ground offered by the emergent fundamental rights regime. Some are better positioned to do so than others.

This multiplicity of high courts leads to a group dynamic that reinforces the recourse to the fundamental rights idiom and contributes to its increasing dominance. Almost every European judicial player now faces powerful pressures to jump on the fundamental rights bandwagon or be left intellectually and institutionally behind. Each judicial institution must accordingly deploy and seek to control this rising idiom, even if doing so threatens to refashion or even replace that institution's traditional role definition. This has prompted a frantic race to the "top" of an increasingly unitary doctrinal, procedural, jurisdictional, and intellectual scheme: the evermore powerful and ubiquitous fundamental-rights framework.

This chapter offers a case study of the dramatic circulation of fundamental rights pressures between the numerous high courts in play at the intersection of the domestic and supranational European judiciaries. It examines the ongoing "fair trial" litigation (conducted under Article 6-1 of the European Convention on Human

[1] Of course, some of the motives for such adherence are deeply practical: candidate countries for the EU must effectively sign onto the ECHR fundamental rights regime. *See* the "Copenhagen Criteria" for accession to the EU, Bulletin of the European Community 6/1993, at I.13.

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Rights) challenging the decision–making procedures used by the numerous high courts designed on the French judicial model.

This analysis, which summarizes the conclusions of my recent book (2009), focuses on the French and European high courts. It explains that what appears at first blush to be a simple case of external European (and, in particular, ECHR) pressures on the French judiciary to modify its traditional decision-making procedures actually represents a far more complex and highly charged set of interactions between multiple French and multiple European courts. This examination could easily and fruitfully be expanded to include other national high courts, ranging from those directly involved in the "fair trial" litigation (such as the Belgian, Dutch, and Portuguese Supreme Courts) to others particularly prominent in the rise of fundamental rights (such as the Bundesverfassungsgericht, the German Federal Constitutional Court). As will soon become apparent, however, the multifaceted interaction between the French and European courts is more than sufficient to suggest the key structural dynamics currently driving the European fundamental-rights revolution.

For heuristic purposes (and heuristic purposes only), I adopt a four-part analysis that examines the four basic types of judicial pressures that operate between and within the European and French courts: European pressures on the French courts (Part II); French pressures on the French courts (Part III); French pressures on the European courts (Part IV); and European pressures on the European courts (Part V). This highly structured approach offers two advantages. First, it organizes an otherwise confusing morass of interactions between a wide range of domestic and international courts. Second, working systematically through this simplified analytic structure eventually demonstrates that the French and European judicial orders are increasingly difficult to disentangle, both theoretically and practically: interventions at every level constitute interventions at all others.

This chapter comes to several conclusions. I state them straightforwardly right now in order to help the reader work through the institutional complexities that follow. First, the current interinstitutional dynamics are prompting a group convergence of all domestic and European High Courts on the fundamental-rights idiom, however disruptive this may be to the particular courts in question. As the French and European example demonstrates quite clearly, there appears to be no effective opt-out of the fundamental-rights framework for any of these courts.

Second, this all-but-obligatory convergence has forced these courts to translate their prior procedural, doctrinal, and conceptual schemes into fundamental-rights terms. This translation process has proven to be not only deeply competitive, but often quite creative as well: numerous individual, group, and institutional interests are in play; the stakes are patently major; and the results are not preordained. This has led to widely divergent interpretations of how to construct and implement the emerging fundamental-rights framework.

Third, the struggle to master and direct these legal developments has further reinforced the rising fundamental-rights regime. The domestic and supranational

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European judiciaries function in an interinstitutional context whose group dynamics have created a strong incentive regarding fundamental rights. The most empowering strategy for any given court is not to attempt to evade the often disruptive fundamental-rights regime; not only does such a refusal appear retrograde, it leaves the institution at the interpretive, doctrinal, and institutional mercy of those who have taken the opposite tack. The more effective strategy is to embrace and even seek to lead the emerging regime by aggressively developing expansive fundamental-rights positions. This "maximalist" approach is the most effective means to disable and trump troublesome interpretations by legal competitors, maintain control over one's own institution, and exercise institutional and intellectual leadership of the emerging judicial order.

Fourth, these developments have prompted major constitutive developments in both the French and European judicial systems. The former is turning itself evermore completely and explicitly into a fundamental-rights-based system, in stark contrast to its traditional republican approach, which focused on a (supposedly) unitary general will. The latter is following suit by: 1) reproducing the intra-domestic tensions between the ordinary-administrative and fundamental-rights high courts; and 2) replicating these domestic courts' solutions to such tensions. This suggests that the European high courts are increasingly organizing themselves into an integrated judicial order along recognizable domestic lines. The chapter concludes with some methodological warnings.

THE TRADITIONAL FRENCH JUDICIAL MODEL: THE PREEXISTING EQUILIBRIUM

The French legal system has traditionally been defined – procedurally, doctrinally, institutionally, structurally, and intellectually – by its distinctive brand of republicanism. The classic French package has consisted of four fundamental and interlocking features: 1) a unitary conception of the general will and general interest; 2) the supremacy of the legislature as the voice of the general will; 3) a strict separation of the judiciary from the political branches of government; and 4) a commitment to elite and expert institutional decision making. These features have traditionally been understood to entail several more, including: 5) the refusal of judicial review; 6) the establishment of separate administrative and constitutional tribunals; 7) a doctrine of the "sources of the law" that refuses to grant the ordinary judiciary lawmaking powers; 8) the theory of *la loi écran* (i.e., the "legislative screen" that shields legislation from administrative review regarding its compatibility with the Constitution or international obligations); 9) legality based – as opposed to fundamental-rights based – administrative review; and 10) institutionally oriented – as opposed to individually oriented – judicial decision-making procedures.

Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen declares: "*La loi est l'expression de la volonté générale*" ("Legislation is the expression of the

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general will"). This statement of principle establishes the core of the traditional French understanding of law. Political will is, in good Rousseauian fashion, general; it is not divisible into subgroups, never mind into the conflicting rights and interests of individuals (Suleiman 1974: 24–29, 297–323; Hazareesingh 1994: 155–171; Rousseau 2002: 164–182, 193–196, 214, 227–30).[2]

The supremacy of general legislation requires a strict separation of the judiciary from the political branches of government. The Revolutionaries established this strict separation as early as August 1790, when they passed the Law on Judicial Organization: judges were explicitly forbidden to interfere with legislative and administrative decisions (French *Code de l'organisation judiciaire* tit. II, arts. 10, 13, Aug. 16–14, 1790). Far from adopting a system of checks and balances, this approach unambiguously rejects judicial review.

