CONSTITUTIONAL DEVELOPMENTS AND HUMAN RIGHTS IN FRANCE: ONE STEP FORWARD, TWO STEPS BACK

I. INTRODUCTION

A major constitutional reform has occurred in France. On 1 March 2010, by virtue of the Constitutional Act of 10 December 2009[1] (itself pursuant to the constitutional reform of 23 July 2008)[2] a new form of constitutional review came into force,[3] with the blessing of the Conseil constitutionnel (the Constitutional council).[4] The changes are considerable: the role of the Conseil constitutionnel has undergone a revolution which will have implications for ordinary courts as well as for citizens' rights. Arguably, the reform transforms the Conseil constitutionnel—so far a council with limited powers of review—into a true Constitutional court, and as discussed below, opens up constitutional issues in ordinary litigation, enhancing the protection of citizens' human rights. Owing to the reform, 'Constitutional rights and liberties guaranteed by the Constitution' can now be invoked against legislation in the course of litigation. This is a true revolution in France because, up until now, no individual was allowed to invoke the jurisdiction of the Conseil constitutionnel,[5] nor were they authorized to invoke a constitutional principle in litigation, as this would have been asking ordinary judges to assess a piece of legislation against the Constitution, a task which exclusively belongs to the Conseil constitutionnel.[6] Constitutional rights and liberties will now (as is further discussed below) play a key part in ordinary litigation.

What specific changes have been brought about? From March onwards, review of the compatibility of legislation with the Constitution can now be carried out *ex post*, ie after the promulgation of legislation, when issues of constitutional compatibility are raised in the course of litigation, as well as *ex ante*, before the promulgation of Acts of Parliament, following the procedure which was until now the only route for

[1] *Loi organique n. 2009-1523 of 10 December 2009* relating to the application of art 61-1 of the French Constitution, JO 11 December 2009, 21379.

[2] *Loi constitutionnelle n. 2008-724 of 23 July 2008* relating to the modernization of the institutions of the Republic, http://www.comite-constitutionnel.fr

[3] For references to articles published in France on that topic, see P Bon, 'La Question prioritaire de constitutionnalité après la loi organique du 10 décembre 2009' (2009) RFDA, 1107–1124, fne 2.

[4] Decision Conseil constitutionnel 3 December 2009 no 2009-595 DC, JO 11 December 2009, 21831.

[5] Since the 29 October 1974 reform, the Conseil constitutionnel has in effect been opened to political opposition. In 1974, 60 members of the lower house of the French Parliament or 60 members of the higher house of the French Parliament were given entitlement, together with the initial four most eminent political figures—the President of the French Republic, the Prime Minister and the President of each of the French Houses of Parliament—to submit legislation to the Conseil constitutionnel (art. 61 §2 of the French Constitution).

[6] French ordinary judges have consistently refused to review the compatibility of French legislation with the French Constitution: cf. for administrative courts, CE 6 November 1936, S 1937, 3, 33, Conclusions X Latournerie; and for private law courts, Cass. Crim. 11 May 1833, S 1833, 1, 357.

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constitutional review.[7] The addition of a review post promulgation was announced by the Prime Minister as an 'important step in the development of the Rule of Law', as a way to 'fill up a gap in the protection of human rights'[8] in France by enabling citizens to challenge the constitutionality of legislation already in force.

Reading these statements might lead us to think that no mechanism for protecting human rights against promulgated legislation existed until the reform. On the contrary, the protection of human rights in France was not neglected, but was carried out mainly on the basis of the European Convention of Human Rights, (ECHR) by virtue of article 55 of the Constitution, which allows the direct application of properly ratified international treaties by French Courts.[9] The new developments therefore merely add a new basis for the protection of human rights—in addition to alleged violations of international treaties (and mostly of the ECHR), parties may now also invoke violations of Constitutional rights and liberties.

However, does this new possibility really improve the protection of human rights in France? In this article, I shall address the claim that this additional legal basis (this new form of Constitutional Review) will enhance the protection of human rights. Several types of flaws or dangers can be highlighted. Some stem from the text of the reform itself, others flow from the delicate articulation between the two types of ex post review: the new review of compatibility with the constitution on the one hand and the traditional review, known as 'conventionality' review, of compatibility with international norms on the other. The latter problems are linked to the fear that the efficiency of the protection of human rights will be undermined by the introduction of a competing form of review under the new Act. The former 'internal problems' relate to the purposes of the reform. The goals of the reform are ambiguous, if not contradictory. The objectives assigned to the reform by the Report Committee[10] from which the reform originates are threefold:

1) to eradicate unconstitutional norms;
2) to enable citizens to invoke individual constitutional rights; and
3) to ensure the pre-eminence of the Constitution in the hierarchy of norms.

In this article, I shall demonstrate that the main goal of the reform is to ensure the supremacy of the Constitution. Despite the numerous virtues of this goal, and despite some advantages for individual human rights in a few instances, the emphasis thus placed on an ideal model of hierarchy of norms has led to the neglect of alternative solutions that would have been more efficient in terms of human rights protection. Supremacy of the Constitution thus prevails in the reform over a real concern for human rights protection.

[7] Art 61 of the French Constitution.

[8] See the speech of the French Prime Minister François Fillon at the Assemblée Nationale on 20 May 2008, available at http://www.assemblee-nationale.fr.

[9] According to art 55 of the Constitution, direct effect of international treaties is subjected to a condition of reciprocity. But this condition does not apply to treaties on human rights. See F Sudre, 'La Dimension internationale et européenne des libertés et droits fondamentaux' in R Cabrillac, M-A Frison-Roche and T Revet (eds), *Libertés et droits fondamentaux* (7th edn, Dalloz, Paris, 2001) 35–56.

[10] On the origins of the reform, see below. For comments about the issue of relying on committee reports itself, X Magnon, 'La Composition de la Commission Balladur: brèves réflexions sur l'expertise en matière constitutionnelle' (2008) 75–76 Revue française de droit constitutionnel 39–47.

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II. ORIGINS AND AMBIGUITIES OF THE REFORM

The introduction of a new *ex post* review of constitutionality into French Law is part of a major reform of French institutions, proposed by President Nicolas Sarkozy[11] and prepared by a Committee chaired by the former Prime Minister Edouard Balladur, whose report was officially submitted to the President of the French Republic on 29 October 2008.[12] If the idea of an *ex post* constitutional review attracted quasi-unanimous support, the objectives that the supporters had in mind were quite diverse. Whereas some sought to enhance the protection of individual human rights,[13] others mainly hoped to nationalize human rights protection.[14] Is the reform about protecting or taming human rights? Both objectives have been kept in the final text. This failure to choose between these two goals is one of the main flaws of the reform. It creates, as we will see, ambiguities and contradictions which are detrimental to human rights protection and may even jeopardize the repatriation of human rights protection under French horizons.

A. Paradox in the Timing of the Reform?

Previous attempts had been made to introduce a similar form of constitutional review. In 1990[15] and 1993,[16] when such reforms were first considered, there was an urgent

[11] cf Nicolas Sarkozy's speech in Epinal on 12 July 2007, http://www.bfdc.org/article-11334863.html.

[12] Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République, *Une V^ème^ République plus démocratique*, (Fayard, 2008), also available at http://www.comite-constitutionnel.fr. Based on the Committee's recommendations, the government prepared a text which was adopted by Cabinet on 8 April 2008 and then submitted to Parliament (On the governmental text, see comments by B Mathieu, 'Question préjudicielle de constitutionnalité—A propos du projet de loi organique' (2008) JCP, AJ 214; M Verpeaux, 'La question préjudicielle de constitutionnalité et le projet de loi organique' (2009) AJDA, 1474; M Fatin-Rouge Stéfanini, 'Le Projet de loi organique relatif à la question préjudicielle de constitutionnalité (Entretiens avec A Levade et J Pini)' (2008) AIJC, 11).
The National Assembly adopted the project, subject to some amendments, on 3rd June 2008 (For an analysis of the amendments made by the National Assembly on first reading, see B Mathieu, 'La Question prioritaire de constitutionnalité: les améliorations apportées par l'Assemblée Nationale au projet de loi organique' (2009) JCP, AJ 280).
The text was then adopted by the Senate, subject to further amendments on 24th June 2008. The text was then considered on second reading by the National Assembly, on 9 July 2008 and by the Senate, on 16th July. The final text adopted by both houses of Parliament separately was then referred to Parliament in Congress, the two houses sitting together in Versailles, and adopted by the required qualified majority, under art 89 of the Constitution, plus one vote (905 present; 896 votes; 539 in favour and 357 against (the required majority being of 538)).

