Chapter 1

Introduction

I. Comparative Dynamics

Fundamental rights are exploding into all corners of the French and European judiciaries. This rights revolution is transforming the judicial landscape at breakneck speed. Not only have fundamental rights become an integral part of litigation in the domestic and European courts, but their advent has provoked an ongoing revolution in French and European procedural, doctrinal, institutional and conceptual structures.

Until extremely recently, the French and the European judicial orders were indifferent, and perhaps even hostile, to justiciable claims of fundamental right. The French legal system's hostility stemmed from its traditional and distinctive brand of republicanism, which stressed four essential and interlocking commitments: (1) a unitary conception of the general will and of the 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 administrative and constitutional tribunals outside of the ordinary judiciary, (7) a doctrine of the 'sources of the law' that refuses to grant the ordinary judiciary law-making powers, (8) the theory of '*la loi écran*' (the legislative screen), which shields legislation from administrative review regarding its compatibility with the constitution or with international obligations, (9) legality-based—as opposed to fundamental rights-based—review of executive acts, and (10) institutionally-oriented—as opposed to party-oriented—judicial decision-making procedures. These core commitments explain why the land of Rousseau was hardly fertile ground for the growth of judicially administered fundamental rights.

These characteristic understandings and structures long dominated at the European supranational level as well. France was the leading legal and political force at the birth of what is now the European Union ('EU'); indeed, the legal orders of four of the other five original Member States (Belgium, the Netherlands, Luxembourg, and Italy) were patterned overwhelmingly on the French model. The EU's strong, centralized, and relatively opaque system of administrative governance reflects this genealogy. So do the procedures, doctrines, and argumentation of the EU's high court, the European Court of Justice. In fact, French remains to this day the Court's one and only working language, despite the fact that the EU has expanded to include a total of 27 Member States.

Until quite recently, not even the European Court of Human Rights ('ECHR') significantly challenged the French perspectives entrenched at the European level. Although the European Convention on Human Rights entered into force in 1953, the ECHR handed down a grand total of 36 judgments prior to 1980.[1] This numerically modest and substantively timid output was no match, it seemed, for the classic French approach at either the domestic or the supranational level.

How quickly times have changed. Part of the story is undoubtedly social and intellectual. 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 the general will and the general interest: it is less and less plausible to hold, in theory or in fact, that the citizenry speaks as one and that its diverse interests are wholly consonant. The result has been a marked rise in individual and group-oriented pluralism increasingly expressed in fundamental rights terms.

This trajectory functions at the European supra- or trans-national level as well. As the domestic polity has become increasingly complicated cross-nationally as well as intra-nationally, fundamental rights have risen dramatically in importance. They have served in effect as a *lingua franca* across jurisdictions: they operate as a common legal denominator and as a pool of common legal terms transferable within and across European polities. By focusing on individuals (including firms) and their fundamental rights, courts have found a cross-jurisdictional and cross-cultural technique for resolving disputes that protects litigants while ostensibly steering clear of bigger aggregation/polis-building enterprises.

[1] MARK W. JANIS, RICHARD S. KAY, ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 69–70 (Oxford, New York: Oxford University Press, 2d edn., 2000).

This common social and intellectual momentum has likely been reinforced by the fall of the Wall and by the incorporation of ex-Soviet bloc and/or ex-totalitarian states into the Western European legal order. This liberalizing 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 ECHR.[2] In short, both the internal fragmentation and the external aggregation of the polity have contributed to the stunningly rapid rise of the fundamental rights idiom throughout Europe.

But that is not the entire story. The fundamental rights revolution is also a matter of the complex—and often competitive—inter-institutional dynamics that increasingly define the judicial arena in our ever more globalized legal space. These inter-institutional dynamics are in many respects a function of the intensifying interaction between the domestic and European legal orders: legal controversies increasingly play out at the jurisdictional intersection of a plethora of high courts, which must interact and coordinate as never before. This growing inter-institutional interface has taken on a logic and momentum of its own.

These judicial dynamics are particularly visible and pressing in contemporary Europe. First, the European judicial arena possesses two layers of powerfully operational courts: the domestic and the European judiciaries. As we shall see, these two sets of courts are constantly interacting: for all practical purposes, the law propounded by the European courts is directly applicable in, and superior to, domestic law. European law and the European courts are therefore omnipresent forces in the domestic courts (and vice versa), even in otherwise routine litigation.

Second, almost all national judiciaries in Europe belong to the Civil Law tradition; as a result, they typically deploy multiple and often quite distinct judicial hierarchies, each headed by its own 'supreme court'. France is but a case in point: it possesses no less than three separate institutional structures that perform judicial or quasi-judicial functions. The 'ordinary' judiciary, headed by the Court of cassation, handles private law and criminal law cases; the executive branch 'administrative tribunals', headed by the Conseil d'Etat, handle public law disputes between citizens and the state; and the freestanding Constitutional Council handles constitutional challenges to

[2] Of course, some of the motives for such adherence are eminently 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.

legislation. France therefore possesses multiple high courts, as do almost all Continental European countries. In fact, even the European judiciary is led by two different courts, the European Court of Justice and the ECHR. As a result, the judicial landscape at the intersection of the domestic and European legal orders is veritably littered with high courts, which must now expend a good deal of effort interacting with, and positioning themselves relative to, each other.

European law lies at the heart of this group dynamic. Until very recently, the internal divisions within each domestic legal order ensured that a country's assorted high courts had relatively little to do with each other: each operated within its particular jurisdictional domain, elaborating the corresponding substantive law according to its particular procedural, doctrinal, and conceptual matrix. European law effectively overrides such domestic divisions: it is applicable to all domestic state actors, including the various courts. It establishes a shared pool of legal materials that links the high courts together in a complexly unified and richly interactive judicial environment.

European fundamental rights law only further raises the stakes of these novel inter-institutional exchanges. If European law takes precedence over domestic law, European fundamental rights effectively become the most powerful legal norms at both the domestic and the supranational levels. They reign supreme among superior European norms; and as we shall see, they have become applicable virtually across the board in any and all controversies.

The pre-eminence and ubiquity of fundamental rights have induced all domestic and European high courts to converge on this increasingly shared conceptual, doctrinal, and procedural framework. This unification of what had been designed domestically as disaggregated judicial fields has unleashed a mad and fascinating scramble to master the emergent fundamental rights regime. Almost every European judicial player now faces powerful pressures to jump on the fundamental rights bandwagon or be left intellectually and institutionally behind. As a defensive matter, it is all but useless for any of the judicial institutions to seek to avoid or opt out of the growing 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. Fundamental rights in general, and European fundamental rights in particular, are superior and justiciable in sister courts at both the domestic and European levels. A given high court therefore cannot reasonably expect

to escape the advance of fundamental rights analysis merely by refusing to espouse it.

In practice, it makes far greater sense for a high court to adopt an offensive posture relative to fundamental rights, regardless of how severely this new framework disrupts—or potentially undermines—the court's traditional procedural, doctrinal, and conceptual logic. This tack at least allows the court to play an active role in defining the scope and content of fundamental rights doctrines, rather than forfeiting this capacity to sister institutions and thus passively submitting to their constructions.