That said, the French system has long been far more flexible and nuanced than has traditionally been portrayed. Although judicial review of the acts of the political branches has been anathema, the French established a series of specialized administrative tribunals within the Executive branch to perform quasi-judicial review of the executive. Furthermore, although the ordinary judiciary was explicitly denied lawmaking powers (French Civil Code Articles 5 and 1351), the Courts have neither been, nor were they intended to be, passive actors in the French legal order. Portalis, the Civil Code's primary author, made the point expressly: codified legislation could only establish the general outlines of the law; judges (and academics) would necessarily have to work out the specifics and adapt the law to the demands of a society in constant change (Portalis 1799).

Institutional and professional structures were designed to ensure the accountability and representativeness of French judges. These judges spend their entire careers within a unified and hierarchical judicial institution (Lasser 2005: 182–185). Because they have tested into the system by formal state examinations, have been trained for their office by state educational institutions, and been promoted by state-defined and managed meritocratic means, the judiciary as a whole bears the imprimatur of elite republican representation (Lasser 2005: 331–334).

Having gone to such effort to select, train, and organize its judges, the French system then gives them the necessary procedural and institutional means to manage the application and development of la loi's broad provisions. The judicial decision-making process of the French High Courts is accordingly dominated by the Courts themselves: in some important sense, it is the Court, not the litigants, who are understood to be appropriately representative of the state and citizenry at large.

Once the parties have submitted their written pleadings, it is therefore the judicial panel that effectively takes responsibility for the case. Partisan oral argument by the parties all but withers away, as elaborate and multistage internal discussions

[2] In fact, Article 3 of the 1958 Constitution goes to the bother of spelling out that, "No portion of the people may arrogate to itself, nor may any individual arrogate to himself, the exercise [of national sovereignty]."

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between key judicial magistrates – such as the advocate general and the judicial rapporteur – take center stage (Garapon and Papadopoulos 2004: 110–112). Shielded from public view, judicial debates unfold in absolute candor and without fear of political retribution.

This sequestering approach also produces an important secondary effect: it greatly diminishes the argumentative and doctrinal control that these judges can exert through their cryptic, collegial, single-sentence, and syllogistic judgments. The syllogism also stands as a powerful reminder: only legislation constitutes the true expression of the general will.

This supremacy of the general will has traditionally meant that the ordinary judiciary – or, for that matter, the quasi-judicial administrative tribunals – cannot call la loi into question, whether on domestic (constitutional) or international (treaty/convention) grounds. Even when the administrative tribunals review Executive branch actions at the behest of disgruntled citizens, they traditionally do so not so much in order to vindicate the rights of the individual, but rather to ensure that the state has acted according to its own standards of appropriate behavior. This review has therefore traditionally been focused not on the *individual*'s fundamental constitutional *rights*, but on the *legality* of the *state*'s actions.

Finally, the Fifth Republic's treatment of constitutional review reflects almost all of these traditional assumptions. It therefore adjusted, rather than subverted, the traditional equilibrium between the ordinary courts, administrative tribunals, and political branches. First, constitutional review was established to police the division between the Legislature and Executive branches, not to protect fundamental rights from legislative or governmental encroachment. Second, individuals could not trigger such review; only a small set of major state actors could file constitutional complaints. Third, the newly created Constitutional Council was established outside of the judiciary. Finally, the Council could only perform review a priori (i.e., while the challenged legislative act was still a pending bill). Once the bill had been passed into law, and had thus become the formal expression of the general will, it was no longer subject to challenge.

EUROPEAN PRESSURES ON THE FRENCH JUDICIAL SYSTEM: THE DOMESTIC ORDER THROWN INTO FLUX

General External Pressures

The traditional model just described has certainly not been the product of a static legal or judicial history. Slowly developed and deeply entrenched over the course of the last two centuries, the model had nonetheless reached a recognizable – if undoubtedly complex and somewhat malleable – state of equilibrium. In the last few decades, however, it has been undergoing a stunningly rapid and sweeping transformation.

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The first important pressures for the current transformation emerged from the European legal plane. In 1964, the ECJ began insisting on the supremacy or "precedence" of European law over conflicting national law.[3] This doctrine called on national courts to refuse to apply national laws inconsistent with European law; in effect, it required judicial review, albeit in the name of European law.

Given the traditional model described in Part II, it should come as no surprise that the French legal system did not exactly rush to adopt this jarring new doctrine. Indeed, it was not until 1975 that the Cour de cassation took the step demanded by the ECJ in 1964. It is a testament to the lasting power of the classic French approach, however, that the Conseil d'Etat and the Constitutional Council refused to follow suit for almost fifteen more years: it was not until 1989 that the Conseil d'Etat finally buckled under by overturning its own jurisprudence.[4] This shift represented an important moment in the acceptance of European law; but it was a truly monumental event in the internal history of French law. The theory of the loi écran had finally fallen, and with it the primacy of legislation and the general will, if only in the context of European law.

This development threw the French legal order into a state of disequilibrium. The new role adopted by the French courts meant that individuals could now seize the ordinary and administrative courts to block the operation of French legislation in the name of *European* rights (including fundamental rights) of EU or ECHR origin. However, these same individuals could *not* do so in the name of domestic *French* rights, even of constitutional status.

This discrepancy had a dual effect. First, the sudden availability of justiciable European rights constituted a bonanza for individuals and firms searching for a basis to challenge unfavorable legal outcomes at the national level. Second, this new turn to superior European norms not only empowered the national judiciary vis-à-vis the political branches, but also disrupted the traditional French mode for reviewing the acts of the Executive branch. Quasi-judicial review of the executive had been an integral part of the French legal order since at least 1799, when Napoleon established the Conseil d'Etat (Brown and Bell 1998: 46–48). Over the ensuing 200 years, the Conseil developed a sophisticated jurisprudence for challenging executive rules and acts, which has been applied throughout the country by a large administrative court hierarchy.