[13] See for example the Vice-President of the Conseil d'Etat, Interview by Jean-Marc Sauvé on 11 September 2007, available at www.comite-constitutionnel.fr.

[14] See for example, Jean-Louis Debré, Interview on 18–19 September 2007, available at www.comite-constitutionnel.fr in favour of reasserting the supremacy of the French Constitution.

[15] *Projet de loi constitutionnelle no 1203 portant révision des articles 61, 62 et 63 de la Constitution et instituant un contrôle de la constitutionnalité des lois* submitted to the French National Assembly on 30 March 1990.

[16] *Projet de loi constitutionnelle no 231 portant révision de la Constitution du 4 octobre 1958 et modifiant ses titres VII, VIII, IX et X* submitted to the French Senate on 11 March 1993. This second attempt had given rise to a full Committee Report favourable to the introduction of an *ex post* review, *Rapport au Président de la République*, 15 February 1993, (Documentation française, 1993) esp 76.

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need to enhance the protection of human rights in France. At the time, there was no proper judicial review guaranteeing respect for human rights. Only administrative courts were then able to quash administrative texts which infringed constitutional rights and liberties.[17] But legislation, once promulgated, could no longer be subject to review in litigation.[18] Deference by judges to Acts of Parliament prohibited it.[19] By contrast, in 2008, when the reform was finally adopted, a full mechanism for protecting human rights was already in place. The Conseil constitutionnel had declined on 15 January 1975[20] to include in the ambit of constitutional review the verification that legislation was compatible with international treaties.[21] However, subsequently the idea began to emerge that two distinct forms of review might be possible: one for compatibility with the Constitution and another for compatibility with international norms. Only the former was provided for by the Constitution according to the Conseil constitutionnel. Consequently, the Cour de cassation decided to fill the gap left by the Conseil constitutionnel and, in its famous decision *Jacques Vabre* of 24 May 1975,[22] decided to set aside a legislative provision which conflicted with the EU Treaty of Rome. Fourteen years later, the Conseil d'Etat finally adopted a similar position in the *Nicolo* case.[23] In both cases, the decisions involved a potential conflict between a legislative provision and an EU Treaty. Neither *Jacques Vabre* nor *Nicolo* are clear authorities for assessing the compatibility of legislation with all international treaties. The *Nicolo* case offers little guidance as the Conseil d'Etat merely held that the legislative provision in question did not conflict with the relevant EU Treaty.

[17] This form of constitutional review of administrative acts remains and falls within the jurisdiction of administrative courts. For a recent example, CE 30 October 2008 *Commune d'Annecy* (2008) RFDA, 1156, where an administrative act was in conflict with the constitutional principle—stemming from the Environmental Charter—of participation in environmental decisions. But this form of constitutional review cannot be carried out if a statute stands in between the disputed administrative act and the Constitution. See, for a recent example, CE 26 December 2008, jurisdata no 2008-074841. Indeed, administrative courts would otherwise indirectly adjudicate upon the constitutionality of the statute itself, a task that belongs exclusively to the Conseil constitutionnel.

[18] But since 1985, in the decision no 85-187 DC of 25 January 1985 *Etat d'urgence en Nouvelle Calédonie*, the Conseil constitutionnel has held that legislation already in force can be scrutinized if and when Acts of Parliaments purporting to complete, amend or clarify the latter are submitted to the Council for review of their compatibility with the Constitution. For an illustration of control of promulgated legislation in this way, see decision no 99-410 DC of 15 March 1999 *Loi organique relative à la Nouvelle Calédonie* AJDA 1999, 324, comments by J-E Schoettl where legislation scrunitized before promulation was again reviewed and two of its provisions were struck down.

[19] See CE 6 November 1936 *Arrighi*, Lebon 966; Com. 11 May 1833, S 1933, 1, 357. And more recently, see CE 5 January 2005 *Deprez et Baillard*, Lebon, 1; AJDA 2005, comments by L Burgogue-Karsen; RFDA 2005, 56, comments by B Bonnet.

[20] Decision Conseil constitutionnel 15 January 1975 no 75–74 DC, Rec Cons Const, 19.

[21] Art 55 of the French Constitution which states that international norms prevail could have served as a justification for including in the scope of constitutional review checking that legislation complies with international norms. But the Conseil constitutionnel took a restrictive view of constitutional review. This position was probably influenced by the circumstances of the referral at the time: the Act referred for scrutiny was the 1975 Act that legalized abortion for the first time in France. In declining to review the compatibility of the Act with art 2 of the ECHR, protecting the right to life, the Conseil constitutionnel may simply have expressed its reluctance to take political positions on highly sensitive issues democratically considered by Parliament.

[22] Ch Mixte 24 May 1975 *Société des cafés Jacques Vabre, D* 1975, 497, Conclusions Touffait.

[23] CE Ass 20 October 1989 *Nicolo*, Lebon, 190.

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A contrario, the reasoning led commentators to conclude that if there had been conflicting norms, the legislative provision would have been set aside. However, none of the reasons for doing so were made explicit in that case. In the *Jacques Vabre* case, the relevant legislative provision was held to be incompatible with the EU Treaty. However, the *ratio* of the Cour de cassation is rather ambiguous; the Cour de cassation grounds the *Jacques Vabre* decision both in article 55 of the Constitution and in the specificities of the EU legal order. Whereas the former is applicable to all properly ratified international treaties, the latter rationale would obviously restrict the solution to EU law—but EU law in a broad sense, including, beyond EU Treaties, EU regulations, ECJ case-law and possibly directives. The jump between EU Treaties to all international treaties, notably the ECHR, and non-treaty EU norms was not therefore an inescapable consequence of *Jacques Vabre* and *Nicolo*. But the jump was made in later cases[24] and is now well established.

Consequently, the ECHR has notably served as a frequent basis for review of legislation in France, whatever the courts, administrative or private, and whatever the level, from first instance to the highest level of Cour de cassation or Conseil d'Etat, for private and administrative law matters respectively. In effect, the ECHR has become a familiar instrument for parties and lawyers in France, including in purely private horizontal applications.[25] Hence the concept of 'conventionality review'. Is it not paradoxical that previous projects to introduce *ex post* review failed at a time when constitutional reform would have improved the protection of human rights in France, but to have such a reform succeeding[26] now, when an efficient judicial mechanism for protecting human rights has already been developed and has flourished? The paradox disappears however if one realizes that the protection of human rights is, at best, a fortunate by-product of the reform. Its real aim is to reassert the supremacy of the French Constitution.

III. A PERSISTENT FRENCH 'ANOMALY'[27]?

It is fair to say that the lack of constitutional protection of individual rights after promulgation appeared to be uniquely French, and an anomaly. Other written

[24] cf for the ECHR, CE 21 December 1990 *Confédération nationale des associations familiales catholiques*, Lebon, 369; AP 24 January 2003 no 497; For EU law in a broad sense, see CE Ass 28 February 1992 *Sté Arizona Tobacco Products et SA Philip Morris France*, no 56776.

[25] M Hunter-Henin, 'France: Horizontal Application of Human Rights in France. The Triumph of the European Convention on Human Rights' Chapter 3 in D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere—A Comparative Study* (Routledge-Cavendish, London and New York, 2007) 98–124.

[26] This success is to be attributed to a more favourable political climate. Given that the present opposition had in 1990 put forward a similar proposal, political consensus was not too difficult to reach.

For a study of the change from reluctance to receptiveness in France to the idea of *ex post* constitutional review of legislation, see P Bon, 'Louis Favoreu et l'exception d'inconstitutionnalité, Hommage à Louis Favoreu' in *Dits et écrits à propos de Louis Favoreu*, (PUAM, 2007) 141–149.

For the reasons behind the failure of previous attemps, cf V Bernaud and M Fatin-Rouge Stefanini, 'La Réforme du contrôle de constitutionnalité une nouvelle fois en question? Réflexions autour des articles 61-1 et 62 de la Constitution proposés par le Comité Balladur' (2008) 75–76 Revue française de droit constitutionnel, 169–199, esp 171.