The same logic holds true within a particular high court. Many of these courts are large institutions in their own right, with significant internal divisions and factions of their own. In these internal struggles for intellectual and institutional leadership, it makes far better tactical sense, as in the external ones, to seek to master and control the emerging fundamental rights regime, rather than be passively controlled by it. The current inter-institutional dynamics are therefore prompting a group convergence of all domestic and European high courts on the fundamental rights idiom.

The common struggle to manage and direct these legal developments has further reinforced the rising fundamental rights regime. The most empowering strategy for any given court is to embrace and even seek to lead the emerging regime by aggressively developing expansive fundamental rights positions. This 'maximalist' approach offers several advantages: it is the most effective means to disable and trump troublesome interpretations by legal competitors, to maintain control over one's own institution, and to exercise institutional and intellectual leadership of the emerging judicial order.

This expansive inter-institutional dynamic has prompted a frantic race to the 'top' of an increasingly unitary doctrinal, procedural, jurisdictional, and intellectual scheme: the ever more powerful and ubiquitous fundamental rights framework. The assorted judicial institutions have therefore been all but required to engage in large-scale adjustments to their operating procedures, doctrinal structures, and conceptual orders.

Such transformation affects different judicial institutions differently. For some, the changes reinforce their substantive and institutional function. For others, they represent a radical challenge to their very ethos, purpose, and status. And for yet others, they offer a welcome opportunity to reconstruct and redefine themselves in a manner that modernizes their approach and/or empowers them relative to sister institutions. The advent of the powerful fundamental rights framework thus triggers reforms that foster important inter- and intra-institutional realignments.

For many high courts, these developments have effectively forced them to translate their prior procedural, doctrinal, and conceptual schemes into fundamental rights terms. This translation process has proven to be not only highly competitive, but also deeply creative: it poses a host of crucial but underdetermined questions. On a first level, it is not clear what the content of particular individual rights will eventually be; but the resolution of such questions is likely to produce a major impact on the shape of the legal system as a whole. French high court decision-making, for instance, has traditionally been dominated by the sheltered deliberations of elite judicial magistrates. This might well change if litigants were granted the procedural right to intervene meaningfully in the judicial decision-making process. At the micro level, therefore, the content of particular procedural or substantive rights can generate meaningful systemic effects: they can redefine the role of key judicial players and thus rework the very nature and processes of judicial institutions.

On a second level, there currently exists considerable uncertainty about what will be the general tenor of the rights that will eventually be foregrounded in the French and European legal orders. Battle has already been joined, for example, about whether rights protection means defending what are understood to be vested property or economic expectation rights or defending what are understood to be group, social, and/or dignity rights.[3] At the macro level, therefore, the French and European legal systems are currently struggling over what types of rights should be treated as pre-eminent and how they should interact with traditionally dominant legal and political conceptions.

These foundational questions obviously put a wide range of social, economic, political, and institutional interests in play. Different social and economic actors care a great deal about the content of their respective substantive and procedural rights. They can therefore be counted on to

[3] Allow me to make plain from the very outset that I have no intention to enter into a substantive discussion about the content of individual economic expectation rights, on the one hand, or group, social, and/or dignity rights, on the other. Nor will I address the theoretical tenability of the distinction between them. US legal academic literature certainly possesses no shortage of works on such fundamental topics. This book seeks instead to demonstrate that the French legal system is currently wrestling over the question of the nature of justiciable fundamental rights and that key legal players are doing so by constructing a fundamental (if as yet inchoate) conceptual distinction between the nature of different types of rights. The distinction between what I am calling 'economic expectation rights' and 'group, social, and/or dignity rights' is only meant to describe as clearly as possible the argumentative, conceptual, and ideological divide that these key French legal actors are currently using to structure their own legal debates.

bring a steady stream of litigation in all available judicial fora in an attempt to influence the construction of these rights.

The resulting litigation, carried out simultaneously or seriatim in multiple venues, triggers important inter- and intra-institutional interests as well. The assorted high courts, as well as the numerous factions and sub-institutions within them, are deeply affected by the resolution of particular fundamental rights issues and by the shape of the emerging European judicial architecture. They have little desire to have their institutional prerogatives extinguished or their fundamental rights constructions overturned. Nor do they wish to be made subject to fundamental rights frameworks developed and applied by sister institutions, whose jurisdictional and intellectual leadership may blossom accordingly at their expense.

In short, the advent of fundamental rights has put a great deal up for grabs: 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, highly contested, and inherently creative interpretations of how to construct and implement the emerging fundamental rights framework. This dynamic has generated a race to the 'top' of the fundamental rights regime; but almost all the players involved have different ideas about what the high ground should actually look like and how the rest of the judicial terrain should be organized. The French and European judicial orders are therefore in the midst of large-scale and ongoing transformation.

The French system, for its part, has been busily reconstructing itself as a fundamental rights regime. This is no small feat, given the traditional French republican hostility to such an approach. This stunning—and remarkably recent—transformation possesses several related components. First, the assorted French high courts gradually (and often quite reluctantly) accepted to enforce European law, including European fundamental rights law, against the political branches of government. Such judicial 'control of conventionality' has radically reworked traditional assumptions about the supremacy of the legislature as the voice of a unitary general will and about the strict separation of the judiciary from the political branches. Piercing the traditional 'veil' that separated the courts from superior international legal norms, it has effectively established rights-based judicial review by all judicial or quasi-judicial tribunals, albeit on the basis of European law.

These fundamental rights developments on the European law front have been supplemented by major domestic revisions. The Constitutional Council, first established in 1958 to perform a *priori* review of legislation to ensure that the legislature did not encroach upon executive branch powers wrested

by De Gaulle, availed itself in 1971 of the power to review legislation on the basis of fundamental rights listed in constitutional preambles and in the 1789 Declaration of the Rights of Man and of the Citizen. For its part, the Conseil d'Etat has aggressively developed a quasi-fundamental rights jurisprudence under the rubric of 'general principles of law' applicable to executive branch actors. Finally, the Court of cassation has, like the Conseil d'Etat, developed its own constitutional jurisprudence by interpreting and applying fundamental rights norms in ordinary civil and criminal jurisprudence. Indeed, because there exists no meaningful 'state action' doctrine for such interpretive exercises,[4] fundamental rights analysis has become utterly ubiquitous throughout the domestic legal field. Furthermore, this drastic transformation has been crowned by a foundational constitutional revision: in July 2008, the Constitution was amended to permit individuals to challenge the constitutionality of existing legislation in the course of litigation before the ordinary and administrative courts. The supremacy of the legislature and of the general will is all but finished.

The transformation of the European judicial order has been astonishing in its own right. The ECHR, once a rather modest and even timid institution, has become a startlingly powerful and self-assured fundamental rights court. In 2007, it received over 50,000 individual applications and rendered over 1,700 judgments on the merits.[5] It has forcefully developed and imposed its jurisprudence on all the institutions of the signatory states.[6] In fact, it has boldly developed an inventive 'fair trial' jurisprudence under Article 6(1) of the European Convention on Human Rights and applied it aggressively to the domestic high courts.