European rights jurisprudence accordingly challenges French administrative jurisprudence rather directly. Elaborated by the ECHR and the ECJ, this jurisprudence undermines the institutional leadership of the Conseil d'Etat, which traditionally elaborated the bases for reviewing state acts. This institutional shift also challenges the conceptual structure and very ethos of French administrative jurisprudence. Review had been steeped in French republican notions. It was grounded in a

[3] *Costa v. E.N.E.L.*, Case 6.64 (1964) CMLR 425.
[4] *See* Judgment of the Conseil d'Etat of 20 October 1989 (*Nicolo*), (1989) Rec. Lebon 190.

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series of "legality" doctrines traditionally oriented toward the state: the key issue was whether the state had behaved according to proper administrative morality.[5] The increasingly dominant European approach, however, offers a more liberal perspective: its key question is whether the rights – including the fundamental rights – of the individual have been violated.[6]

Targeted External Pressures

Plaintiffs have now successfully wielded these newly justiciable European rights to overturn a whole series of specific French legal rules, ranging from the nonrecognition of sex changes to the calculation of VAT taxes.[7] Amazingly, plaintiffs have even leveraged their European rights to target the decision-making procedures traditionally deployed by all of the French High Courts. This "procedural" litigation has proven to be immensely disruptive: it subjects the ethos and practices of these proud "Supreme Courts" to the critical appraisal of foreign courts on the basis of an unfamiliar fundamental-rights logic.

In a major and ongoing line of decisions handed down over the last ten years, the ECHR has struck repeatedly at the decision-making procedures of the high courts designed on the French model.[8] In doing so, it has condemned precisely those practices and institutional structures that reflect the classic French republican understanding of the judicial role: stressing the importance of permitting the individual litigant to take an active role in litigation, it has criticized the French high courts' characteristically closed and institutionally oriented decision-making procedures.

These French procedures were traditionally designed to permit two key judicial figures – the rapporteur and an advising magistrate (known as the advocate general at the Cour de Cassation or the commissaire de gouvernement at the Conseil d'Etat) – to lead the judicial panel in intensive and candid debates about how to decide cases in such a manner as to promote the general interest and public good. As a result, the litigants would almost always wave their nominal right to engage in oral arguments: once they had submitted their written pleadings, their role in the decision-making process was effectively over.

[5] I owe the elegant term "administrative morality" to Brown and Bell (1998: 216).

[6] These two approaches could of course be fused: the violation of an individual's rights could, for example, be treated as a violation of state morality.

[7] *See, e.g.*, Court of Cassation judgments of Dec. 11, 1992, JCP, *jurisprudence* no. 21991, p. 41 (conclusions Jéol); Joined cases C–177/99 and C–181/99 *Ampafrance v. Directeur des services fiscaux de Maine-et-Loire* (2000) ECR I–7013.

[8] The ECHR cases specifically condemning the French Supreme Courts only date back to 1998, but the first ECHR decision to condemn the French model of judicial decision making dates to 1991, when the ECHR censured similar procedures utilized by the Belgian Cour de Cassation. *See Borgers v. Belgium*, 214 Eur. Ct. H.R. (Ser. A) 22 (1191); *Reinhardt and Slimane-Kaïd v. France*, 1998-II Eur. Ct. H.R. 640; *Kress v. France*, 2001-VI Eur. Ct. H.R. 1; *Martinie v. France*, case no. 58675/00, (April 12, 2006). Retrieved from http://www.menschenrechte.ac.at/orig/06_2/Martinie.pdf.

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Elaborating a fundamental-rights perspective that stresses the right of individuals to take an active role in litigation, the ECHR has found much to fault in the traditional French procedures. In particular, it has insisted that individual litigants be granted access and response rights with respect to the key internal documents generated within the French preparatory judicial debates. First, because the judicial advisor might put forward damaging arguments, the litigant must be allowed to receive the advisor's conclusions in advance in order to respond to them as necessary at oral arguments. Second, the judicial advisor must not be put in a privileged position by gaining access to the otherwise unavailable report and draft judgments of the rapporteur. Finally, the advisor must also be removed from the judicial panel's final deliberations, lest he be perceived (accurately or not) to be gaining an argumentative advantage.

The ECHR's Article 6-1 "fair trial" jurisprudence could hardly have done a more thorough job of pitting its individual fundamental-rights perspective against the French judicial system's republican self-understanding. Reducing the prototypically republican figure of the judicial advisor to little more than a potential opponent of the individual litigant undermines the governing logic of the French system; namely, that it is the judicial institution – rather than the individual and self-interested litigant – that best represents the general interest and public good. The ECHR instead placed the individual litigant in a privileged position: by dint of his fundamental procedural and substantive rights, he had to be empowered to play an analytically and procedurally central role, even at the expense of the French courts' traditional structure, ethos, and practices.

FRENCH PRESSURES ON THE FRENCH JUDICIAL SYSTEM: INTERNAL MOTIVATIONS

The French legal order has thus been subjected to tremendous pressures from the European rights-based approach in general and the ECHR's fair trial jurisprudence in particular. However, it has also been exerting major pressures on itself at the same time. These internal motivations and dynamics are caused in large measure by the broad and enduring structural design of the French courts.

As is the case in most Civil Law systems, the French "judiciary" is organized into several distinct hierarchies. The "ordinary" "judicial" courts, headed by the Cour de Cassation, handle civil and criminal litigation. The "administrative" tribunals, headed by the Conseil d'Etat, are instead housed within the Executive branch. This distinction is not merely formal. Ordinary French judges receive their educational and vocational training at the Ecole Nationale de la Magistrature, the national judge school. Administrative judges, however, receive theirs at the particularly prestigious Ecole Nationale de l'Administration, which trains all high-ranking Executive-branch civil servants. They are therefore prepared above all not to be judges, but to manage state affairs. For its part, the Constitutional Council is a free-standing

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(and largely political) institution, distinct from both the ordinary and administrative tribunals.[9]

This division of judicial turf into subparts has prompted somewhat competitive interinstitutional motivations and dynamics. On the sociological front, the high Executive judges look upon their civil/criminal counterparts with a certain disdain. The former are the cream of the elite management team that composes the "State nobility" (to use the term coined by Bourdieu 1996); the latter are mere judges. On the institutional front, the Constitutional Council has come to play an increasingly prominent role in defining the proper structure and operation of the state, a field previously dominated by the Conseil d'Etat. Finally, on the doctrinal front, the partitioning of the "judiciary" has fostered interpretive complexities: even if the jurisdictional field is divided between the three hierarchies, the three institutions periodically elaborate doctrines in related and even overlapping fields.[10]

The addition of a strong European presence on the French legal scene has greatly multiplied the number and stakes of such competitive judicial interactions; this has added another layer of internal motivation for the assorted French courts' institutional responses. First, European law represents a whole new field of action on which French judicial institutions can compete. Second, to conquer the European legal terrain is to occupy the high ground for French domestic law purposes: European law is, by both its own definition and French constitutional standards, superior to French law. Third, European law cuts across the key jurisdictional and doctrinal divisions that we have been describing: corporate, environmental, or other European regulation can generate litigation in any of the domestic judicial hierarchies. These factors have in essence thrown the French courts into an ongoing negotiation regarding their respective roles, domains, and powers.