[27] See however for a similar system in Belgium, *Loi spéciale du 12 juillet 2009 modifiant l'article 26 de la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage*. The Belgium system

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constitutions provide for *ex post* constitutional review, whether it be by the ordinary courts, with the final say granted to a Supreme Court—under the US model—or through a preliminary reference from ordinary courts to a Constitutional Court—under the German model. The introduction of *ex post* review in the French system may thus be seen as a victory for comparative constitutional law. But is it a victory for human rights? The anomaly was often criticized[28] on the ground that whereas international norms could justify setting aside legislation at any time in the course of litigation, the power under the Constitution to strike down legislation was strictly limited in time between the vote and the promulgation of Acts of Parliament. This imbalance was thus seen as devaluing the Constitution, even though ordinary judges from administrative[29] and private law courts[30] alike had allayed some of these fears by asserting that when international law conflicted in a given case with a constitutional norm, the latter would prevail before French ordinary courts.

For better or for worse, the reform does not erase French exceptionalism or 'anomalies'. The reform in fact follows neither of the two main above-mentioned models of *ex post* constitutional review. At first sight, the new French review looks similar to the German model. Indeed, it introduces a form of preliminary reference, rather than a form of direct constitutional review—a feature which was underlined by a change in terminology since the initial projects.[31] Ordinary courts are still not invested with the power to review legislation for compatibility with the Constitution. Their role is limited to filtering constitutional issues on their way to the Conseil constitutionnel, which retains sole jurisdiction to make a decision on constitutionality. But unlike the German model, ordinary judges cannot seize the Constitutional Court (Conseil constitutionnel) directly. A double filter[32] is put in place: if the issue is raised at first instance or on an appeal, the judge will need—if the set conditions are met—to refer the issue first to the Conseil d'Etat or Cour de cassation as applicable and will not be able to refer the issue directly to the Conseil constitutionnel.[33] The Cour de cassation or Conseil d'Etat (depending on which type of case it may be) will then have to decide whether to forward the issue to the Conseil constitutionnel.

similarly provides (since 2009) that when a party claims before a court that a legislative provision violates a fundamental right wholly or partly protected both by title II of the Belgium Constitution and international or European norms, the judge is to refer the issue of compatibility with the Constitution to the Constitutional Court first.

[28] See amongst many, R Badinter, 'Protecting Human Rights: the European Perspective' in P Mahoney (ed.), *Mélanges à la mémoire de Rolv Ryssdal* (Carl Heymanns Verlag KG, 2000) 79–85, esp 84.

[29] CE Ass. 30 October 1998 *Sarran*, RFDA 1998, 1081; JCP, G, 1999, II, 1278, M-Ch Rouault.

[30] AP 2 juin 2000 *Delle Fraisse*, Bull. Ass Plén, no 4; JCP, G, 2001, II, 10453, A-C de Foucaud.

[31] Hence the change of name from 'exception d'inconstitutionalité' used in past projects (See TS Renoux, 'L'exception, telle est la question' (1990) RFDC, 651) which could wrongly suggest that litigants could ask ordinary judges to decide on the constitutionality of potentially applicable legislative provisions and set them aside if seen as unconstitutional, to 'question préjudicielle de constitutionnalité' ('preliminary reference on constitutionality'), as adopted by the governmental text or 'question prioritaire de constitutionnalité' ('constitutional question to be considered first') as adopted by the National Assembly and in the final reform.

[32] See comments by P Bon, 'La Question préjudicielle de constitutionnalité en France: solution ou problème?' in *Contrôle de constitutionnalité par voie préjudicielle* (PUAM, 2009), 231.

[33] Direct referral from lower ordinary judges to the Conseil constitutionnel was by contrast possible under the initial proposals made by the Balladur Committee (n 10).

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Moreover, and more importantly, as we will discuss below, the strict distinction between constitutional and 'conventional' review of legislation remains and many of the efforts in the drafting (and no doubt in the implementation) of the reform have been targeted at ensuring smooth collaboration between ordinary judges and the Conseil constitutionnel. Whether these efforts have distracted French lawyers from the (more important) aim of preserving human rights is a question worth asking.

Let us turn first of all to the mechanism put in place so as to ensure collaboration of judges in the handling of constitutional issues.

IV. INTERNAL PROBLEMS

As we have seen, ordinary judges will have discretion whether to refer a question at two levels: at first or second instance and at the highest level, before the Cour de cassation or the Conseil d'Etat. The criteria applied at each level vary.

At first or appellate level, ordinary judges are to examine:

i) whether the case, the procedure or the basis for legal action raise a constitutional issue;
ii) whether the legislative provision in question has already been declared compatible with the Constitution in previous Conseil constitutionnel case law, in the absence of a change of circumstances;
iii) whether the issue is not 'unarguable' ('dépourvu de sérieux')

In other words, ordinary judges at first and second instance are to conduct a minimal test designed to verify the relevance of the issue to the case (first condition) and eliminate questions already considered and decided by the Conseil constitutionnel (second condition) or questions that are futile (third condition). The latter two conditions do not present high hurdles: past Conseil constitutionnel case law will only bar referral if the question was addressed by the Conseil constitutionnel in both the solution (*dispositif*) and the *ratio decidendi* (*les motifs*) of a previous decision. And even then, a change of circumstances,[34] even purely as to the facts, will—despite controversies in parliamentary debates on that point[35]—justify referring the issue. The third condition does not require a positive evaluation of the pertinence of the issue but merely the elimination of hopeless or unarguable questions.

At each stage, the issue of constitutionality needs to be treated in compliance with the requirements of a fair trial.[36] Reasons supporting the first or second instance

[34] On this qualification, see Parliamentary debates before the French Senate (2008– 2009), Doc Parl Sénat, no 637, 43.

[35] cf critical comments made by Professor B Mathieu when interviewed by the *Commission des lois de l'Assemblée Nationale* and summarized in his article, 'La question prioritaire de constitutionnalité: les améliorations apportées par l'Assemblée nationale au projet de loi organique' (n 12). The main fear is that this qualification will undermine the authority of Conseil constitutionnel decisions in that a change of circumstances can easily be found in order to justify repeated challenges to Conseil constitutionnel decisions.

[36] cf S de la Rosa, 'Droit constitutionnel et CEDH. L'article 6 §1 de la Convention européenne, le Conseil constitutionnel et la question préjudicielle de constitutionnalité' (2009) 80 Revue française de droit constitutionnel 817–837.

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judge's decision to refer or not to refer will thus need to be made clear, and each side must have the opportunity to present arguments before the decision is made. An appeal is possible against a decision not to refer the issue to the Cour de cassation or Conseil d'Etat but only as an additional ground in an appeal against the (or part of the) decision on the case itself, so as to avoid deliberate delaying tactics. No appeal is possible if the judge decides to refer the issue, as by definition the case for referral will be examined again by the Cour de cassation or Conseil d'Etat and the party contesting the appropriateness of a reference will be given the opportunity to present his/her arguments then.

Before the Conseil constitutionnel itself, the requirements of a fair hearing will need to be taken into account. Might this not change the nature of the Conseil profoundly and turn it into a proper court, necessitating in consequence further changes?[37] Possibly. Whether the Conseil constitutionnel has to change its name and nature in order to accomplish its new mission is one thing; whatever its name and composition, whether it will be able to do so in a manner more satisfactory for human rights than at present is another more troubling issue. The main worry for human rights purposes is the considerable extension of the duration of the trial that is entailed by the reform. Is time not a crucial concern when violations of human rights are at stake?

Notwithstanding time pressure, the filter operated by first or second instance judges is just the first piece of the process of selecting cases for the Conseil constitutionnel. As already indicated, a second filtering exercise is then to be carried out by the highest relevant court before the Conseil constitutionnel can finally examine the issue. One may wonder whether a second filter was really necessary. Given the increased delay it will cause and the likelihood that lower court judges will in most cases already have eliminated the obviously ill-founded claims, as well as the hope that *ex ante* review will have answered some of the queries that litigants may raise against legislation, why not have instead put the Conseil constitutionnel itself in charge of this final tier selection?[38]

Instead the reform opts for a double filter but with tighter requirements at the top. Indeed, the filter operated at highest level by the Cour de cassation or the Conseil d'Etat requires a slightly more demanding selection process. If the first two tests to be carried out by the highest courts are the same as those applicable before lower courts,

[37] In the Senate, an amendment had been voted in order to change the title of the Conseil constitutionnel from Constitutional Council to Constitutional Court (additional art 24 ter adopted by the Senate in the debates dated 24 June 2008). The amendment as to the change of name was dropped by the National Assembly (July 2008, *Rapport AN, commission des lois*) 163. But behind the issue of denomination, the problem of ensuring that the composition and procedure before the Conseil satisfy the requirements of a fair hearing remains. One may for example wonder to what extent automatic membership of the Conseil for ex Presidents of the French Republic would be compatible. The Balladur Committee had suggested abolishing automatic membership, a suggestion not followed in the government's text but introduced again by the Senate on 24 June 2008 before finally being rejected by the National Assembly on second reading. The Minister of Justice (before the Senate, on 24 June 2008) justified keeping automatic membership for ex Presidents of the Republic on the tenuous ground that Presidents of the French Republic whilst in office are entrusted with the mission under art 5 of the Constitution to protect the Constitution. See however how the appointment procedure for members appointed to the Council by the President of the Republic is now restricted by a possible veto exercisable by committees composed of members of Parliament (art 13 of the Constitution).