The meteoric rise of the ECHR is but one facet of the changes occurring at the European level. The European Court of Justice ('ECJ'), long the dominant European judicial institution, has—in a manner tellingly reminiscent of the French Conseil d'Etat—been unable to stay off the fundamental rights bandwagon. Bowing (perhaps willingly) to pressures from the ECHR and the domestic constitutional courts, it has developed a fundamental rights

[4] *See* Michel Troper, 'Who Needs a Third Party Effect Doctrine?—The Case of France', *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 115 (Utrecht: Eleven International Publishing, 2005).

[5] *See* <http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5–8F3F-F289B4A03008/0/Annual_Report_2007.pdf>.

[6] For a superb volume on the domestic impact of the ECHR, *see* HELEN KELLER and ALEC STONE SWEET (eds.), A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Oxford: Oxford University Press, 2008).

jurisprudence of its own. The European judicial order has thus become, like the French, pervasively infused by fundamental rights analysis.

Indeed, the parallel rise of fundamental rights at the French and European levels is deeply suggestive. Not only does it underline the interactive relationship between their respective judicial transformations, it also highlights the path-dependence of their respective institutional adaptations. The French have had to elaborate a workable method for incorporating fundamental rights throughout their carefully delineated multi-institutional judicial order. Indeed, their disaggregated judicial architecture has aggravated the competitive dynamics that have helped to propel the fundamental rights revolution, severely testing the French system's adaptive capacities. Meanwhile, very similar forces are operating at the European level. The European courts are reproducing these tensions between the ordinary administrative and the fundamental rights courts; and they are replicating the French solutions to these tensions. This emerging parallel supports a final and fascinating conclusion: the European high courts are increasingly organizing themselves into an integrated judicial order patterned along recognizable domestic lines.

II. Methodology

Before offering a Chapter by Chapter summary of the rest of this book, it is worth pausing briefly to present some general methodological explanations. This book is quite different from my first, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*.[7] That monograph examined the specific procedural, argumentative, and institutional practices of the French Cour de cassation, the US Supreme Court, and the ECJ in order to crystallize the foundational ideas that characterize and animate them. Its purpose was to construct clear and stylized comparative depictions of the distinctive attributes of the French, American, and EU judicial orders.

As I was completing *Judicial Deliberations*, however, I became increasingly convinced that one of my principal objects of study was on the verge of fundamental change. In particular, the French judicial order was in the midst of large-scale transformation, triggered by its interaction with the European

[7] Mitchel Lasser, Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy (Oxford: Oxford University Press, 2004) ('Judicial Deliberations').

order and informed in part by the US one. The book therefore consisted, to some extent, of 'preservation anthropology': it offered a final testament to traditional—and perhaps vanishing—French judicial practice and ideals.

This book puts forward a fundamentally different type of analysis. It examines the *dynamics* that are driving the French judicial order to transform into a fundamental rights regime. This analysis is deeply indebted to the detailed study offered by my first book, whose conclusions, further elaborated here in the administrative, constitutional, and international law contexts, form the baseline from which the current transformations can be explained and compared.

The key to the current analysis, however, is to refuse to treat the French judicial order as monolithic, static, or self-contained. Although the French order undoubtedly possesses characteristic procedures, structures, and mentalities that operate across its institutional terrain, it is by no means monolithic. Indeed, one of its defining features is its intentionally disaggregated institutional design, i.e., its division and allocation of what Americans would consider to be 'judicial' functions to a series of distinct institutions. The ordinary courts (headed by the Cour de cassation), the administrative tribunals (headed by the Conseil d'Etat), and the Constitutional Council each get different slices of the 'judicial' pie; and they often possess quite different perspectives regarding, for example, the state of the French system, how it came to be what it now is, how it should aim to develop, and why. Such internal conflicts (and many more) provide both an important motivation and a key structural mechanism for the current changes.

Similarly, the French judicial order has hardly been static. True, the Napoleonic era Civil Code remains largely in effect; and yes, the eighteenth century legacy that glorified the legislator and distrusted the judge continues to inform judicial institutions and mindsets. But French legal and political institutions (and theory) have never stopped changing over the last two hundred years, despite such evident continuities. In the nineteenth century, both the Cour de cassation and the Conseil d'Etat became honest-to-goodness courts, rather than self-consciously political bodies.[8]

[8] In its original form, the Cour de cassation was not part of the court system at all. Originally entitled the Tribunal de cassation, it was attached to the legislature until 1804. *See* ROGER PERROT, INSTITUTIONS JUDICIAIRES (Paris: Montchestien, 8th edn., 1998) No. 175. Similarly, the Conseil d'Etat was not formally recognized as capable of rendering decisions (as opposed to giving advice to the state about decisions it should take) until 1872. *See* Loi du 24 mai 1872 sur l'organisation du Conseil d'État; L. NEVILLE BROWN and JOHN BELL, FRENCH ADMINISTRATIVE LAW 47–48 (Oxford: Clarendon Press, 5th edn., 1998).

In the second half of the twentieth century, the newly created Constitutional Council has emerged as a key judicial and political institution in its own right: it now performs substantive review of legislation on the basis of fundamental rights, and, as Alec Stone Sweet has so clearly demonstrated, directly impacts on the political process.[9] Furthermore, the developments on the European legal front have had a dramatic and ongoing impact on these evolving domestic legal arrangements.

The French judicial system has thus proven to be anything but self-contained, notwithstanding its notorious linguistic, professional, and intellectual insularity. As this book will make quite clear, the French and European legal orders have become ever more intertwined doctrinally, institutionally, and conceptually. As a result, the seemingly 'pure' components of the domestic system have dropped in number and in importance. If we are interested in studying what is characteristic of the French legal order today, it therefore makes increasing sense to study not its unadulterated elements, but rather the ways in which it is interacting with and responding to Europe.

This is a comparative law book about *change*. It is about the potentially radical transformation of the French legal and judicial system in the shadow of the interaction between France and Europe. It is about the dismantling of the procedural, institutional, and conceptual underpinnings of the French republican legal tradition and the reconstruction—or at least reordering—of the French legal order partially, but only partially, in light of its ongoing interchange with Europe.

This is also a comparative law book about Europe. On a first level, the current French changes are in part a function of Europe. On a second, they represent a significant change within one of its leading Member States. On a third, French legal actors routinely act under color of European law. Their actions therefore constitute European law even as they transform the domestic legal landscape. Finally, the French transformation deeply implicates the European judicial order: the dominant European institutions were originally designed on the French model; and as we shall see, they are now reproducing surprisingly faithfully the key elements of the French system's own transformation.