The fundamental rights doctrines of the ECHR offer the clearest example of the collapsing of domestic divisions and distinctions. ECHR law is superior law; it must be applied by all state actors (including the courts); and it therefore operates across the board in disputes litigated in any and all of the judicial hierarchies. This alters the nature and intensity of the competition between the three major "judicial" institutions. Now that European law bridges the substantive and jurisdictional divisions between the three major institutions, the classic partitioning of the French "judicial" field blurs: all three must increasingly interpret and apply the same (superior) fundamental-rights principles.

The internal motivations and dynamics of the French judiciary were already apparent decades ago when the ECJ insisted that the precedence (i.e., superiority)

[9] Unlike the ordinary and administrative judges, the members of the Constitutional Council serve for limited terms (nine years) are directly politically appointed by the heads of the political branches (the President of the Republic and the Presidents of the two legislative houses).

[10] For example, "tort" doctrines are elaborated in both the ordinary courts (for private injuries) and the administrative tribunals (for public ones). Similarly, procedural rights of "defendants" have been elaborated in the ordinary, administrative, and constitutional courts, albeit in somewhat different contexts.

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of European law required domestic courts to refuse to apply conflicting national norms. Deeply attached (professionally, institutionally, and intellectually) to the French republican tradition, the Conseil d'Etat was dead set against recognizing the precedence of European law and violating the doctrine of la loi écran by exercising review over French legislation. Composed primarily of major French political figures similarly attached to existing national traditions and power structures, the Constitutional Council was not much more enthusiastic. Indeed, having recently granted itself the power to review legislation for substantive violations of fundamental rights incorporated into the 1958 French Constitution, the Council was in no rush either to adopt another deeply controversial position or subjugate the authority of its constitutional mission to routine European legal norms. The Cour de Cassation, however, had excellent motivations for staking out a different (and pro-European) position: not only could it drastically empower itself relative to the legislative branch,[11] but it could also greatly increase its standing relative to the Conseil d'Etat and Constitutional Council. By dutifully following the ECJ's demands, not only would it adopt the mantle of the open-minded, progressive, and commercially sensitive institution, it could suddenly wield legal materials superior to those handled by its sister institutions. The results followed suit: in 1975, the Cour was the first French Supreme Court to set aside a loi that conflicted with a European norm; the Constitutional Council began to waver noticeably in the mid-1980s; and the Conseil d'Etat finally caved in 1989.[12]

Similar French interinstitutional motivations and dynamics have been unleashed repeatedly in the face of European legal pressures. The ongoing Article 6-1 "fair trial" litigation offers a particularly clear and telling example. The Conseil d'Etat has steadfastly resisted the ECHR's "fair trial" jurisprudence. Advancing arguments so tenuous as to border on the disingenuous, it has done all in its power to maintain its traditional understanding of republican procedures. It has refused to remove its judicial advisor (the Commissaire de gouvernement) from its internal deliberations; and it has offered litigants as little as possible in the way of information and response rights (Lasser 2009: 93–94).[13]

The Cour de Cassation, however, has jumped on the opportunity presented by the ECHR's jurisprudence to institute a major overhaul of its decision-making procedure. These reforms significantly increase the capacity of individuals, firms, and interested parties to intervene aggressively in the decision-making process. In all important cases, the rapporteur must now disclose her report's legal analysis not only to the parties well in advance of oral argument, but also to the public at large:

[11] This is the so–called empowerment thesis (Weiler 1981, 1994).

[12] *See* Cass. mixte, Judgment of May 24, 1975, D. 1975, p. 497 (*Jacques Vabre*); Judgment of the Constitutional Council 86–116 of Sep. 3, 1986, (1986) Recueil des decisions du Conseil Constitutionnel 135; *Nicolo*.

[13] Even the Conseil d'Etat's recent reforms changing the title of the judicial advisor from the Commissaire de gouvernement to the Rapporteur public are designed to resist the ECHR's jurisprudence. See Art. R 733 of the Code de justice administrative.

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it is to be published alongside the final judgment in the Cour's official reports. As a result, the judicial advisor (the advocate general) no longer obtains privileged access to internal judicial information. Not only can he only receive the same "objective report" as the litigants, but he has been banished altogether from the Cour's pre– and post–oral-argument deliberations. Finally, the litigants can respond either orally or in writing to the advisor's conclusions to the court. In short, the Cour has chosen to shift the balance of procedural power noticeably in the direction of private parties at the expense of the advocates general. The Article 6-1 "fair trial" litigation has thus triggered a schism between the Conseil d'Etat and the Cour de Cassation, which again reveals the latent structural and intellectual tensions between these two domestic high courts.

This window into the internal diversity of the French judiciary holds great analytic importance for the examination of the French judicial system, European judicial system, and interaction between the two. On the French side of the equation, the tensions between the Cour and the Conseil demonstrate that the institutional and intellectual threat (or promise) posed by the rise of the European courts and fundamental rights idiom affects different institutional players quite differently. Put simply, their motivations differ.