[38] In that sense, see G Drago, 'Réformer le Conseil constitutionnel' (2003) 105 Pouvoirs 81.

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the third condition implies a more careful examination. The Cour de cassation or Conseil d'Etat will have to examine:

i) like lower judges, whether the case, the procedure or the basis for legal action raises a constitutional issue;
ii) like lower judges, whether the legislative provision in question has already been declared compatible with the Constitution in previous Conseil constitutionnel case law, in the absence of a change of circumstances; but also
iii) whereas lower judges are only required to check that it is not *un*arguable ('dé-pourvu de sérieux'),[39] whether the issue is arguable *or* whether the issue is novel.

This two-stage system is designed to avoid the Conseil constitutionnel being flooded with references. It is also an acknowledgment of the importance of the Cour de cassation and Conseil d'Etat. But might it not generate justified anxieties about the risk of possible conflicting decisions on constitutional matters between the Conseil d'Etat, Cour de cassation and Conseil constitutionnel? Will the evaluation of the seriousness of the issue not imply, to some extent, an evaluation of the likelihood of success of the unconstitutionality argument before the Conseil constitutionnel?[40] Is there not a risk therefore that such a prediction of the Conseil constitutionnel's position will lead to conflicting interpretations of constitutional rights and liberties? This risk is not insignificant, but is not likely, in my view, for two reasons discussed below, to lead to major difficulties. Indeed, first and foremost, the criteria to be used by ordinary courts, including the highest ones, interfere only marginally with the substance of the review, ie with the question as to whether the Act in question is constitutional or not. Any doubt at all as to constitutional conformity should lead to referral to the Conseil constitutionnel. The third test to be carried out by the Conseil d'Etat and Cour de cassation before deciding whether or not to refer the issue of constitutionality to the Conseil constitutionnel may indeed carry some prediction as to the substantive question of compatibility itself. The Conseil d'Etat or Cour de cassation here do not merely content themselves with a process of elimination of unsound (unarguable) claims, as in the lower courts, but are asked to assess whether the claim is sound (arguable) which goes much further. Indeed in the UK, the arguability test used for judicial review has gradually changed from a low threshold to a more substantial hurdle.[41] But how would the Conseil d'Etat or Cour de cassation carry out a constitutional assessment in the absence of any clear guidance? The Conseil constitutionnel's existing case law in the *ex ante* review will be of little help. The pre-promulgation nature of traditional French constitutional review gives it an abstract style of reasoning quite foreign to the concrete disputes that lead to the Conseil d'Etat's or Cour de cassation's rulings.[42]

[39] See the parliamentary debates relating to the stricter criteria to be applied by the highest courts, JOAN CR, Session of 14 September 2009, 7052.

[40] In that sense, see D Rousseau, 'La Question préjudicielle de constitutionnalité: une belle question?' (25 juin 2009) LPA, 7.

[41] C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP, Cambridge, 2009), 689.

[42] It is true that at first sight, decisions by the Cour de cassation will also look very abstract. Indeed, Cour de cassation judges will not examine the facts of the case put before them but rather rely on the findings made by the lower courts. Moreover, their ruling will be based on a particular interpretation of the law and not on factual considerations. There is no doubt however that facts do play an important role in the Cour de cassation's decisions. Commentators always refer to the facts of a case in order to ascertain the ambit of a particular ruling by the Cour de cassation and to

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Consequently, lest some unconstitutional issues be unduly prevented from falling under the scrutiny of the Conseil constitutionnel, some soundness/arguability here should be enough to warrant referral, whatever the chances may be of the Conseil constitutionnel actually striking down the disputed piece of legislation. Moreover, a novel question (ie one not considered even remotely by the Conseil constitutionnel in the past) will escape this brief assessment and should—so long as it is related to the case—be referred to the Conseil constitutionnel. Finally, there is no reason why ordinary judges would not engage in a cordial dialogue with the Conseil constitutionnel, just as they have done for example with the European Court of Justice (ECJ).[43]

In my view the danger does not so much lie in the risk of conflicting interpretations as in the risk of increasingly lengthy trials. The risk will be all the more real where an issue of the protection of human rights is raised, since the issue of constitutionality will be given priority and dealt with before the conventionality issue can be determined, thus—albeit temporarily—preventing remedying violations of human rights on the basis of international norms.[44] How long will the constitutional issue thus delay the trial and possible human rights protection on the basis of international texts?

V. THE THORNY QUESTION OF DELAYS AND TIME LIMITS

The governmental text had not specified any time limits within which decisions for referral from lower judges to the Conseil d'Etat or Cour de cassation must be made. The National Assembly had inserted an amendment whereby lower court judges had two months to decide whether to refer the issue to their relevant Supreme Court. Failure to decide one way or the other was moreover to entitle parties to refer the question to the Conseil d'Etat or Cour de cassation directly within one month. A much less stringent framework was put in place by the Senate and finally adopted: lower court judges are urged to decide whether to refer or not to refer 'without delay', but the two month deadline and the automatic right for parties to refer the issue to the highest courts in the case of inaction were dropped. The two month deadline was described as unrealistic given the high case loads that lower courts have to deal with. Failure to decide might therefore have become systemic, leading to all issues being directly forwarded to the highest courts, consequently making the first tier filter utterly symbolic and the strict deadline imposed counter-productive.[45]

determine the underlying justification of a particular decision. Facts are more remote from the Conseil constitutionnel's *ex ante* decisions, as reviews of constitutionality do not stem from a dispute, from litigation but from a complaint made about a piece of legislation which has not been implemented and has never yet been applied. Facts will enter into the reasoning to some extent as French constitutional judges will speculate on the various potential factual implications of the text, but the perspective will in any case remain vertical. The question put to the Conseil constitutionnel is indeed whether the State (or more specifically Parliament) has violated Constitutional rights in passing the piece of legislation in question.

[43] M Mangent, 'Le Conseil d'Etat et l'Europe. Conditions et effets d'un ralliement' in P Raimbault (ed), *La Puissance publique à l'heure européenne*, (Actes de colloques, Dalloz, 2006) 173–190.

[44] A few derogations have been put in place to this scheme. The conduct of the trial will thus not be suspended where a person is deprived of his/her liberty because of the trial or when someone's liberty is at stake in the trial.

[45] Cf. http://www.senat.fr/bulletin/20090921/lois.html, First President of the Cour de cassation before the *Commission des lois du Sénat* on 23 September 2009.

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The Cour de cassation and the Conseil d'Etat on the other hand will have to decide whether to refer the issue to the Conseil constitutionnel within a specific time limit of three months and the Conseil constitutionnel itself will then have three months to decide whether the relevant legislative provision is compatible with the Constitution. In total, there could be a delay of up to six months,[46] plus whatever time it took lower court judges to decide in favour of referral if the question was first raised at lower level. This is a considerable extension of the length of trials—an extension which would be impossible to justify in human rights terms were it not for the fact that it will be self-inflicted: the issue of constitutionality will come into play only if it is raised by one of the parties.