This book is therefore quite consciously designed to bridge the unfortunate gap between the comparative law and the European law

[9] *See* ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (Oxford, New York: Oxford University Press, 1992).

disciplines. On one side of this disciplinary chasm, comparative legal scholars have traditionally been rather indifferent to the deeper issues raised by European law, even when they have focused on the leading legal systems of the EU's Member States. These comparative analyses tend—quite understandably—to turn their attention instead to the difficult task of mastering the key institutions, doctrines, processes, and conceptions that characterize the jurisdictions under study.[10]

To these comparative analyses, Europe often functions as something of an irritant. Either it is of no real importance to the comparatist, as it is not an indigenous and thus defining part of the national legal system under examination; or it is of secondary importance, as it adds some peripheral and often unpredictable and disorderly wrinkles to the existing national legal doctrines or structures; or it is a separate object of study left to specialists in the field of European law; or it threatens to supersede the expertise that the comparatist has scrupulously acquired in a given national legal system.

This book therefore seeks to fill this gaping hole in the discipline of comparative law. It brings European law into the field of vision of comparative law neither as a threatening irritant nor as a superseding goal. It demonstrates just how profoundly the interactions between European and national law are impacting not only upon the substantive norms of the national legal orders, but also and more importantly, upon the fundamental procedural, institutional, and conceptual characteristics that have traditionally defined what those domestic legal systems are all about. This book makes plain that the interaction with European law has triggered—by both European and domestic means—an ongoing transformation of the very foundations of the national legal orders. As a result, comparatists may well need to begin reworking what they understand contemporary 'Civil Law' systems to be, especially to the extent that the French legal order—a particularly proud

[10] Even the very finest works on French law, such as John Bell's peerless quartet of books, rarely make reference to Europe. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW (Oxford: Clarendon Press, 1992); JOHN BELL, SOPHIE BOYRON, and SIMON WHITAKER, PRINCIPLES OF FRENCH LAW 61 (Oxford: Oxford University Press, 1998); BROWN and JOHN BELL; JOHN BELL, FRENCH LEGAL CULTURES (London: Butterworths, 2001). Similarly, Donald Kommers's immensely useful book on German constitutional jurisprudence offers almost nothing of significance about Europe. *See* DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF GERMANY (Durham: Duke University Press, 2d edn., 1997). Amazingly, the latest edition of Basil Markesinis' encyclopedic study of German tort law contains not a single European case reference and not a single index entry for Europe or for European law. *See* BASIL MARKESINIS and HANNES UNBERATH, THE GERMAN LAW OF TORTS (Oxford and Portland: Hart Publishing, 4th edn., 2002).

and intractable flagship of Civilian legality—has been undergoing major internal reconstruction.

At the same time, this book also seeks to remedy a parallel blind spot in the literature on European law. This literature quite logically focuses on patently Europe-centered issues, which explains the rivers of ink that have been spilled over the foundational 'constitutional' doctrines of European law, such as the EU/ECJ doctrines of supremacy and direct effect.[11]

Unfortunately, however, scholarship on European law has remarkably little to say about the interface between the European and domestic legal systems.[12] A few European analyses examine the instrumental question of whether national institutions—and especially the courts—accept to apply the key European doctrines.[13] Others have responded to growing Member State resistance to the EU project by elaborating solutions to the EU's so-called 'democratic deficit'.[14] But such analyses, which are pitched almost exclusively at the European level, do not—and are not intended to—penetrate very deeply into the national legal systems.

In this respect, these scholarly works mirror the European judicial doctrines that expressly refuse to consider national circumstances or

[11] One need only run a citation search for Joseph Weiler's seminal article, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991), to get a rough idea of the scope of this voluminous literature.

[12] Until the appearance a few months ago of the volume edited by Hellen Keller and Alec Stone Sweet, the only notable exception was the collection of essays edited by Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler on the relationship between the ECJ and the national courts. *See* KELLER and STONE SWEET; A.M. SLAUGHTER, A. STONE SWEET, and J.H.H. WEILER (eds.), THE EUROPEAN COURT AND THE NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 41 (Oxford: Hart Publishing, 1998).

[13] In addition to the collection of essays edited by SLAUGHTER, *et al.*, a very useful study of the national acceptance of EU law supremacy has been published by Karen Alter. *See* SLAUGHTER, *et al.* (1998); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (Oxford: Oxford University Press, 2001). The greatest contribution to our understanding of the effect of European law and domestic judicial power is Joseph Weiler's analysis of how the application of EU law effectively empowers national judges, especially lower court judges. *See* JOSEPH WEILER, THE CONSTITUTION OF EUROPE 22, 124, 197 (Cambridge: Cambridge University Press, 1999).

[14] Prominent structural solutions in this vein have included: (1) the replication at the European level of a more parliamentary form of governance (*e.g.*, by promoting the European Parliament's powers or by removing national veto powers via the increased use of qualified majority voting ('QMV') procedures at the EU level), (2) the preservation (at least in the short term) of national veto power (via the reduced use of QMV) in order to comfort anxieties about Europe's capacity to override deeply held national beliefs and preferences, (3) the enlisting of Member State Parliaments and civil society representatives in the European law-making process (including in the European 'constitutional' Convention process), etc.

particularities when determining Member State liability for breaches of European law: the state is responsible *qua* state, period.[15] However practical and even necessary such doctrines may be for the smooth functioning of a reasonably uniform and efficient European legal order, this posture entrenches a deeply revealing and potentially damaging European veil of ignorance about what is occurring at the national level.

This disciplinary blind spot should really be of concern to European law specialists. This is not to say that the national legal order should somehow be privileged over the European one. But it does suggest that serious attention really ought to be paid to what is actually going on within the national legal systems, if only to gain a better understanding of the dynamics between developments on the domestic and supranational levels. Indeed, the need for such attention is all the greater to the extent that we: (1) conceive of the national legal order as a part of the European one (and vice versa), and (2) wish to grasp the source and nature of national legal resistance to, acquiescence in, and/or contributions to, the ongoing development of the European project.

This book therefore seeks to fill a characteristic gap in the discipline of European law (and more generally in the discipline of international law) and can therefore be understood as an intervention in the increasingly sophisticated debates over legal globalization. It aims to bring the disciplinary expertise of comparative law—the detailed analysis of foreign legal systems—to the study of European law in order to reveal the truly transformative effects that the interface with supranational institutions (in this case, the two Europes[16]) can provoke on the procedural, institutional, and conceptual underpinnings of domestic jurisdictions, and vice versa. It brings a comparative law ethic to the study of European legal developments, working to deploy a sufficiently sensitive understanding of national legal institutions, traditions, and culture. This should help us grasp the full

[15] *See, e.g.*, Case 77/69, *Commission v. Belgium* ('Timber Tax') [1970] ECR 237, [1974] 1 CMLR 203 (5 May 1970) (holding that the dissolution of the Belgian Parliament does not excuse Belgium of its responsibility to repeal legislation conflicting with European law); Case 166/73, *Rheinmuhlen-Dusseldorf v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1974] ECR 33, [1974] 1 CMLR 523 (16 January 1974) (holding that the German requirement that lower courts follow the *ratio decidendi* of superior courts cannot be permitted to block lower courts from referring questions of European law directly to the ECJ); Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] ECR I-2433 (holding that the British constitutional orthodoxy regarding the separation of powers does not permit the British judiciary to refuse to exercise judicial review of legislation that may conflict with EU law).