Furthermore, the institutional schism between these two high courts hardly exhausts the wide range of domestic responses. Even within the Cour de Cassation, which has taken a pro-European law and fundamental–rights-friendly approach, there is endless disagreement about what such stances actually require. All of the fundamental-rights norms need to be interpreted, and the range of possible interpretations is obviously quite large. Some factions wish to interpret these fundamental rights in a dignitarian fashion that empowers disadvantaged groups relative to the state and powerful private interests. Others seek, to the contrary, to interpret them in such a fashion as to protect vested economic and property rights from the disruptions threatened by such a dignitarian approach. The key is to recognize that, despite their disagreements, all of these French institutions and factions have converged on fundamental rights as the appropriate mode of legal analysis, as each jockeys to control the development of supremely powerful fundamental rights within the domestic legal order.

Moreover, the institutional competition on the fundamental-rights front has developed simultaneously with regard to French constitutional norms. The reasons for this are both structural and doctrinal. First and foremost, the Constitutional Council has traditionally been limited to abstract a priori review of legislation. As a result, it only got one crack at reviewing a given piece of legislation. Once it had given the law its blessing, the ordinary and administrative courts took over that law's interpretative development. Although these courts could not formally review the law and declare it unconstitutional, they could – and necessarily often did – apply it in light of their own interpretations of constitutional norms.

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The Constitutional Council has had only very weak means to control such ongoing constitutional interpretation of both legislative and constitutional norms.[14] Individuals could neither petition the Council directly nor refer concrete judicial interpretations to the Council for further constitutional review. The Council therefore had only the first say in constitutional interpretation;[15] the ordinary and administrative courts would then elaborate their own interpretations in a relatively decentralized fashion.[16]

The absence of an important "state action doctrine" compounds this interpretive decentralization. Almost any litigant in any private controversy can put forward arguments couched in fundamental-rights terms, thereby triggering further constitutional interpretations. In this manner, contract clauses have been challenged on the grounds that they violate the right to exercise a profession, malpractice liability has been imposed in the name of the dignitarian right to bodily integrity, and the like.[17]

The combination of external pressures, internal motivations, and institutional structures has thus led fundamental rights (of both European and French origin) increasingly to dominate the French legal terrain in almost all domains. The advent of fundamental rights thus challenges the structural, institutional, and doctrinal divisions that have traditionally partitioned the French judicial order into relatively distinct subparts. As we shall soon see, it challenges the division between the French and European judicial orders, as well.

FRENCH PRESSURES ON THE EUROPEAN JUDICIAL SYSTEM: EXTERNAL PRESSURES IN REVERSE

The pressures exerted between the European and French judicial orders are not a one-way street. The institutional roots of the returning pressures can be inferred from the internal tensions and motivations described above: the multiplicity of domestic high courts. The European courts are negotiating their relationship with a multifaceted and fractured set of French judicial institutions whose own interinstitutional motivations function as strongly on the domestic level as on the European one. The

[14] Perhaps the most important of these powers is the capacity to condition its approval of legislation on interpretive reservations (Bell 1992, 2001). This approach seeks to control the potential meaning and application of the challenged legislation over time. However, there exist no formal policing mechanisms for enforcing such reservations.

[15] Even this power is debatable: the Conseil d'Etat actually has the first say, as it gives advice to the government about the constitutionality of proposed legislation (Bell 1992).

[16] The recent amendment of the French Constitution has changed this state of affairs, although it is not yet clear how significantly. The addition of Article 61-1 now allows references to be made to the Council in concrete cases. Although this opens the door for a posteriori review of legislation (undoubtedly a major development), it establishes the Cour de Cassation and the Conseil d'Etat as the gatekeepers to the Conseil. This effectively maintains the partial autonomy of these high courts' interpretive powers in the constitutional realm (Lasser 2009).

[17] *See, e.g.*, Cass. Soc., July 10, 2002, D. 2002, 2491, note Serra; Cass. 1re civ., Oct. 9, 2001, D. 2001, 3470, rapport P. Sargos, note D. Thouvenin.

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judicial chess match is therefore being played on at least two levels at once, with moves on either level affecting the relationships on the other.

This reality presents strong opportunities for the European judiciary. Because European law qualifies as superior (if only by ECJ doctrine), it is relatively easy for European legal institutions to enlist the support of tactically insightful domestic counterparts, who now function as agents for European legal progress in the national legal order. Internal French judicial motivations thus offer welcoming points of entry for European fundamental-rights pressures.

However, this state of affairs also imposes significant costs. The multiplicity of domestic high courts, when combined with the interpretive leeway of fundamental-rights norms, leaves the development of European law vulnerable to the interpretive decisions taken by self-interested domestic legal institutions. The Article 6-1 fair trial litigation provides an excellent example of this dynamic.

When the ECHR started condemning French High Court decision-making procedure some ten years ago, the French courts had some tough decisions to make about how to respond. The range of possibilities was quite large. For example, the 1998 *Reinhardt* decision condemned the unequal ("imbalanced") access given to the reporting judge's work product in Cour de Cassation cases (the judicial advisor received all of this preparatory material prior to oral arguments; the litigants received none).[18] Furthermore, the 2001 *Kress* judgment held that the judicial advisor at the Conseil d'Etat (the commissaire de gouvernement) could not legitimately retire with the sitting judicial panel to participate in post–oral-argument judicial deliberations, lest the appearance be given that he might press his arguments in a prejudicial fashion.[19] The French Supreme Courts could have legitimately adopted a wide range of potential responses, each premised on more or less expansive or restrictive interpretations of the ECHR's jurisprudence.[20] For example, the requirement that the litigants receive the same access as the advisor to the judicial materials prepared in advance of oral arguments does not settle how much access should be given to what kind of information.

As we have seen, the Conseil d'Etat and the Cour de Cassation adopted fundamentally different tacks in the face of the ECHR's decisions. The Conseil stonewalled as best it could by refusing to remove the judicial advisor from its final deliberations (it merely required him to remain silent). The Cour de Cassation, however, removed him not only from the final deliberations (as apparently required by the ECHR's *Kress* judgment), but also from the preparatory ones that take place before oral argument. Indeed, the Cour used the ECHR's jurisprudence as a springboard to rework its decision-making procedures in a manner that significantly increased the procedural rights of litigants, interested parties, and the public at large.

[18] *See Reinhardt*, 1998–II Eur. Ct. H.R. at 666.

[19] *Kress* at para. 70–72.

[20] Nick Huls (Ch. 7 in this volume) underlines this interpretive agency in his insightful analysis of the Dutch Hoge Raad's expansive interpretations of EU law and jurisprudence.