VI. CONSTITUTIONAL SUPREMACY OR INDIVIDUAL RIGHT?

The issue of constitutionality cannot be raised by the judge. It is for the parties to raise the issue of constitutionality in a written and specific submission. As well as making the drawbacks of the reform more acceptable, leaving the issue in the hands of litigants fits in with the philosophy of the text in which the new form of constitutional review is described as *a new individual right*.[47] But this stands at odds not only with the idea that judges in French Law are responsible for the correct application of the law,[48] but also with the objective of ensuring the supremacy of the Constitution. The explanation for the curiously low status of the Constitution in the new procedure is that its protection is now entrusted to citizens. The idea in fact is not only to ensure strict respect for the hierarchy of norms, but to develop awareness and respect for the Constitution amongst litigants, in other words to develop a kind of expression of democracy in the court-room. Increasing political participation in a broad sense, raising awareness of constitutional law and concern for the rule of law are certainly noble aims. But, as will be demonstrated below, these may not be achieved given the existence of a far more

[46] The Conseil constitutionnel has had a good record of respecting the strict time limits set to its members (one month only under art 61 para 3 of the Constitution) in the context of the traditional *ex ante* constitutional review. One may hope that the same would apply under the new constitutional review. But the combination of the *ex ante* and *ex post* review will cause a steep increase in the Conseil constitutionnel's workload. Moreover, the requirements of a fair trial and the necessity to take into account the context are likely to be more time consuming than the abstract evaluation undertaken under the *ex ante* review. Even if time limits are respected, the maximum time frame of 3 months is therefore likely to be needed. Given the huge pressure that already lies on ordinary courts, the same is likely to be true for the highest ordinary courts. We are therefore realistically looking at least at a 6 month delay.

[47] Other provisions of the reform illustrate the wish to involve citizens in the promotion of the rule of law and of the Constitution. The reform has thus created new possibilities for holding referenda, on the initiative of Parliament or citizens. Furthermore, it has entitled citizens to address petitions to the Conseil économique, social et environemental or to seize the 'Conseil supérieur de la magistrature' or the 'Défenseur des droits'. On these, see A Roblot-Troizier, 'L'Impact de la révision constitutionnelle sur les droits et libertés' (2008) AJDA, 1866–1871.

[48] cf art 12 CPC.
But in administrative litigation, the Conseil d'Etat considered that the issue of compatibility of legislation with international norms did not fall within the ambit of the ≪correct application of the law≫. As such, issues of compatibility of legislation with international norms similarly need to be raised by litigants. See R Chapus, *Droit du contentieux administratif*, (13th edn, Montchrestien, 2008) 825. This is not true before private law courts. See for example, Soc. 5 June 2001, Bull, no 208; Com. 31 March 2004, Bull, no 66.

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efficient, far more familiar and far quicker route for protecting human rights, namely the well established 'conventionality' review.

VII. COMPETITION BETWEEN CONSTITUTIONAL AND 'CONVENTIONAL' REVIEW

Instead of adding a distinct *ex post* constitutional review to the existing mechanism of protection of human rights through 'conventional' review, in the course of ordinary litigation, the two forms of review could have been merged and thus united in their common objective of enhancing individual human rights. The ordinary courts could thus have been placed in charge of both types of *ex post* review, whether against international norms or, in addition, against the Constitution.[49]

Two centuries of distrust of ordinary judges may have prevented the government and Parliament from going down that route.[50] More positively, it might be argued that the existence of double review can only increase the protection of human rights. In theory, French Acts of Parliament will now face greater scrutiny since, presuming they pass the constitutionality test under the new review, they may also be reviewed against international norms under the traditional 'conventionality' review. In reality however, the merits of the strict order of priority given to constitutional review over 'conventional' review are highly debatable in terms of human rights protection. The First President of the Cour de cassation had expressed his strong preference for a system where no form of review would be given priority over the other but where judges would be left discretion to decide which mode of review—on the basis of international or constitutional norms—was the most effective and the quickest way to protect human rights in a given case.[51] Instead the text of the reform provides that the new constitutional form of review takes precedence over a claim of violation of international norms.

Moreover, priority is given to the constitutional route whenever the same legislative provision is at stake, even though the fundamental rights it allegedly violates may be different under the constitutional and the international umbrella. Why maintain a strict precedence of the constitutional route even when it is very likely that it will not remedy all of the alleged infringements and that conventional review will then, six to 12 months later, need to be carried out? Is it because of a fear that a broad construction of international texts would cover the alleged infringements of constitutional rights and liberties and render the constitutional route useless? But either that fear is well-founded, in which case it should provide an impetus in favour of prompt review against international norms—the most efficient route; or that fear is ill-founded, in which case the priority granted to constitutional review is not necessary. Either way, the priority of the constitutional mode of review is dependent on one of the parties raising the issue in the first place and is therefore likely to fail unless parties have real incentives to choose the constitutional route.

[49] See for example, D de Béchillon, 'Plaidoyer pour l'attribution aux juges ordinaires du pouvoir de contrôler la constitutionnalité des lois et la transformation du Conseil constitutionnel en Cour suprême', in *Renouveau du droit constitutionnel, Mélanges en l'honneur de Louis Favoreu* (Dalloz, 2007) 109–129.

[50] See however presenting the reform as having effected a radical change in French dominant legal philosophy, F Fabbrini, 'Kelsen in Paris: France's Constitutional reform and the Introduction of *A Posteriori* Constitutional Review of Legislation' 9 German Law Journal 10 1297–1312.

[51] Doc Parl Ass Nat, no 1898 (13ème législature) 183 and 171.

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This inherent contradiction between the goals of the reform, ensuring the supremacy of the Constitution on the one hand and granting a new individual right to litigants on the other, is a flaw as much as a virtue. It is a flaw as the aim of protecting the supremacy of the Constitution, if it does not coincide with litigants' interests,[52] will not be best protected. But it is also a virtue as the improvement of human rights protection, so far a hopeful side effect of the reform, may thus reappear at the forefront, as the main incentive for litigants to raise a constitutional issue, unless delaying tactics, which the meagre filters put in place, can but partly discourage, dictate parties' preference for the constitutional route. What positive incentives if any will alleged victims of human rights have to invoke the constitutional form of review?

VIII. POSITIVE INCENTIVES TO USE THE NEW FORM OF CONSTITUTIONAL REVIEW

If the reform is to work for the enhancement of human rights, constitutional rights or liberties not protected by international norms need to be identified. In such a case, parties would have a real incentive to invoke constitutional rather than 'conventional' incompatibility. It is not the entirety of constitutional norms that can be invoked under the reform. 'Rights or liberties guaranteed by the Constitution' must be at stake. It will therefore be necessary to identify those constitutional rights and liberties.

A. Specific Constitutional Rights and Liberties?

The task of identifying rights and liberties guaranteed by the Constitution is not impossible but will give rise to uncertainties,[53] especially in the absence of a specific section in the French Constitution where such rights and liberties are specified (unlike the German Constitution or Spanish Constitution which respectively contain a part entitled 'Fundamental Rights' or 'Of Fundamental Rights and Duties'). Even though the Preamble to the French Constitution refers to the main rights and liberties guaranteed by the Constitution, not all of the texts and principles referred to will assert rights and liberties, whereas other parts of the Constitution may well do so.[54] Should we therefore make rights and liberties guaranteed by the Constitution more easily identifiable? To that end (amongst others), the President of the French Republic set up a special Committee,[55] presided over by Mme Simone Veil, in order

[52] With the limited exception of parties who represent group interests: unions, associations, etc.

[53] See, critical of the restriction in scope of the review to 'rights and liberties' because of the indeterminate nature of this category, F Mélin-Soucramanien, 'Du Déni de justice en droit public français', in *Renouveau du droit constitutionnel, Mélanges en l'honneur de Louis Favoreu*, (Dalloz, Paris, 2007) 277–290, esp 284–285. See, regretting that the whole of the Constitution has not been placed 'in the hands of citizens', P Cassia, 'Le Renvoi préjudiciel en appréciation de constitutionnalité, une question d'actualité' (2008) RFDA 877.

[54] For example, individual liberty guaranteed by art 66.

[55] *Redécouvrir le préambule de la Constitution, Rapport au Président de la République au nom du Comité présidé par Mme Simone Veil*, (La Documentation française, Paris, 2009), (also available on line at: http://lesrapports.ladocumentationfrancaise.fr/BRP/084000758/000.pdf). Comments by J-P Feldman, D 2009, 1036–1039 and JCP 2008, AJ 50; S Hennette-Vauchez, 'Nouvelles modifications de la Constitution? Redécouvrir le préambule de la Constitution ou l'éthique minimale appliquée à l'expertise constitutionnelle' (2009) RFDA 397–406.