[16] The 'two Europes' consist of the ECHR system and the EU.

significance—on the pragmatic as well as on the conceptual and symbolic levels—of the interaction between the national and supranational legal orders. As we shall see, a comparatist's awareness of the procedural, institutional, jurisdictional, and conceptual structure of the evolving French legal order will also provide invaluable insights regarding the particular ways in which the ECJ and the ECHR are now organizing their own relationship as a coordinated judicial order.

In short, by adopting a dynamic comparative perspective that is attuned to the interaction between the domestic and supranational judicial orders, this book highlights the magnitude of the current changes and demonstrates both their creativity and their path-dependence. The French and the European transformations are occurring in an existing institutional and intellectual matrix that deeply affects their dynamics and outcomes. As we shall see, however, there nonetheless remains a great deal of room for savvy individual and institutional actors to formulate, resist, or effectuate highly imaginative reconstructions of the existing order.

III. The Structure of the Analysis

This book is structured as follows. Chapter 2 briefly presents the core conceptual and institutional attributes that traditionally characterized the French judicial order. This portrait of the French legal system, which I developed in detail in my last book, stresses three interrelated and defining characteristics. Above all, the French system has traditionally functioned on the basis of a distinctive republican notion of judicial control and legitimacy. In accordance with this theory, the authority and legitimacy of judicial decisions—especially at the appellate levels—rested not with the public accountability of judicial reasoning, nor with individually signed and authored judicial opinions, nor with the ability of individual litigants to intervene in, and contribute to, the judicial decision-making process. They hinged instead on the pedigree of the appellate judiciary as an elite, specialized, and representative state institution capable of making decisions in the name of 'the general interest' and 'the public good'.

The second key facet has been the French system's strongly institutional character. The French state has gone to great pains to ensure that its 'ordinary' and 'administrative' judiciaries consist of small corps of elite and state-sanctioned judicial players. These corps are selected in what is

understood to be a representative fashion from the general population, primarily through the state's national examination-based educational system; they are then educated, trained, and constrained in carefully designed meritocratic and hierarchical institutional frameworks in which their members will typically be embedded for the entirety of their professional lives.[17] This institutional structure of rigorous selection, educational 'formation', and professional meritocracy yields judicial corps that can then be entrusted with the task of debating and resolving legal controversies in such a way as to promote the general interest and the public good.[18]

The third key characteristic consists of the system's traditionally bifurcated judicial decision-making process. Having gone to the significant trouble of generating such elite corps, the system traditionally grants them a privileged (and largely inaccessible) deliberative space in which to engage in particularly frank, collegial, and highly substantive debates about how best to manage the important legal controversies that come before them. This protected judicial deliberation yields a dual mode of judicial discourse. Internally, judicial magistrates engage in remarkably substantive, collegial, and open-ended discussions heavily oriented not only towards issues of legal and institutional policy, but also towards questions of equity and substantive justice. Externally, however, the courts speak in a radically impersonal institutional mode; they issue magisterial judicial syllogisms that seemingly do no more than mechanically apply the dictates of the legislature.

This traditionally bifurcated discursive approach limits the capacity of individual litigants to take an active role in the judicial decision-making process. It is intentionally opaque and patently unreceptive to the external input of individual litigants. On the other hand, by requiring the courts to express themselves in highly formulaic, univocal; and single-sentence judicial syllogisms, it also limits rather effectively the capacity of the judiciary to monopolize ongoing legal debates and developments.

The rest of this book examines how the interaction between France and Europe is transforming this traditional French approach, and how this transformation is simultaneously reconstructing the European judicial

[17] *See* MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 18–21 (New Haven: Yale University Press, 1986).

[18] Sudhir Hazareesingh does an excellent job of demonstrating the surprising degree of elasticity that has marked the actual practice of French republicanism, despite the seeming inflexibility of its commitment to unitary, representative, institutional, and elitist ideals. *See* SUDHIR HAZAREESINGH, POLITICAL TRADITIONS IN MODERN FRANCE (New York: Oxford University Press, 1994).

order. In order to organize the analysis of this complexly interactive and dynamic process, the ensuing Chapters work through a simple 2 × 2 inside/outside heuristic grid that examines the basic permutations of 'external' European pressures on the French 'inside', 'internal' French pressures on the European 'outside', and so on. This simplified organizational scheme will eventually help to illustrate the extent to which the French and European judicial orders are increasingly interwoven: interventions at every level constitute interventions at all others. This illustrates that the inside/outside dichotomy, though useful for organizational purposes, is increasingly untenable at both the theoretical and practical levels.

Chapters 3 and 4 begin the analysis by demonstrating how 'external' European pressures are currently transforming the French legal system at its very core. Chapter 3 presents the most striking shift: Europe has triggered the development of an individual fundamental rights regime that is increasingly operative both in and around the French legal system. This rather recent development, which sharply challenges the traditionally unitary French republican ethos, goes hand in hand with the establishment of a multi-faceted system of judicial review. First, judicial review now functions in an external sense: the ECHR and the ECJ routinely oversee and condemn domestic legal and political acts on the basis of applicable European treaties. Second, judicial review now functions in an internal sense as well: the ECJ and the ECHR have both effectively required that the domestic courts themselves review the acts of the domestic political and judicial branches in order to ensure their conformity with European treaty obligations, including the protection of fundamental rights defined by European law; and the French supreme courts finally accepted to do so thanks to a series of seminal judgments decided between 1975 and 1989.

But that is not all, for these European-based developments have helped to induce yet another: the establishment and normalization of a fundamental rights regime that, since 1971, is grounded in the French constitution and has become increasingly operative throughout the legal order.[19] This represents a truly major transformation as well. In the French legal order, 'judicial review', 'individual/fundamental rights', and 'constitutional law' were simply not traditionally connected: not only was the protection of individual rights

[19] In this respect, the transformation of the French legal order confirms the transformation that Mattias Kumm observes in the German one. *See* Mattias Kumm, *Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 German L.J. 341 (2006).

not understood to be a 'constitutional law' function, but protection against improper state action was not understood to be either a 'judicial' or a 'constitutional', but rather an 'administrative' and 'public law' matter.

Chapter 3 argues that this increasing emphasis on providing judicial review for the purposes of protecting the individual's fundamental rights represents the gradual demise of a rather different notion: providing review for the purposes of ensuring that the state behave in accordance with principles of good governance enshrined in traditional public law doctrines of 'legality'. In order to illustrate this transition, the Chapter briefly analyzes the classic Conseil d'Etat *jurisprudence* stemming from its 1959 *Lutétia* decision regarding state limitations on the screening of films. As the *Lutétia* example demonstrates, the French traditionally conceived of—and dealt with—such thorny issues not as 'judicial review' of 'constitutional' protections of 'individual' or 'fundamental rights', but as 'administrative review' of 'administrative acts' on the basis of 'public law' principles of 'legality', 'mayoral police powers', 'public order' and, to a more limited extent, 'public liberties'.