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We can learn a great deal from this type of interchange. First, even in instances in which a European court has settled an issue in a seemingly straightforward fashion, there nonetheless remains more than enough room for ongoing interpretive effort at the domestic level. Second, expansive domestic interpretations of European law in effect become European law, if only for domestic purposes. That is, the Cour's expansive interpretation of what was required by the ECHR's jurisprudence functions as the meaning of European law in France. The Cour's procedural modifications were made in the name of European law, and the ECHR has few viable means of policing, never mind overriding, this interpretation. On the practical level, the ECHR can only effectively oversee a tiny percentage of the cases that raise fundamental-rights issues arising from the Convention: there are limits to how many cases an institution composed of only one judge per country can possibly handle. As a prudential matter, things are not much better. Faced with the recalcitrance of the Conseil d'Etat, could the ECHR really object to the exuberance of the Cour de Cassation, thereby jeopardizing the Cour's ongoing support of the ECHR project? As a legal matter, furthermore, on what basis could the ECHR criticize the Cour? The Convention and its ECHR interpretation set minimum fundamental-rights standards, not maximum ones. Beyond this minimum level, domestic legal actors are free to read the Convention as liberally as they like.

These factors demonstrate that expansive domestic interpretations of European law exert strong pressures not only within a given domestic level order, but also on the European one, to the point that they effectively become European law. Within the national legal order, they specify what European law requires. At the European level, the ECHR has excellent prudential reasons to adopt such interpretations as its own. In fact, these expansive domestic interpretations even operate between different domestic orders: expansive positions taken by the Belgian courts, supported (almost by necessity) by the European ones, exert pressures on their French counterparts (Lasser 2009).

This cycle of pressures reveals an essential attribute of the ongoing fundamental-rights explosion. Domestic legal actors have powerful incentives to frame their interpretations in expansive fundamental-rights terms. To adopt a contrary tack is to invite sanction, but to take an expansive approach is deeply empowering. When artfully done, it helps insulate the domestic court from effective European intervention (Caruso 2004), at the same time permitting it to exercise intellectual, institutional, jurisdictional, and doctrinal leadership on both the national and supranational levels.

This dynamic has helped fuel the fundamental-rights revolution. Every major domestic judicial institution has good reason to engage in the increasingly frantic "race to the top" of the fundamental-rights regime, in which the courts seek to recast their preexisting doctrinal and intellectual frames in fundamental-rights terms. This dynamic exerts tremendous pressures back on the European judicial order, as it fosters a decentralized fundamental-rights one-upmanship that the European

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courts cannot effectively control. The internal motivations of the French courts thus manifest as external pressures imposed on the European courts.

EUROPEAN PRESSURES ON THE EUROPEAN JUDICIAL SYSTEM

The European courts are by no means immune to these fundamental-rights pressures. As suggested above, the domestic courts can back the European ones into something of a corner: by casting their domestic judgments as expansive interpretations of European fundamental-rights norms, they can pressure the European courts to ratify and even adopt these interpretations. That is not all. The European judiciary is no more unified than its domestic counterparts: it is headed by two preeminent courts, the ECJ and the ECHR, who have strong internal motivations of their own to pressure each other quite strongly on the fundamental-rights front.[21] It should not be surprising, therefore, to see that the European courts reproduce many of the same interinstitutional dynamics that characterize the domestic judicial terrain.

As in the domestic arena, the European courts are situated differently with regard to fundamental rights. The ECHR is on its home turf when elaborating fundamental-rights doctrines. Such work represents its jurisdictional, institutional, and doctrinal raison d'être. The ECJ, however, is in a very different situation. It has long exercised review over actions taken by the EU institutions. But such review was based not on fundamental rights, but on the four "legality" grounds listed in Article 263 (ex 230) of the EC Treaty: "lack of competence, infringement of an essential procedural requirement, infringement of [the] Treaty or of any rule relating to its application, or misuse of powers." As knowledgeable readers will recognize, this legality framework faithfully reproduces the state-oriented good-governance approach deployed domestically by the Conseil d'Etat: the four traditional grounds for reviewing the legality of French administrative actions are none other than *incompétence*, *vice de forme*, *violation de la loi*, and *détournement de pouvoir* (Brown and Bell 1998: 239).

The explosion of fundamental-rights doctrines accordingly challenges the conceptual and doctrinal framework of the ECJ, which was derived directly from the Conseil d'Etat. As might be expected, the ECJ has met this challenge with some resistance: it only accepted to develop a fundamental-rights jurisprudence when faced with mounting institutional threats. These pressures came from at least two directions. Classic EU analyses stress the first: pressure exerted by domestic constitutional courts, especially the German Federal Constitutional Court (FCC). The FCC threatened to protect the fundamental rights of German citizens against encroachment by the acts of the community institutions unless the community (and the ECJ in particular) took on this task in a manner substantially similar to German

[21] The struggle for institutional, intellectual, and doctrinal leadership of the European high courts is on the verge of entering a new and potentially explosive phase: when the EU accedes to the European Convention system, the ECJ will suddenly become directly subject to the ECHR's jurisdiction. *See infra* Note 27 and accompanying text.

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constitutional protections.[22] Our analysis highlights a second, European motivation that complements this domestic pressure: the ECJ was also increasingly threatened by the ECHR, whose evermore bold and influential fundamental rights analyses of governmental action challenged its own legality-based approach.[23]

Pushed from both directions, the ECJ had little tactical choice but to hop onto the fundamental-rights bandwagon, regardless of how unsettling this may have been to its traditional prism. Tellingly, however, it did so in a manner that faithfully reproduced the Conseil d'Etat's approach: it started to develop its own fundamental-rights jurisprudence under the rubric of "general principles of [European] Community law."[24] This solution – since enshrined in Article 6-2 of the Treaty of Amsterdam – parrots the Conseil d'Etat's creative elaboration of such "general principles of law" under the rubric of the cardinal French administrative notion of legality.[25] It also offers the same basic tactical advantage: it allows the ECJ to partake of, be responsive to, and influence the existing fundamental-rights regimes (both domestic and European), while also establishing the legal independence of the ECJ and its fundamental-rights doctrines.