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to focus specifically on the Constitutional Preamble, where, currently, reference is made to the main French constitutional sources of individual rights and liberties: the Declaration of the Rights of Man and the Citizen of 1789 and the Preamble of the previous Constitution of the IV[th] Republic of 1946, both forming the main sources for constitutional rights and liberties together with unwritten principles or more recent texts, such as the Charter for the Environment. But the Committee in the end decided to maintain the status quo.[56] The Veil Committee took the view that the constitutional corpus of human rights did not require to be modernized but to be better known.[57]

Secondly, those rights and liberties will only become interesting for litigants in the absence of an overlapping right in international norms. More often than not, a right guaranteed under the Constitution will have an equivalent legal basis in an international text. For instance, in order to protect the freedom of trade unions, one may rely either on paragraph 2 of the Preamble of 1946 or article 11 of the ECHR.[58] Amongst constitutional rights and liberties, presuming that they can be identified, which ones therefore would not have a counterpart in international and European human rights law or would have a wider ambit[59] than their international counterpart? Recent studies on that question have excavated a few exclusive constitutional rights and liberties.[60] A recent decision of the Conseil constitutionnel[61] has also revealed that the principle of equality, guaranteed under article 6 of the Declaration of the Rights of Man and the Citizen, has more potential than its counterpart in the ECHR, under article 14.[62] Legislation which had passed the conventionality test[63] was thus struck down under the new mode of review.[64]

However, these instances will remain marginal and the success of the reform cannot rely on these 'truly' constitutional rights. 'Truly' constitutional rights are moreover transient in nature, given the tendency of the ECHR and the Conseil constitutionnel to 'listen' to each other and align to some extent the degree of protection they offer with

[56] With the exception of one proposed addition: the reference at art 1 of the French Constitution to dignity.

[57] 'Le vice principal de l'arsenal des droits fondamentaux n'est pas d'être insuffisant mais d'être méconnu' Veil Comittee Report (n 54) 98.

[58] cf CE 9 April 1999, no 19 0749.

[59] For example, see the right to access to courts, more restrictively construed under art 6 of the ECHR than it is under art 16 of the Declaration of the Rights of Man and the Citizen.

[60] Around 10 exclusively constitutional rights have been identified, see P Cassia, 'Le Renvoi préjudiciel en appréciation de constitutionnalité, une question d'actualité' (2008) RFDA, 877. For example, the principle of the independence of lecturers and researchers.

[61] Decision no 2010-1 QPC Conseil constitutionnel 28 May 2010, JO 29 May 2010, 9728.

[62] Art 14 ECHR is not free standing. Discriminatory measures will only infringe ECHR requirements if the measures are first proven to fall within the ambit of one of the other Convention rights.

[63] CE avis 18 july 2006 and CE section *GISTI*, Lebon 350 and 353; AJDA 2006, 1833; RFDA 2006, 1201.

[64] The disputed legislative provision allowed for differing modes of calculation of pensions for people who had served and fought for France depending on whether or not they were French citizens.
French veterans were entitled to higher pensions than foreign veterans. This was held by the Conseil constitutionnel to violate the principle of equality guaranteed under art 6 of the Declaration of the righs of man and the citizen.

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that guaranteed under the other's umbrella.[65] The crucial question is therefore whether the constitutional route would be utterly devoid of practical value should constitutional rights and liberties overlap with fundamental rights protected by international texts.

B. Procedural Incentives

Besides the issue of which rights may have been violated, the main difference in the two modes of review lies in the diverging consequences they cause: if found in violation of a constitutional right and liberty, the incompatible legislative provision will be struck down by the Conseil constitutionnel and will disappear from the legal order. The incompatible legislative provision will in effect be void. If found in violation of an international or European right and liberty, the contrary legislative provision will simply be set aside for the purposes of the case in question, and its application to, and compatibility with, human rights texts may possibly be raised again in another case. Do these diverging consequences matter from the parties' point of view? Is it important for litigants to have the incompatible piece of legislation struck down rather than set aside? It could be argued that, so long as the incompatible Act or provision is not applicable to them, there is no advantage for them in the availability of a more powerful sanction. But precisely, under the conventional route, litigants will not know whether the allegedly incompatible provision will be applied to them until a final decision is reached on their case. A finding at first instance that a given legislative provision violates an ECHR right, and should therefore be set aside, may be overruled on appeal or confirmed on appeal but overruled at the highest level. Until appeals have been exhausted or delays for appeals have expired, parties will not know for certain whether the contested legislative provision will be applied to their case. Despite the delays entailed by the new form of review, it is therefore possible that in some instances, the constitutional route more quickly offers certainty as to the applicability of a contested legislative provision to a given case. However, the Conseil constitutionnel's decision on the constitutional issue will not affect the other issues raised by the trial. Once the Conseil constitutionnel has found that the provision was incompatible to constitutional rights and liberties, the trial will resume and all other questions of law and facts examined by ordinary judges as normal. The overall duration of the trial is still therefore likely to be longer if the constitutional route is used. Moreover, certainty as to the fate of the disputed legislative provision may only be secured more quickly through the constitutional route if the Conseil constitutionnel finds that there is incompatibility. If the Conseil constitutionnel holds that no constitutional rights nor liberties are infringed by the disputed provision, the issue of conventional compatibility will still need to be examined by ordinary courts. In that scenario, the constitutional review and conventional review would thus be carried out successively, leading to a considerable increase in the duration of the trial. The real danger of increased delay may well discourage parties from raising constitutional incompatibility altogether, unless success is almost guaranteed. However, the new remedy could be an attractive tool to test the most contentious provisions which have escaped constitutional scrutiny through the *ex ante* review. Private litigants who have almost reached the end of the litigation

[65] See O Dutheillet de Lamothe, 'Conseil constitutionnel et Cour européenne des droits de l'homme: un dialogue sans paroles' in *Le Dialogue des juges. Mélanges en l'honneur du Président Bruno Genevois* (Dalloz, Paris, 2009) 403–417.

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process may be tempted to play the card of the new constitutional review against controversial provisions.[66]

Moreover, the constitutional mode of review may appear attractive to parties representing interest groups. Indeed one of the references recently made by the Conseil d'Etat to the Conseil constitutionnel was based on a claim made by a group representative of families' interests.[67] Such groups are more likely than private parties to instigate proceedings for the main purpose of testing legislation. In private party litigation on the other hand the issue of the constitutionality of legislation is more likely to be mingled with numerous other aspects, and the fate of the former will not matter as much as, or more than, the overall resolution of the dispute. However, litigation by representatives of group interests is limited under French Law.[68] The attraction of the new mode of review for interest groups with legal standing will therefore have limited practical impact and would not be enough to offer salvation for the new mode of review. But might the new mode of review offer opportunities to lobbying groups devoid of legal standing? Instead of focusing their efforts on influencing parliamentary debates, these groups may be tempted to use the new review so as to gain a judicial presence. In view of the absence of legal standing, this judicial lobbying would have to be indirect, by lending support to litigants who embody the groups' interests. This could particularly be of interest to environmental groups who may be tempted to rely on the Constitutional Charter for the Environment in the hope of fostering environmental rights. This phenomenon of judicial lobbying through test cases, well known in Britain,[69] but still alien to French legal culture, will in any case remain limited given the above-mentioned scarcity of truly constitutional rights and liberties in comparison with international ones. Once again, the competition between the two modes of review thus restricts greatly the practical potential impacts of the new review.

Independently of the possible flaws or problems associated with the new form of constitutional review itself, it thus seems that the very existence of a competitive form of review serving the same purposes—the protection of human rights—diminishes greatly the possible benefits of the new constitutional review.

This conclusion would of course need to be revisited if the constitutional route were to absorb the current 'conventional' review. Certain current trends lead us to envisage this possibility.

[66] See the two recent references made by the Conseil d'Etat to the Conseil constitutionnel following allegations made by private parties of unconstitutionality in respect of legal provisions restricting handicapped children's right and their parents' to claim compensation against medical bodies and staff for failing to detect the handicap in utero (case no 329290) and of legal provisions relating to calculation of retirement allowances (case no 336753). Both references were made on 14 April 2010 and are available at http://www.conseil-etat.fr/cde.fr.

[67] CE 14 April 2010 case no 323830, available at http://www.conseil-etat.fr in which the association known as Union for Families in Europe, affiliated to 'Union nationale des associations familiales et des unions départementales' (UNAF and UDAF) raised the constitutionality of legal provisions from the French Code for Social Action and Families.