The explosion of the vocabulary of individual fundamental rights into all corners of the French legal and judicial systems, due in large measure to exposure to and pressure from the European legal orders, therefore represents a profound transformation in the very ethos of the French legal and political orders. For all that the French long continued to maintain their refusal to permit individual, concrete, and/or *a posteriori* constitutional challenges to legislation, this refusal can now be understood as a monument to a largely bygone era in which, as Lou Henkin perceptively explained, rights were understood in a more Rousseau-ian fashion to be vindicated *through* generally applicable legislation (*la loi*), not *against* it.[20] In short, the French system appears to be rapidly undergoing a dramatic discursive, intellectual, and substantive shift towards a fundamental rights regime.

Chapter 4 presents a particularly explicit and threatening example of such external fundamental rights pressures. In a major and ongoing line of decisions handed down over the last ten years, the ECHR has struck repeatedly at the time-honored French decision-making procedures described in Chapter 2.[21] It has insisted: (1) that individual litigants be granted access

[20] *See* LOUIS HENKIN, THE AGE OF RIGHTS 161–67 (New York: Columbia University Press, 1990). This legislative approach might be compared to so-called 'super-statutes' in the US context. *See* WILLIAM N. ESKRIDGE and JOHN FEREJOHN, *Super-Statutes*, 50 Duke L.J. 1215 (2001).

[21] 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 it censured the parallel procedures utilized by the Belgian Cour de cassation.

to documents generated within the internal judicial debates in preparation for oral argument, (2) that these litigants be granted the opportunity to respond to those documents, and (3) that certain key judicial magistrates (in particular, the Advocates General of the Cour de cassation and the *Commissaires du gouvernement* of the Conseil d'Etat) be removed from the courts' internal deliberations. In other words, the ECHR has been calling for a radical reconstruction of the bifurcated and institutionally-oriented procedural structures that have long defined French judicial decision-making.

As Chapter 4 explains, these European pressures have provoked a deep and deeply telling schism between the French supreme courts. On the one hand, the Conseil d'Etat, the proud Napoleonic 'public law' institution that has traditionally guaranteed that the state behave properly in its interaction with the citizen, has doggedly resisted the ECHR's pressures. The Cour de cassation, on the other hand, has taken an altogether different tack: capitalizing on the opportunity presented by the ECHR's condemnation, the Cour's formidable and innovative Chief Justice, Guy Canivet, undertook a sweeping set of reforms that significantly open the Cour de cassation's decision-making processes to individual litigants and to the public at large. The Conseil d'Etat and the ECHR are therefore in the midst of a protracted struggle over the future of French judicial procedure and philosophy, a struggle in which the Cour de cassation is far more than a passive observer.

Chapter 5 changes the perspective of the analysis in order to stress that the pressures for—and against—such domestic legal change include 'internal' French, as well as 'external' European, forces. In order to demonstrate this internally contested state of affairs, Chapter 5 analyzes a series of mutually informing debates now raging within the high ranks of the French judicial system. These debates have clustered around a heated procedural issue: prospective overruling. The Chapter carefully decodes these debates in order to demonstrate that the significance of the prospective overruling issue derives from the manner in which it has been made to connect to several others, including classic theoretical questions over the proper 'sources of the law', more recent policy discussions concerning the promotion of '*la sécurité*

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 (12 April 2006), available at <http://www.menschenrechte.ac.at/orig/06_2/Martinie.pdf>.

juridique' (poorly translated as 'legal certainty'), and methodological fights over the pros and cons of judges and jurists engaging in a more 'realist'—and perhaps even economically oriented—form of legal analysis.

Chapter 5 therefore presents the French legal and judicial system as deeply and self-consciously divided over a range of fundamental and interlocking procedural, institutional, and conceptual issues. As a result of these internal struggles, its self-consciously republican structure and ethos are being increasingly called into question. If, as important players in the contemporary debates now argue, judicial decisions function as an important source of law, should judges not be realists about their judgments? Should they not take explicitly into consideration the social, economic, and other practical consequences of their decisions? Should they not be informed of the multiple and conflicting interests at play in any important litigation, whether or not the interests at stake happen to be represented by the parties at bar in a given case? If so, should not the Cour de cassation, for example, invite these multiple and conflicting interests to express themselves before the Court by filing partisan *amicus* briefs?

In short, Chapter 5 demonstrates how the French judicial system can be seen to be on the verge of shifting from its traditionally unitary republican to a more pluralist logic. In these interlocking debates, a particularly powerful trio of institutional players—*Premier président* (Chief Justice) Guy Canivet and *Procureur général* (Chief Advocate General) Jean-Louis Nadal of the Cour de cassation and Professor Nicolas Molfessis of the University of Paris-II (Panthéon-Assas)—has put forward an image of judicial decision-making that is increasingly characterized as the public clash of self-interested parties.[22] They have even seized on the ECHR's condemnation of the French supreme courts' decision-making procedures as a means to transform the Advocate General—traditionally the independent voice of the general welfare in the Court's internal deliberations—into a vector for the expression of individual and plural interests.

The full significance of these internal French debates can only be grasped, however, by working through the deep-seated resistance that has been levied against the trio's reforms. As Chapter 6 explains, this resistance had been led most visibly by one of the most senior members of the Cour de cassation: Justice Pierre Sargos, the President (Chief Judge) of the Court's Social

[22] Whether this marks a shift towards a more adversarial procedural model is debatable. *See infra* Chapter 10, text accompanying notes 2–8.

Chamber.[23] Sargos resists what he presents as the trio's improper alignment of the issues at hand: an excessive antipathy towards judicial retroactivity represents an overemphasis on legal certainty at the expense of judicial interpretive flexibility; and this overemphasis represents in turn an undue valorization of settled economic interests at the expense of the fundamental rights of the weak and vulnerable. In Sargos's view, the inability to revise past judicial interpretations retroactively functions in effect as a non-legislative means to offer a safe haven against dignity, group, and other fundamental rights whose elaboration and protection should properly take precedence over merely self-regarding economic interests. As Sargos cleverly (if somewhat inchoately) suggests, the Canivet presidency therefore threatens to sacrifice the Cour de cassation's proper mandate, namely, to elaborate the law in such a manner as to advance the general interest and the public good via the protection of fundamental rights.

Chapter 6 therefore reveals that the trigger and the stakes of the prospective overruling debates actually lie in the explosive incursion of fundamental rights into the French legal order. Their establishment as ubiquitous and pre-eminent legal norms threatens large-scale instability: the entire system is rapidly translating itself into fundamental rights terms. This disruption is not only conceptual; without a meaningful state action doctrine, fundamental rights arguments are being advanced in even the most routine private law cases. This means that almost all settled legal doctrines are suddenly subject to abrupt judicial revision in the name of European or constitutional rights. This burgeoning disruption raises pressing questions of judicial transition: hence the tremendous interest in prospective overruling, legal certainty, the 'sources of the law', judicial decision-making procedures, and the like. Chapter 6 accordingly concludes its examination of the prospective overruling debates by presenting a final set of creative and revealing proposals: Professor Christophe Radé has proposed submitting innovative judicial decisions to constitutional review by the Constitutional Council as if they were new pieces of legislation.[24]

Chapters 5 and 6 therefore demonstrate the deeply conflicting pressures for legal change within the French legal system today. In one camp, the Canivet-Nadal-Molfessis trio has aligned the prospective overruling issue

[23] The Cour de cassation is divided into six chambers: three 'civil' (private law) chambers, one 'criminal', one 'commercial', and one 'social' chamber. See <http://www.courdecassation.fr/_Accueil/francais/siege.htm>.