These startlingly vivid institutional, conceptual, and doctrinal parallels between the ECJ and the Conseil d'Etat support several conclusions. At the most general, systemic level, the European courts are gradually organizing themselves as a complexly integrated judicial order, and they are doing so along recognizable domestic lines. Not only do they replicate the basic institutional division between fundamental-rights-oriented "constitutional" courts (the ECHR playing the role of the Constitutional Council) and legality-oriented "administrative" courts (the ECJ playing the role of the Conseil d'Etat), but they are reproducing the tensions, motivations, and solutions that characterize these domestic judicial orders. This confirms our analysis of the fundamental-rights dynamics that have been operating at the national level; justifies its transposition to the supranational level; and illustrates its relevance to

[22] When the ECJ did so, the FCC suspended its own review. *Re Wünsche Handelsgesellschaft* (*Solange II*), Judgment of Oct. 22, 1986, (1987) 3 CMLR 225, 265. *See* also *Brunner v. European Union Treaty*, (1994) 1 CMLR 57, 89 BverfGE 155.

[23] The centrality of the ECHR and its rights-based analyses has since been formalized in the EU legal order. The Charter of Fundamental Rights of the European Union, which took effect in 2000, established that the EU's institutions (including the ECJ) would respect fundamental rights "as they result," inter alia, from the European Convention on Human Rights and "the case-law of the [ECHR]." It even specified that insofar as it "contains rights which correspond to rights guaranteed by the [European Convention], the meaning and scope of those rights shall be the same as those laid down by the said Convention." Charter of Fundamental Rights of the European Union, Article 52(3).

[24] These general principles were to be inspired by the "constitutional traditions common to the Member States" and the European Convention on Human Rights. *See*, *e.g.*, *Hauer v. Land Rheinland-Pfalz*, Case 44/79, December 13, 1979, (1979) ECR 3727.

[25] Developed most aggressively and expansively in the post–War years, these general principles have permitted the Conseil to crystallize a set of overarching principles of legality that ground the French state and its actions. *See* conclusions of CDG Fournier in *Syndicat général des ingénieurs-conseils*, June 26, 1959, Rec. Lebon 364; Conseil d'État 5 mai 1944 *Dame Trompier-Gravier* and CE 26.10.1945, *Aramu*, Leb. 213.

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the increasingly porous and interactive environment at the intersection of these two domains.

The Article 6-1 fair trial litigation reveals quite clearly the operation of these dynamics. In theory, this litigation should not have been a bone of contention between the ECJ and ECHR: the former is not subject to the latter's jurisdiction.[26] The litigation has nonetheless spilled over into the Euro-European realm, because the decision-making process of the ECJ is so clearly patterned on the French model.[27] Litigants have therefore sought to challenge unfavorable ECJ judgments on the grounds that they were the product of similarly flawed judicial procedures. In fact, this procedural link between the ECJ and the French high courts has been stressed by almost all parties involved as a means to exert leverage on one another.

These Euro-European Article 6-1 debates have played out in multiple venues. First, the ECHR has explicitly and repeatedly addressed the ECJ's judicial decision-making processes in litigation concerning similar practices employed by the French and Belgian Supreme Courts. ECHR majority decisions have worked hard to distinguish ECJ from national Supreme Court decision-making practices: it would be highly impolitic for the ECHR to condemn the practices deployed by its august European colleague.[28] Dissenting ECHR judges have, to the contrary, stressed Franco-ECJ parallels as a means to critique the majority's developing jurisprudence in a (largely unsuccessful) attempt to shield French-style supreme courts from ECHR condemnation.[29] Indeed, the national high courts under review have done the same, both in domestic litigation and when defending themselves before the ECHR.[30]

Second, the Article 6-1 litigation has also surfaced before the ECJ itself. In effect, the ECHR's 6-1 jurisprudence has all but forced the ECJ to defend its traditional judicial decision-making procedures against the claim that they violate the fundamental right to a fair trial in a manner comparable to those of the French, Dutch, Belgian, and Portuguese Supreme Courts. In *Emesa Sugar v. Aruba*, the ECJ took matters in hand by issuing an order that held explicitly that its procedures do not run afoul of fair trial guarantees.[31]

[26] The EU has not yet acceded to the European Convention on Human Rights, as the ECJ ruled in 1996 that accession was outside the scope of EU's competences. *See* Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, 1996 E.C.R. I-1759, at para. 35. Accession has been further delayed by the failure to ratify the proposed Constitutional Treaty. The Lisbon Reform Treaty calls for such accession. *See* Article 6 TEU.

[27] For more on these procedural parallels and their limits, *see* Lasser (2009: Chapters 4 and 7).

[28] *See, e.g., Delcourt v. Belgium*, 11 Eur. Ct. H.R. (Ser. A) 1 (1970), para. 30; *Kress* at para. 52, 86.

[29] *See* dissenting opinions of Judge Van Compernolle and Judges Gölcüklü, Matscher, and Pettiti in *Vermeulen v. Belgium*, 1996-I Eur. Ct. H.R. 224 (1996); *Reinhardt*, Dissenting Opinion of Judge De Meyer, at No. 13; Partly dissenting opinion of Judges Wildhaber, Costa, Pastor Ridruejo, Kūris, Bîrsan, Botoucharova, and Ugrekhelidze in *Kress*, at para. 11.

[30] *See, e.g., Kress* at para. 62.

[31] *See* Order of the Court in Case 17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 E.R.C. I-665.

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This exchange demonstrates a number of key points. First, the ECHR has been exerting significant pressure on the ECJ through the development of its fundamental-rights doctrines, although it does not formally exercise jurisdiction over its sister court. Second, the ECJ has understood that it has no choice but to meet this challenge directly on its own fundamental-rights terms: it must make an effort to seize control of the fundamental-rights analysis insofar as possible, lest it be at the mercy of less favorable interpretations. Third, the ECJ is nonetheless in a disadvantageous position in these exchanges. Fundamental-rights analysis is not the traditional source of its jurisdictional or doctrinal power. Worse, the ECJ finds itself in a defensive posture, as it must fend off the suggestion that its own decision-making procedures violate the fundamental right to a fair trial. This puts the ECJ in the awkward and seemingly retrograde position of fighting a rearguard action against fundamental-rights protections.

The ECJ has nonetheless held firm, claiming the authority to make its own fundamental-rights determinations. Relying on its self-availed – and treaty- and charter-ratified – power to interpret fundamental-rights norms as "general principles of law," it has even taken the dramatic tack of challenging the ECHR overtly: by explicitly refusing to follow the Strasbourg Court's Article 6-1 fair trial jurisprudence, the ECJ is in effect challenging the ECHR's leadership in the fundamental-rights arena.