[68] Under art 31 of the French Code of Civil Procedure. See L Boré, *La Défense des intérêts collectifs par les associations devant les juridictions administratives et judiciaires*, (LGDJ, 1997, foreword G Viney).

[69] See for example *Wilkinson v Kitzinger*, [2006] EWHC 2022 (Fam) where the challenge brought by Mrs Wilkinson and Mrs Kitzinger against the Civil Partnership Act was financially supported by gay rights movements.

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IX. A POSSIBLE ABSORPTION OF 'CONVENTIONAL' REVIEW INTO THE NEW CONSTITUTIONAL REVIEW?

The question to be considered at this point is whether in its scrutiny the Conseil constitutionnel will incorporate the whole 'conventional' review into the process. If that were the case, constitutional review may in some ways become more appealing for parties as in one decision, albeit after some delay and a one to two tier selection procedure, all the questions surrounding human rights protection would be considered together. Two questions immediately come to mind however: how could such an absorption of 'conventional' review into constitutional review occur, given the abovementioned strength of the distinction between the two forms of review? Secondly, would such a merger in the hands of constitutional 'judges' really transfer all human rights issues to the Conseil constitutionnel?

The very possibility of such an expansion of the jurisdiction of the Conseil constitutionel is surprising given that the 1975 case on abortion law still stands as authority for a strict construction of constitutional review as excluding review based on international norms.[70] But the division between EU and constitutional law for example is as we will see often blurred. The question may therefore be raised as to whether legislation violating an EU fundamental right could be struck down by the Conseil constitutionnel under the new form of review. And yet, the Cour de cassation[71] was heavily and almost unanimously[72] criticized for raising this very question in a preliminary reference to the ECJ.[73]

The Cour de cassation's reasoning was not devoid of constitutional basis. Indeed, the absorption of EU law into Constitutional review seemed to find a natural terrain in article 88-1[74] of the French Constitution, whereby EU obligations imposed on France

[70] See 1975 Decision above. The solution was reiterated in Decision Conseil constitutionnel 30 March 2006 no 2006-535 DC, Rec Cons Const, 19; AJDA 2006, 1961, comments by C Geslot.

[71] Cass. QPC, 16 April 2010, no. 10-40002, D 2010, 1254, A Levade; RFDA 2010, 445 contrary Conclusions by M Domingo, 449, note M Gautier; 458, note P Gaia; AJDA 2010, 1023, note P Manin.

[72] Most commentators were indeed critical: G Carcassonne and N Molfessis, 'La Cour de cassation à l'assaut de la question prioritaire de constitutionnalité', Le Monde 23 April 2010; B Mathieu, 'La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg' (2010) JCP, G, 464; D Rousseau and D Lévy, 'La Cour de cassation et la question prioritaire de constitutionnalité: pourquoi tant de méfiance?' (2010) GP 25–27 April, 20; D Simon & A Rigaux, 'Drôle de drame: la Cour de cassation et la question prioritaire de constitutionnalité' (2010) Europe, May, 5. For more favourable appraisal, see P Cassia & E Sauvier-Cassia, 'Imbroglio autour de la question prioritaire de constitutionnalité' (2010) D, 1234; P Manin, AJDA, 2010, 1023.
Moreover, both the Conseil d'Etat and the Conseil constitutionnel rejected the Cour de cassation's reasoning: CE 14 May 2010 *Rujovic* no 312 305; AJDA 2010, 1408, comments by S Brondel; D 2010, 1228, comments by P Fombeur and 1234 comments by P Cassia and E Saulnier-Cassia and Décision n.2010-605 DC Conseil constitutionnel 12 May 2010, Cahiers conseil constitutionnel no 29; P Fombeur, 'Question prioritaire de constitutionnalité, droit constitutionnel et droit de l'Union européenne' (2010) D 1229; P Cassia and E Sauvier-Cassia, 'Imbroglio autour de la question prioritaire de constitutionnalité', (2010) D, 1234; A Levade, D 2010, 1321.

[73] The Cour de cassation in a preliminary reference to the European Court of Justice queried whether the priority to be granted under the reform to a constitutional issue which also raised a question of compatibility with EU Law respected the supremacy to be conferred in Member States on EU law. Cf Cass. QPC, 16 April 2010, no. 10-40002.

[74] Art 88-1 of the French Constitution states that 'the French Republic takes part in the EU, formed of States which have freely agreed to jointly exercise certain of their powers'. On that art,

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are largely translated into French Constitutional requirements. Under that article, the Conseil constitutionnel thus held that incorporation into domestic law of EU directives was not only an EU but also a Constitutional imperative. It may be doubtful whether this Constitutional imperative on French public authorities actually confers a right on citizens to claim the application of EU law or—at least, under the current more restrictive interpretation given by the Conseil constitutionnel[75]—of EU directives under the new mode of constitutional review. Administrative case law may prompt us to think so. Indeed, the Conseil d'Etat has overruled its own previous case law[76] and now hears litigants' claims against administrative texts which are allegedly contrary to unimplemented EU directives.[77] But the Conseil d'Etat does not have to prove that a '*right or liberty*' is at stake so the analogy with the new form of constitutional review has its limits.

It may therefore be more useful to consider the Conseil constitutionnel's own case law, under the traditional *ex ante* review. Article 88-1 has led to interesting case law by the Conseil constitutionnel. On the basis of this provision, the Conseil constitutionnel thus held that French legislation passed for the purposes of EU directive incorporation, if faithful to the EU directive, would undergo limited constitutional scrutiny.[78] Unconstitutionality of legislation incorporating EU directives will only occur where legislation violates a rule or principle inherent in France's constitutional identity.[79] This delicate articulation of EU and constitutional law had led in the initial text of the reform to a derogation from the rule that constitutional review prevails over 'conventional' review when article 88-1 of the Constitution was at stake. In effect, legislation incorporating an EU directive allegedly contrary to both constitutional and international rights would have been examined first under the 'conventional' umbrella, except in the instances where violation of a rule or principle inherent to France's constitutional identity was invoked. The sheer complexity of the derogation militated against such a move and the derogation was dropped. The suggestion however illustrates the blurred distinction between EU and constitutional law. More specifically, the EU law dimension within the French Constitution lends support to the idea that EU law itself could become the point of reference for constitutionality pronouncements under the new mode of constitutional review. In its above-mentioned preliminary reference,[80] the Cour de cassation precisely suggested that a problem of compatibility with EU law also amounted to a constitutional issue under the new mode of constitutional

see J Rideau and F Picot, 'Article 88-1', in F Luchaire, G. Conac and X Pretot (eds), *La Constitution et la République française* (3rd edn, Economica, Paris, 2009) 1864–1916.

[75] See below.

[76] CE 22 December 1978 Cohn-Bendit, Lebon, 524; GAJA, 644.

[77] CE 30 October 2009 *Perreux*, JCP, G, 2009, 592, comments by S and V Corneloup; JCP, S, 2009, 1569, comments by J Cavallini.

[78] Decision no 2004-496 DC of 10 June 2004 *Loi pour la confiance dans l'économie numérique*, Rec Cons Const 101; AJDA 2004, 1534; D 2005, 199, comments by S Mouton; RFDA 2004, 654, comments by B Genevois.

[79] Decision no 2006-540 DC of 27 July 2006 *Loi relative aux droits d'auteur et droits voisins de la société d'information*, Rec Cons Const 88; JCP, G, 2007, II, 10 066, comments by M Verpeaux. See also for an illustration of legislation held to be in manifest violation of an EU directive Decision no 2006-543 DC 30 November 2006 *Loi relative au secteur de l'énergie*, JO 8 December 2006, 18544; JCP, G, 2006, AJ 567.

[80] cf (n 72).

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review and was therefore to fall within the remit of the Conseil constitutionnel's new powers.

However, the Conseil constitutionnel[81] clearly rejected such a broad interpretation of its mission. We may wonder whether the Conseil constitutionnel thus missed an opportunity to assert itself as a true Supreme Court and reinforce the status of the French Constitution. In other words, would an integration of the whole of EU law into the new constitutional review have strengthened the role of the Constitution? The case law of the Conseil d'Etat suggests exactly the opposite. Indeed, when asked in the *Arcelor*[82] case to review the compatibility with the Constitution of an administrative act implementing an EU directive, the Conseil d'Etat modified the constitutional test to be satisfied. Instead of examining whether the constitutional provision which had allegedly been violated had actually been complied with or not, the Conseil d'Etat first felt the need to check whether the right provided for under that constitutional provision was not also provided for effectively by an EU law principle.