[24] *See* Christophe Radé, *De la rétroactivité des revirements de jurisprudence*, D. 2005, Chron. 988.

with the 'sources of the law' and the 'legal certainty' issues in such a way as to promote not only the procedural empowerment of what are understood to be vested, self-regarding, and individual economic interests, but also the Cour's own ability to turn individual cases into occasions on which to function as a public forum for the resolution of large-scale policy issues.

In another camp, Justice Sargos has bundled the issues in such a way as to resist the logic of this institutionally powerful alignment. He works hard to translate the new fundamental rights idiom in such a way as to empower the traditional republican fraternal concern for the general interest and the public good rather than allowing this new focus on rights to entrench settled economic interests.

For all that the current French debates thus offer a wide range of possible solutions, they have clearly coalesced around a particular set of issues, all of which revolve around a central problematic: fundamental rights. In this respect, the conceptual parameters of the French system, through both external and internal pressures, have gelled in a manner relatively recognizable to jurists working in the US liberal tradition. In many respects, the current debates over the tenor of fundamental rights therefore mirror longstanding US ones. Reduced to their most basic form, these debates ask to what extent settled economic/property expectations are entitled to freeze or pre-empt the capacity of the legal order to take assorted forms of socially progressive and/or redistributive action? France appears to have arrived in the post-*Lochner* age.

This emerging conceptual parallel, however, partially obscures a significant feature of the institutional context in which the conceptual debate now functions. In the contemporary French legal environment, the rights debate is *not* primarily operating in the framework of judicial versus legislative power. Paradoxically—given the French legal system's traditional distrust of judicial authority—the current debates pit judicial versus judicial power. The issue, as it is now framed, is not whether the judiciary will apply fundamental rights in such a way as to freeze *legislative* developments, but whether the judiciary will apply fundamental rights in such a way as to freeze—or instead to require—*judicial* developments. Given that all the major players now seem to agree that fundamental rights (of both French constitutional and European origin) require active judicial solicitousness even in civil litigation between private parties, the separation of powers issue has turned into a judicial retroactivity question; hence the significance and volatility of the judicial overruling debates in contemporary French legal culture.

Chapters 7 and 8 address the two remaining dimensions of Franco-European interaction. For starters, it takes little imagination to recognize that the national legal systems exert powerful political and legal pressures 'externally' on the European ones. In one notorious example, De Gaulle boycotted the 1965 meetings of the EC's Council of Ministers, leading to the transformative adoption of the 1966 Luxembourg Accords.[25] In another, the German Federal Constitutional Court played a famous game of legal brinksmanship: by threatening to withhold its cooperation, it induced the ECJ to develop a fundamental rights jurisprudence of its own.[26]

Instead of limiting itself to such dramatic and well documented examples, Chapter 7 focuses on more routine, but much more persistent, pressures that a given national legal order constantly exerts on the European ones: it uses them. As Chapters 3 through 6 demonstrate, French judges, academics, and litigants regularly strive to interpret and deploy European law for their own purposes, thereby shaping quite directly via interpretation what the two Europes actually are and do on a daily basis on the ground in France (and, as we shall see, elsewhere). To the extent, for example, that the Cour de cassation refuses to change its past judicial interpretations of domestic law on the grounds that European law does not permit judicial retroactivity, this interpretation represents a European law intervention, even if no institution located in Brussels, Strasbourg, or Luxembourg took part directly in the decision.

It is of course well known that the availability of European legal claims has created strong incentives for litigants to turn both to European law and to national judges as vectors of that European law. But we need to recognize that this dynamic not only fosters the judicial construction of Europe,[27] it also encourages the development of expansive interpretations of European law by national legal actors. By engaging in such interpretive practices, these actors in effect trump unfavorable domestic legal norms

[25] *See* PAUL CRAIG and GRÁINNE DE BÚRCA, EU LAW: TEXT CASES AND MATERIALS 13–14 (Oxford: Oxford University Press, 3d edn., 2003); N. Piers Ludlow, *Challenging French Leadership in Europe: Germany, Italy and the Netherlands and the Origins of the Empty Chair Crisis of 1965*, 8 Contemp. Eur. Hist. 231 (1999). One would have to assume that the recent French and Dutch rejections of the proposed constitutional treaty—and perhaps the Irish rejection of the Lisbon Treaty—will also eventually produce significant structural and other effects.

[26] *See, e.g.*, T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 135–138 (Oxford: Oxford University Press, 2003).

[27] Alec Stone Sweet has been particularly interested in analyzing this vital dynamic in the EU context. *See* STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (Oxford, New York: Oxford University Press, 2004).

and institutions and—crucially—do so in a manner that is extremely difficult for the European courts to control. As a result, domestic legal actors exercise expansive interpretive and normative authority over the European legal orders, even as they transform the domestic ones.

This deeply circular process of Franco-European interaction demonstrates that the French legal system has now veritably internalized European law. Europe is no longer truly 'external' to the domestic legal order; it is very much inside it.[28] When French judicial or other actors turn to European rights and arguments for leverage, they simultaneously change both French and European law and do so by means that are effectively and at once French and European. The Europeanization of national law and the nationalization of European law go hand in hand.

This interactive dynamic has produced vital and ongoing effects on the European judicial order. The active and tactical use of European law by domestic legal actors has created a strong demand for high-level European legal norms that can both override domestic ones and be invoked in almost all litigation. The interpretive empowerment of domestic legal actors has therefore put pressure on the European ones to generate a legal framework that offers vertically superior and horizontally effective European legal norms. The result has been the establishment of immensely powerful and readily accessible European fundamental rights.

Chapter 8 demonstrates that these demands for European fundamental rights have profoundly affected the dynamics within the European judicial order. In much the same way as the rise of fundamental rights has impacted differently upon different domestic judicial institutions, it has also produced different effects on the two European high courts. These variable effects underscore the non-monolithic quality of the European judiciary: the interactions between the ECJ and the ECHR are increasingly revealing significant jurisdictional, institutional, and conceptual tensions. In other words, the dramatic rise of fundamental rights highlights—and has likely aggravated—a final mode of judicial pressure: European pressure on the European legal order.