Tellingly, the ECJ could hardly have picked less congenial ground on which to make its stand. It was the very institution charged with having violated the fundamental-rights norms in question; its analysis was therefore inescapably self-interested, if not self-serving. Worse, the ECJ was effectively forced to frame its self-defense as a restrictive, rather than an expansive, fundamental-rights interpretation: the ECJ had to conclude that the litigants' fair trial rights did not extend to the decision-making procedures at issue. The ECJ's very willingness to stand its ground under such unfavorable circumstances demonstrates the severity of the threat posed by the ECHR's Article 6-1 jurisprudence: backed against the wall, the ECJ had to claim fundamental-rights authority more forcefully, lest the ECHR dominate the field completely.

Equally telling, the ECJ defended its decision-making procedures in terms that unabashedly reproduced those put forward two years earlier by the French Conseil d'Etat.[32] By closing ranks in this manner, the ECJ presented the ECHR with a threateningly unified front against its developing jurisprudence. In so doing, the ECJ effectively recognized that it and the Conseil d'Etat are structurally, intellectually, doctrinally, and procedurally kindred institutions; the rise of the fundamental-rights idiom and fundamental-rights courts subjects both courts to deeply analogous pressures. These structural parallels confirm that the European courts are indeed

[32] *See Id.*, drawing heavily from *Esclatine*, Conseil d'Etat, July 29, 1998, D. 1999, at Jur. 85, concl. Chauvaux, at 89.

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organizing themselves into an integrated judicial order along recognizable domestic lines.

SUBSTANTIVE CONCLUSIONS AND METHODOLOGICAL CAVEATS

The French and European judiciaries are both in the midst of a major constitutive moment. On its side, the French judicial system is rapidly turning itself evermore completely and explicitly into a fundamental–rights-based regime. This has triggered a major realignment of French judicial doctrines, procedures, jurisdictions, and ideologies. All French courts now interpret constitutional rights when handling litigation, even if formal constitutional review has traditionally been vested solely in the Constitutional Council. When combined with the establishment of fundamental-rights review of European derivation, the French judicial order has shifted ever further from its traditional package of republican-inspired attributes.

The French constitutional amendments of July 2008 offer the latest and clearest indication of this transformation. The addition of Article 61-1 opens the door for a posteriori concrete review of legislation on behalf of individuals: it allows references to be made by the Cour de Cassation and Conseil d'Etat to the Constitutional Council in ongoing litigation. This means, by definition, that all judicial (and/or quasi-judicial) branches of the French legal order are suddenly and explicitly important players in triggering judicial review of legislative norms on constitutional fundamental-rights grounds. One can only assume that this represents the death knell of the general will as classically defined.

On its side, the European courts are replicating ever-more faithfully the structure and logic of domestic legal orders such as the French. The ECJ and ECHR, although rooted in different treaty regimes and doctrinal logics, are gradually organizing themselves into an integrated judicial order. They have not only reproduced the institutional ethos and conceptual framework of the Conseil d'Etat and the Constitutional Council, respectively, but also the tensions between them. Indeed, they have even gone so far as to elaborate the same doctrinal mechanism for bridging between their legality and fundamental-rights perspectives: general principles of law. The full extent of these emerging parallels is only underlined by the ECJ's defense of its decision-making procedures in terms that explicitly parrot those authored by the Conseil d'Etat. What remains to be seen, however, is whether the EU's ratification of the Lisbon Reform Treaty, which should bring the ECJ under the fundamental-rights jurisdiction of the ECHR, will significantly alter this familiar institutional balance.

The complex and ongoing transformations occurring at the intersection of the French and European judicial systems therefore pose an analytic conundrum. Are the French and European judicial systems in the process of moving toward a unified fundamental-rights regime, led most likely by the key fundamental-rights court at the European level, the ECHR? Or do their complex and shifting interinstitutional dynamics actually represent a decentralized form of equilibrium in its own right, one

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that allows the plethora of domestic and supranational courts to govern their respective domains as they all converge on – and compete over – an increasingly common fundamental-rights idiom? This problem of historical perspective is compounded by what might be termed a problem of systemic perspective. The interrelated convergence of all of these domestic and European courts on the fundamental-rights idiom has made it increasingly difficult to treat the domestic and supranational judicial orders as truly external to each other.

The Article 6-1 fair trial litigation demonstrates this phenomenon quite elegantly. When the Cour de Cassation interpreted the ECHR's jurisprudence so expansively as to require a large-scale reconstruction of its own decision-making processes, it all but forced the ECHR to adopt this interpretation of European law and impose it on the Conseil d'Etat. It is not at all clear whether this cycle of French and European judicial interaction is best understood as an example of: 1) external European (ECHR) pressure on the French courts; 2) internal (Cour de Cassation) motivations regarding its relations to the Conseil d'Etat; or 3) reverse (Cour de Cassation) pressure on the ECHR. My own inclination is to understand it as an example of all three at once, not only because the pressures and motivations operate simultaneously on all fronts, but also because the more one knows what one is looking at, the less and less clear it becomes whether, for example, the Cour de Cassation can best be described in such instances as a French or European legal actor. This suggests a fourth interpretation; namely, that the Cour de Cassation was internally motivated – as one European court – to exert interpretive pressure on another – the ECHR. In this complex and shifting legal environment, domestic institutions such as the Cour de Cassation act as both the subjects and objects of European law, constructing Europe and realizing European law even as they reformulate French legal traditions and rework French legal institutions (Lasser 2009).

The dramatic emergence of fundamental rights manifests this complexly interactive and fluid state of affairs. Fundamental-rights analysis crossed traditional jurisdictional boundaries, linking together a series of courts that had previously operated in relatively distinct legal and political spheres. This doctrinal linkage not only provided the opportunity for interinstitutional communication in common terms, but also triggered intense and ongoing interinstitutional competition: each of the high domestic and European courts was – and still is – deeply invested in mastering the high ground of fundamental rights. Finally, as the highest ranking and most readily applicable norms in the emerging legal regime, fundamental rights have become the privileged and ubiquitous medium for engaging in these charged interinstitutional struggles.

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