If so, as in that case, review of the disputed administrative text should, according to the Conseil d'Etat, be carried out against the EU law principle rather than the Constitution, and in case of doubt as to EU compatibility, be referred to the ECJ following the preliminary reference mechanism under article 267 of the Treaty on the Functioning of the European Union. It is only in the absence of an EU Law principle guaranteeing an equivalent protection that constitutional review will be conducted. It is true to say that the priority given to EU law rests on the Conseil d'Etat being satisfied that EU law provides an effective equivalent protection, but depending on how stringently this prerequisite is interpreted, the 'absorption' of EU law into constitutional review seems to have led before administrative courts to a reinforcement of EU law rather than Constitutional supremacy. It is therefore doubtful whether the integration of EU law into constitutional norms would have served to reinforce the supremacy of the Constitution. Besides, there is a logical leap between including reference to EU law in the Constitutional text and the constitutional standing of EU law. If EU law were to acquire constitutional standing because of the reference made to the EU in article 88-1, it would be indirectly, by mere reference.[83]

Such reasoning had already been used by the Conseil constitutionnel[84] in order to include in the French Constitution the main French texts relating to human rights—the 1789 Declaration on the Rights of Man and the Citizen and the Preamble of 1946 which are merely quoted in the Preamble of the Constitution. But it was rejected for international norms by the Conseil constitutional in its landmark 1975 decision where it rejected article 55, which refers to the supremacy of international norms, as a possible entry point for the incorporation of international norms into the Constitution, even

[81] cf Décision n.2010-605 DC Conseil constitutionnel 12 May 2010 (n 72).

[82] CE Ass 8 February 2007 *Arcelor*, Lebon, 55; *RFDA* 2007, 384, Conclusions Guyomar; D 2007, 2272, comments by M Verpeaux.

[83] On this question of acquiring constitutional standing through reference in the French Constitutional text, see A Roblot-Troizier, *Contrôle de constitutionnalité et normes visées par la Constitution française. Recherches sur la constitutionnalité par renvoi* (Dalloz, Nouvelle Bibliothèque des thèses, 2007) esp 31–116.

[84] Decision Conseil constitutionnel no 71-44 DC of 16 July 1971 *Liberté d'association*, JO 18 July 1971, 7114.

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though here human rights were also clearly at stake.[85] Should EU law be treated differently from other international norms because of a specific reference in subsequent articles, notably article 88-1?[86]

But if EU law is specifically mentioned, it is still merely referred to and is still left out of the Preamble. Indeed, the Veil Committee explicitly rejected the idea of adding a reference to the EU into the Preamble of the Constitution lest Europe would later be construed as part of France's constitutional identity.[87] Moreover, incorporation into the Constitution does not necessarily confer constitutional standing.[88] It is possible to imagine a range of 'constitutional' norms with varying levels of normative force, following a model of multilevel constitutionalism.[89] There may be practical advantages to a growing constitution, expanding by reference to other living constitutional or international orders. Collaboration between legal orders would certainly benefit. It would however clearly be in contradiction of the ideology of the reform whose aim as we have seen is as much if not more about protecting as it is about 'Frenchifying' human rights.

X. CONCLUSION

What conclusions can we draw from this French Constitutional revolution in force since 1 March 2010? The new mode of constitutional review in France is riddled with ambiguities. The main ambiguity that underlies the reform is the tension between the desire to enhance the protection of human rights and the aim of asserting the supremacy of the Constitution—of taming human rights and bringing them back under French horizons. Because of that tension, French exceptionalism, whereby a distinct form of review of compatibility of legislation is carried out, respectively, by the Conseil constitutionnel (compatibility of legislation against constitutional norms) and ordinary judges (compatibility of legislation against international norms) has been maintained. Of course, the tension itself—the double aim of enhancing the protection of human rights and of strengthening a certain political identity—is not specifically French and may, for example, have European echoes.[90] The legitimacy of both objectives, taken separately, may not be in the best interest of human rights. Under French terms, because of the ensuing delays, procedural complexities and problematic overlap between conventional and constitutional rights, the resulting choice between two modes of (in my view) competitive—rather than

[85] See J Rivero, 'Commentaire de la décision du 15 janvier 1975' (1975) AJDA, 136.

[86] See J Roux, 'Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution' (2004) Rev droit public, 923.

[87] Veil Committee (n 54) 45.

[88] In that sense C Geslot, 'Normes constitutionnelles et normes de référence du contrôle de constitutionnalité des lois' (2007) JCP, G, I, 149, 11–25, esp 15.

[89] See I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) Eu Law Rev, 511; N Krisch, 'The Open Architecture of European Human Rights Law' 71 (2008) Mod L Rev, 183, esp 189.

[90] cf U Haltern, 'Pathos and Patina. The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 Eu Law J 2003, 14; O Cayla, 'La Négation de toute possible identité européenne par la Charte européenne des droits fondamentaux' in G Lebreton (ed), *Regards critiques sur l'évolution des droits fondamentaux de la personne humaine*, (L'Harmattan, 2002) 103–113.

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complementary—review is, I have argued, not the best option for the protection of human rights in France.

In my view, the drawbacks and dangers of the reform thus outweigh its benefits. On balance, the reform may be described as 'one step forward, two steps back'. One step forward has been made: the new mode of review may be an opportunity to develop test cases. Controversial legislative provisions which have escaped constitutional scrutiny may now be submitted to the Conseil constitutionnel. This possibility undoubtedly improves the rule of law. Unconstitutional legislation can now be eradicated more directly and more efficiently than before.[91] Moreover, the new mode of review may offer opportunities to lobbying groups devoid of legal standing. Instead of focusing their efforts on influencing parliamentary debates, these groups may be tempted to use the new review so as to gain a judicial presence. A new form of judicial democracy could thus emerge.

But this step forward has come at a price: two steps back have followed. The first step back is the increased risk of conflicting decisions on constitutional matters between the Conseil d'Etat, Cour de cassation and Conseil constitutionnel. The risks of diverging interpretations of constitutional issues are real. The Conseil d'Etat and Cour de cassation, when asked to filter constitutional references to the Conseil constitutionnel, are to select arguable cases and eliminate unarguable cases.

Inevitably, this evaluation of the arguability of the case (in respect of the constitutional issue) will imply to some extent a prediction of the Conseil constitutionnel's future position. But how is the Conseil d'Etat or Cour de cassation to carry out such an assessment in the absence of any clear guidance? The abstract style of the Conseil constitutionnel's existing case law in the *ex ante* review will be of little help for the concrete disputes which the Cour de cassation and Conseil d'Etat have to consider. The uncertainty as to which rights and constitutional liberties may be invoked by litigants will only add to the difficulties and exacerbate the risk of conflicting approaches. In my view, the most likely reaction of the Cour de cassation and Conseil d'Etat will therefore be to refer all remotely arguable cases. Indeed, a decision to refer does not necessarily imply that the referral will be successful but only that it may be. On the other hand, a decision not to refer will imply that the referral could not have been successful—a conclusion that could be later contradicted by the Conseil constitutionnel in the context of an *ex ante* review or on referral by the other Supreme court, Cour de cassation or Conseil d'Etat as the case may be. The risk of conflicting decisions may thus be relatively avoided by quasi systematic referrals. But this in turn will increase the workload of the Conseil constitutionnel and consequently the length of trials where human rights violations are at stake—the second and more worrying step back.

Overall, the new mode of constitutional review, while improving the rule of law and the quality of French legislation in human rights terms, may prove detrimental to human rights protection in individual cases. If neglected for that very reason by

[91] Since 1985, in the decision no 85-187 DC of 25 January 1985 *Etat d'urgence en Nouvelle Calédonie*, the Conseil constitutionnel has held that legislation already in force can be scrutinized if and when Acts of Parliaments purporting to complete, amend or clarify the latter are submitted to the Council for review of their compatibility with the Constitution. See above (n 19).

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private litigants, the new mode of review will not reach its other (and in fact real) aim of ensuring the supremacy of the French Constitution. There is therefore a well-founded fear that the reform will be neither about protecting, nor about taming, human rights. A far better solution would have been to introduce a more flexible system, where no form of review is given priority but with judges left the discretion to decide which mode of review—on the basis of international or constitutional norms—is the most effective and expeditious way to protect human rights in a given case.

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