The point of entry for studying these Euro-European interactions is the example that resurfaces in every Chapter of this book: the 'fair trial' litigation challenging the traditional judicial decision-making practices of

[28] *Cf.* Philip Allott, The Health of Nations: Society and Law Beyond the State (Cambridge: Cambridge University Press, 2002) (describing a fundamental breakdown of frontiers).

the supreme courts patterned on the French model. This ongoing ECHR-based litigation has spilled over dramatically into the Euro-European realm: the ECJ's decision-making processes—unlike the ECHR's—were explicitly designed on the French model. As a result, the ECJ has become deeply embroiled in the ECHR's developing Article 6(1) fundamental rights jurisprudence, despite the fact that the ECJ is not (yet) legally subject to the ECHR's jurisdiction.[29]

In addition to highlighting Franco-French and Franco-European judicial tensions, the Article 6(1) litigation therefore underscores the brewing tension between the two flagship European courts, especially with regard to the development of fundamental rights doctrines. This growing inter-judicial strain suggests an important comparative insight: the European judiciary increasingly resembles a multi-institutional national judiciary designed on the contemporary Civilian model (described in the French context in Chapters 3 and 4). On one side are to be found the more traditional, state-oriented, collegial and syllogistic courts in the mold of the Conseil d'Etat or Cour de cassation—a role taken up by the ECJ; and on the other are the increasingly powerful, individual/fundamental rights-oriented, and often discursive and plurivocal contemporary constitutional courts—a role taken up by the ECHR.

By visualizing the two European courts in these quasi-domestic terms, we can properly recognize the tremendous path-dependence of their interactions. In particular, the ECJ faces a competitive bind quite similar to that faced by the Conseil d'Etat. For both, fundamental rights review is neither their traditional source of normative and institutional power nor the guiding logic of their doctrinal, procedural, and institutional structures. But neither institution can afford to ignore, dismiss, or forfeit that increasingly powerful idiom, leaving it entirely in the hands of adjacent courts.

The ECJ has therefore responded by developing its own fundamental rights jurisprudence under the rubric of 'general principles of law' applicable to the institutions of the EU. This solution, since enshrined in the Treaty of Amsterdam,[30] represents an almost perfect replica of what the Conseil d'Etat

[29] The advent of the Lisbon Reform Treaty will complicate this delicate relationship.

[30] Article 6(2) of the Treaty on European Union reads: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' The EU institutions have also signed onto the Charter of Fundamental Rights of the European Union, which is given legally binding force by Article 6 of the Reform Treaty.

has done over the last few decades: develop a version of fundamental rights analysis that is not directly subject to the Constitutional Council's (or, in the case of the ECJ, the ECHR's) normative control.[31] First the Conseil d'Etat and now the ECJ have thus deployed 'general principles of law' as doctrinal and conceptual placeholders: these principles smooth the transition from traditional French administrative notions of 'legality'—which call, as Chapter 3 explains, for review of state action on the basis of state-centered principles of good governance and proper state administration—to the contemporary vocabulary of individual and fundamental rights.

The comparative analysis of the French and European judiciaries thus leads to two important insights on the European law front. First, the ECJ's development of its own fundamental rights jurisprudence, traditionally explained as a response to national judicial demands (especially by the German Federal Constitutional Court), should also be understood as a response to powerful Euro-European judicial pressures: the ECJ cannot leave fundamental rights entirely to the control of the ECHR, just as the French Conseil d'Etat and Cour de cassation cannot afford to leave them entirely to the Constitutional Council.[32] Second, this intra-European dynamic demonstrates that the European high courts are increasingly organizing themselves into an integrated judicial order patterned along recognizable domestic lines.

The French and European courts are, therefore, currently negotiating a complex and deeply interrelated set of problematics. Both are simultaneously working through conflicts not only over jurisdiction and institutional status, but also over conceptual and normative leadership. They are doing so concurrently within and between the domestic and transnational planes. And they are doing so while being rather directly implicated in the very 'fair trial' fundamental rights jurisprudence they are developing.

In short, fundamental rights represent both a driving intellectual force and the medium for waging inter-institutional battles within and between the domestic and European judiciaries. In this respect, the concurrent French and European rights revolution is not only an intellectual development; it is

[31] For an excellent English-language introduction to the Conseil d'Etat's jurisprudence regarding 'general principle of law', *see* BROWN and BELL (1998) at 216–239.

[32] The European development of a fundamental rights jurisprudence in response to national pressures has been much discussed, particularly in the context of the ECJ's response to resistance from the German Constitutional Court. *See*, *e.g.*, *supra* note 26; STONE SWEET (2004) at 87–91. Chapter 3 analyzes what is in essence the flip side of this dynamic, namely, the national development of a fundamental rights jurisprudence in response to European pressures.

also the product of a competitive structural dynamic between the numerous high courts in play at both the national and supranational levels.

Chapters 9 and 10 assess the effects that the fundamental rights revolution has produced on the French legal order, paying particular attention to the reforms that Chief Justice Canivet has instituted at the Cour de cassation in response to the ECHR's Article 6(1) 'fair trial' jurisprudence. In order to do so, they return to the benchmark established in Chapters 1 through 3 to highlight the full extent to which the central commitments of the French order have been transformed in the shadow of Europe.

The depth and breadth of these transformations is nothing short of extraordinary. The advent of fundamental rights has shattered the traditionally unitary conception of the general will and of the general interest. The supremacy of the legislature has accordingly been greatly diminished: applying European law (including European fundamental rights norms), all branches and levels of the 'judiciary' now exercise judicial review of the political branches on behalf of individual litigants. This radical transformation of the separation of powers, which rejects the classic doctrine of '*la loi écran*' (the legislative screen), has been further advanced by important developments in domestic constitutional law: not only does the French Constitutional Council now invalidate legislation on the basis of constitutional fundamental rights norms, but the ordinary and administrative courts actively develop their own constitutional jurisprudences when interpreting statutory, regulatory, and jurisprudential norms.

The rise of judicial power and the advent of individual rights have thus gone hand in hand. The prospective overruling debates demonstrate this shift in the separation of powers particularly clearly. The courts have increasingly emerged as major policy venues and as key normative players. This has shaken the traditional doctrine of the sources of the law and altered expectations regarding judicial procedure. Individual parties and affected interests are accordingly being granted greater procedural rights to intervene in the decision-making process; and the sheltered and elite judicial debates are increasingly being reworked to take account of individual rights and plural interests.

Much less evident is whether these dramatic transformations represent a full-fledged rejection of the traditional republicanism of the French legal order. As the reconstruction of the Advocates General clearly attests, self-interested individuals and groups have been procedurally empowered at the expense of more classical institutional representatives of the general interest and the public good. The judicial order is suddenly saturated with substantive

claims of individual fundamental rights, increasingly enforced through new adversarial procedural rights.

But these reforms can readily be interpreted as a long overdue renewal of the republican model, one that improves, rather than dismantles, the representative and participatory capacities of French judicial institutions. The advent of substantive and procedural fundamental rights may finally open the door for the expression of more variegated notions of the citizenry, which may mitigate the relatively unitary notions of 'the public good' and the 'general interest' that have traditionally dominated the internal French judicial debates.

The key question—which, for reasons of path-dependence, implicates the emerging European judicial order as well—is whether enough remains of the traditional French republican package to counterbalance the dramatic procedural, doctrinal, institutional, and conceptual changes that have already taken place. The Epilogue therefore addresses the most recent and striking evidence: in July 2008, the French Constitution was amended to permit individuals to raise constitutional objections to existing legislation before the ordinary and administrative courts. In the shadow of Europe, the French judiciary has been transformed; and the European judiciary is being transformed along with it.